THE

INDIAN HIGH COURT REPORTS

Being a re-print of all the cases of the Privy Council on appeals from India and of all the High Courts in India from the year 1901.

ALLAHABAD VOL. V

(1911-1913)

I. L. R. ALLAHABAD VOLS. XXXIII TO XXXV.

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JUDGES OF THE HIGH COURT OF JUDICATURE

FOR THE NORTH-WESTERN PROVINCES.

DURING 1911—1913.

Chief Justice:

The Hon'ble Sir John Stanley, *Kt., K. C.* (*Retired on the 20th April*, 1911).

„ „ Henry George Richards, *Kt., K. C.* (*Took his seat on the* 21st *April*, 1911).

Puisne Judges:

The Hon'ble Sir G. E. Knox, *Kt.*

„ P. C. Banerji, (*Knighted in* 1913).

„ H. G. Richards, (*To the 20th April*, 1911).

„ Saiyid Karamat Hussain. (*On leave from the* 10*th July to the* 10*th of August* 1911; *retired on the* 30*th June*, 1912).

„ Sir H. D. Griffin, *Kt.* (*On leave from the 5th May to the* 10*th August* 1911; *on deputation from the 2nd April to the 26th July* 1912; *again on deputation from the 5th April*, 1913).

„ W. Tudball.

„ E. M. Des C. Chamier. (*Took his seat on the* 21*st April*, 1911; *on privilege leave from 9th July to 8th August*, 1912; *again on leave from the 20th March*, 1913).

„ T. C. Piggott. (*Officiated from the 5th May to the* 10*th August*, 1911; *from the 9th April to the 22nd July* 1912, *and from the* 10*th July*, 1913.)

„ Syed Muhammad Rafiq. (*Took his seat on the* 1*st July*, 1912; *on privilege leave from the 8th July, to the 7th August*, 1913).

„ A. E. Ryves. (*Officiated from the 20th March*, 1913).

„ W. H. Lyle. (*Officiated from the 7th April to the* 10*th July*, 1913.)

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I. L. R. XXXIII ALLAHABAD.

33 All. 1 (=6 I. C. 891).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

CHIRANJI LAL (*Defendant*) *v.* KEHRI SINGH (*Plaintiff*).*

[7th June, 1910.]

Civil and Revenue Courts—Jurisdiction—Suit to set aside decree of Revenue Court—Matters within exclusive jurisdiction of Revenue Court.

Held, that no suit can be entertained by a Civil Court for the purpose of setting aside a decree of a Court of Revenue in a matter as to which the latter Court has exclusive jurisdiction. *Keshab Deo* v. *Bahori* (1) and *Kishen Sahai* v. *Bakhtawar Singh* (2) referred.

THE facts of this case were as follows :—

The defendant, who was a recorded proprietor, obtained decrees for profits from the Revenue Court on the 19th June, 1905, and the 1st September, 1905, against the plaintiff and realized the money due under the decrees. The plaintiff then brought the present suit in the Civil Court and prayed (1) for a declaration that the defendant was not entitled to any profits for the land in suit, and (2), that the decrees of the Revenue Court dated the 19th June 1905, and the 1st September, 1905, be declared null and void and be set aside, and the amount decreed as profits be refunded. The Court of first instance granted the first prayer ; but on appeal the lower appellate Court decreed the whole suit. The defendant preferred a second appeal as to this second relief only.

* Second Appeal No. 478 of 1909 from a decree of H. W. Lyle, District Judge of Agra, dated the 17th of March, 1909, modifying a decree of Lakshmi Narayan, Munsif of Agra, dated the 31st of October, 1908.

(1) S. A. No. 883 of 1905, decided on the 30th of November, 1906.

(2) (1898) I. L. R. 20 All. 237.

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Babu *Piari Lal Banerji* (for Babu *Durga Charan Banerji*), for the appellant :—

Under section 201 of the Tenancy Act, all that the Civil Court could do was to declare the right of the plaintiff. The [2] Legislature only reserved to the unsuccessful party in the Revenue Court, the right to get his title declared by a Civil Court. When there was no question of fraud, a Civil Court could not set aside a decree of a competent Revenue Court in a matter within its exclusive jurisdiction. He relied on *Keshab Deo* v. *Bahori* (1) and *Rai Krishn Chand* v. *Mahadeo Singh* (2). He further contended that the money which was realized under a decree of a competent Court could not be refunded. The Civil Court could only declare the plaintiff's right and not order any restitution consequential to the declaration. It had no jurisdiction to set aside the Revenue Court's decree, much less could it pass a decree for the refund of the money paid under the Revenue Court's decree. He relied on *Marriot* v. *Hampton* (3) and *Kishen Sahai* v. *Bakhtawar Singh* (4).

Munshi *Govind Prasad*, for the respondent :—

When the very basis of the Revenue Court's decree was taken away by the Civil Court's declaration that the plaintiff was not entitled to the profits, then the Civil Court was competent to decree by way of refund the amount which had been improperly realized under a wrong decree. He cited *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (5) and *Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery* (6).

Babu *Piari Lal Banerji* was not heard in reply.

STANLEY, C.J., and GRIFFIN, J.:—The plaintiff in the suit out of which this appeal has arisen prayed for a declaration that the defendants were not entitled to any portion of a piece of land entered as holding No. 3 in the khewat of a village and also to have two decrees of the Revenue Court, dated respectively the 19th of June, 1905, and the 1st September, 1905, set aside and declared void, and for an order that the defendant No. 1 should be ordered to refund to the plaintiff two sums of money paid to him under and by virtue of the said decrees of the Revenue Court.

The Court of first instance passed a decree in favour of the plaintiff in regard to the declaration as to title asked for, but dismissed his claim in other respects.

[3] Upon appeal the lower appellate Court give a decree to the plaintiff in the terms of his claim.

This second appeal has been perferred, and it is contended before us that the Civil Court has no jurisdiction to set aside decrees passed by the Revenue Court under the powers conferred on them by the Agra Tenancy Act. It appears to us that this contention is well founded. If we were to entertain suits to set aside decrees of the Revenue Courts, we should be bringing the Civil Courts into direct antagonism with the Revenue Courts. In certain matters the Agra Tenancy Act has provided that the Revenue Courts shall have exclusive jurisdiction, and it is not within the power of Civil Courts to interfere with the decrees of the Revenue Courts, which have been passed in matters exclusively within the jurisdiction of the Revenue Courts. This was so held by a Bench of this Court, of which one of us was a member in the unreported case of *Keshab*

(1) S. A. No. 883 of 1905 decided on the 30th of November, 1906.
(2) Weekly Notes, 1901, p. 49.
(3) (1797) 2 Smith L.C. 10th Edn. 409.
(4) (1898) I. L. R. 20 All. 237.
(5) (1877) I. L. R. 3 Cal. 30.
(6) (1865) 10 Moo. I. A. 203.

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Deo v. *Bahori* (1). The facts of that case were similar to those before us now, and in the judgment we find the following passage:— "In our opinion this suit has been misconceived. The plaintiff asked the Civil Court to set aside a decree of the Revenue Court in a matter as to which the Revenue Court had exclusive jurisdiction. We are of opinion that such a suit could not be entertained by the Civil Court." We would also refer to the case of *Kishen Sahai* v. *Bakhtawar Singh* (2). We therefore allow this appeal. We set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs in this Court and also in the lower appellate court.

Appeal decreed.

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33 All. 4 (6 I. C. 793=7 A. L. J. 815.)

[4] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

MADHO RAM (*Defendant*) *v.* DURGA PRASAD (*Plaintiff*). *
[7th June, 1910.]

Act No. XXVI of 1881 (*Negotiable Instruments Act*), *section* 98—*Want of notice of dishonour—Whether damage caused by reason of such want of notice—Burden of proof.*

In a suit by intermediate endorsers of a *hundi* against earlier endorsers, the court found that the *hundi* had not been presented for payment within a reasonable time and the notice of dishonour was not given. *Held* that it lay upon the plaintiffs to prove that the defendants could not suffer damage by reason of want of notice of dishonour; not upon the defendants to prove that they had suffered damage. *Moti Lal* v. *Moti Lal* (3) followed.

[Fol: 39 All. 364.]

THE facts of this case were as follows:—

Ali Sajjad and Kanhaiya Lal drew a *hundi* for Rs. 806 on Lachman Das and Piari Lal in favour of Ismail and Tayab Ali. The *hundi* was drawn on the 10th November, 1903. The *hundi* was endorsed by Ismail and Tayab Ali in favour of Madho Ram and Gopal Das, appellants in the case. Madho Ram and Gopal Das transferred it to Mata Din and Durga Prasad, the plaintiffs respondents. The *hundi* passed through the hands of the following in order:—

1. Mata Din and Durga Prasad.
2. Thakur Prasad and Ganga Prasad.
3. Prabhu Dayal and Sham Lal.
4. Kedar Nath and Babu Lal.
5. Sheo Dat and Banarsi Das.

All these transfers took place between the 10th and 16th of November, 1903. The last holders sent the *hundi* to their agent at Calcutta for recovery of money. The *hundi* was dishonoured, as the business of the drawees had failed. It was presented after three months and some days and after dishonour returned to the last endorsees Sheo Dat and Banarsi Das. They realized the money from Kedar Nath and Babu Lal, and the

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*Second Appeal No. 1111 of 1909 from a decree of Mahammad Siraj-ud-din, Judge, Small Cause Court of Cawnpore, dated the 11th of August, 1909, reversing a decree of Hamid Hasan, Munsif of Fatehpur, dated the 15th of May, 1908.

(1) S. A. No. 883 of 1905, decided on the 30th November, 1906.

(2) (1898) I. L. R. 20 All. 237.

(3) (1883) I. L. R. 6 All. 78.

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latter in their turn from Prabhu Dayal and Sham Lal who brought a suit on the *hundi* against their endersers and the drawers and the payees.

The Munsif decreed the suit against the drawers, the payees and the first three sets of endorsees. The payees appealed and [5] the suit against them was dismissed as the *hundi* had not been presented within three months and no notice of dishonour had been given to them. Prabhu Dayal and Sham Lal realized the money from Mata Din and Durga Prasad.

This was a suit by Durga Prasad to recover the money from Madho Ram and Gopal Das and the drawers.

The defence was that the *hundi* was not presented in time and that no notice of dishonour was given. The first court gave effect to these pleas and dismissed the suit. The lower appellate court considered the question how far the respondents had suffered loss by reason of want of notice of dishonour and held that they had failed to prove loss by reason of want of notice and decreed the suit.

The defendants appealed.

Babu *Durga Charan Banerji*, for the appellants, contended that it was for the plaintiffs to prove that the defendants had not suffered any loss through want of notice and not for the defendant to prove that they had suffered loss. He cited *Moti Lal* v. *Moti Lal* (1), *Amiruddi Bepari* v. *Bahadoor Khan* (2), section 98 of the Negotiable Instruments Act, *Jambu Ramaswamy Bhagavathar* v. *Sundararaja Chetti* (3) and *Askaran Baid* v. *Piyar Bux* (4).

It was for the holder to give notice of dishonour.

Munshi *Damodar Das*, for the respondents, submitted that in the cases referred to by the appellants, the plaintiffs were the holders of the *hundis*. It was not so in this case. The person in possession for the time being was the one to give notice. An endorsee could not know that a *hundi* had been dishonoured. He cited *Subramanian Chetty* v. *Alagappa Chetty* (5).

STANLEY, C. J., and GRIFFIN, J. :—This appeal arises out of a suit brought by intermediate endorsers of a *hundi* against earlier endorsers and the drawers of the *hundi* to recover the amount paid by them to the holder of the *hundi*. The court of first instance dismissed the plaintiff's claim, finding that the *hundi* was not presented for payment within a reasonable time, and that notice of dishonour was not given. It also held, in accordance [6] with the ruling in *Moti Lal* v. *Moti Lal* (1), that in a case of the kind the *onus* lies upon the plaintiffs to prove that the defendants could not suffer damage by reason of want of notice, and that being so, the want of notice of dishonour was excused. It pointed out that in this case the plaintiffs did not venture to allege, much less prove, that the defendants could not suffer damage by reason of the want of notice.

Upon appeal all other questions appear to have been abandoned, except the question as to whether the defendants suffered loss by reason of want of notice of dishonour. In other words whether notice of dishonour in this case was excused. Section 98 of the Negotiable Instruments Act provides that no notice of dishonour is necessary when the party charged could not suffer damage for want of notice. If the plaintiff seeks to excuse the want of notice of dishonour, it lies upon him to establish

(1) (1883) I. L. R. 6 All. 78.
(2) (1903) I. L. R. 30 Cal. 977.
(3) (1902) I. L. R. 26 Mad. 239.
(4) (1903) 12 C. W. N. 644.
(5) (1907) I. L. R. 30 Mad. 441.

that the party charged could not suffer damage for want of such notice. This was so held in *Moti Lal* v. *Moti Lal*, which we have quoted above. The learned Judge of the Small Cause Court, however, shifted the *onus* of proof in this case upon the defendants. He says in his judgment—" it was for the defendants to prove the damage" and that "it was necessary to see whether they had proved it." Then he finds that the defendants had failed to prove loss by reason that the notice of dishonour had not been given and the plaintiffs were therefore entitled to their money.

In this view of the law we are unable to concur. It was for the plaintiffs, as we have said, to show that by reason of the want of notice of dishonour the defendants could not suffer damage. The decision of the court of first instance appears to us to be correct upon the findings, and we accordingly allow this appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs in all courts. The objections are disallowed.

Appeal decreed.

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33 All. 7 (=7 I. C. 112=7 A. L. J. 852).

[7] APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Chamier.

BALWANT SINGH AND ANOTHER (*Defendants*) *v.* AMAN SINGH (*Plaintiff*).*

[8th June, 1910.]

Hindu Law—Joint Hindu family—Sons' liability for father's debts—Mortgage—Suit for sale—Sons not made parties—Property sold in execution of decree for sale—Act No. IV of 1882 (Transfer of Property Act), section 85—Purchase by mortgagee decree-holder.

In execution of a decree for sale upon a mortgage of joint family property executed by the head of a Hindu joint family certain property was brought to sale and purchased by the mortgagees. A member of the family (great-grandson of the original mortgagor) sued the mortgagees for redemption upon the ground that the mortgagees at the date of the suit had been aware of his existence and had not impleaded him. *Held* that the plaintiffs' suit would not lie on this ground alone, and that his position was not affected by the fact that the mortgagee had himself purchased the mortgaged property. *Debi Singh* v. *Jia Ram* (1) followed. *Ram Prasad* v. *Man Mohan* (2) dissented from. *Lal Singh* v. *Pulandar Singh* (3) referred to.

[**Fol**: 8 A. L. J. 922=12 I. C. 111 ; 13 I. C. 951; 37 I. C. 833=1 Pat. L. W. 197; **Ref.** 33 All. 71 ; 25 I. C. 620 ; 1 Pat. L. J. 180 ; 33 All. 436 ; 13 I. C. 197 ; 68 I. C. 283.]

THIS was a suit by the respondent for redemption of a mortgage made by his great-grandfather, Pirthi Singh, in favour of the appellants. The latter brought a suit upon the mortgage, impleading as defendants his son and grandsons, including the father of the respondent, and they obtained a decree for sale, in execution of which they purchased the property themselves. The respondent based the present suit on the allegations that he was born before the appellants instituted their suit : that they were aware of his existence; that they should have impleaded him as a defendant, and as they failed to do so, his right to redeem the mortgage was still subsisting. The appellants contended that the respondent had no right to sue for redemption of the mortgage. The first court dismissed the suit on the

* First Appeal No. 119 of 1909 from an order of L. Marshall, District Judge of Mainpuri, dated the 15th of July, 1909.

(1) (1903) I. L. R. 25 All. 214.
(2) (1908) I. L. R. 30 All. 256.
(3) (1905) I. L. R. 28 All. 182.

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ground that it was barred by the proceedings in and consequent upon the suit upon the mortgage. The lower appellate court reversed that decision and remanded the suit for trial on the merits. The defendants have appealed.

Dr. *Tej Bahadur Sapru*, for the appellants :—

The question in this case is whether a great-grandson can bring a suit for redemption after the mortgaged ancestral property has been sold in execution of a decree to which he was not a party, [8] and purchased by the mortgagee. I submit he cannot. The ruling in the case of *Bhawani Prasad* v. *Kallu* (1) was much modified by subsequent rulings. Now the son or grandson, who has not been made a party to the mortgage suit, only gets an opportunity to show that the debt was not of such a character as would be binding upon him in Hindu Law; *Debi Singh* v. *Jia Ram* (2). In the present case the binding nature of the debt is admitted, and the sole ground of the plaintiff's suit is that he ought to have been made a party to the mortgage suit. The mere ground that he was not impleaded is no longer held, by itself, sufficient to entitle him to any relief. The fact that in the present case the plaintiff is willing to redeem does not take the case out of the rule laid down in the case of *Debi Singh* v. *Jia Ram*. The case of *Lal Singh* v. *Pulandar Singh* (3) which followed the case just referred to was a suit for redemption like the present suit. A similar case to that in I. L. R. 25 All. was that of *Chattarpal Singh* v. *Natha* (4). The case of *Jhabba Lal* v. *Chhaju Mal* (5) and *Ram Prasad* v. *Man Mohan* (6) have gone back again from the rule laid down in *Debi Singh* v. *Jia Ram* and subsequent cases cited above. The case of *Ram Prasad* v. *Man Mohan* is in the teeth of the ruling in *Debi Singh's* case and in direct conflict with *Lal Singh* v. *Pulandar Singh*. I rely also on S. A. Nos. 711 and 712 of 1905 ; and L. P. A. Nos. 110 and 111 of 1907, decided on 6th December, 1907.

Dr. *Satish Chandra Banerji*, for the respondent :—

I rely upon the latest ruling of our Court, *viz*, the case in I. L. R. 30 All. already cited, which, I submit, lays down the correct law. A Hindu son born after the family property has been mortgaged takes, by his birth, an interest in the equity of redemption which is the property then left to the family. The case is analogous to that of a second mortgagee, who is interested in the equity of redemption of the prior mortgage. The interest which the plaintiff had in the equity of redemption, that is to say, his right to redeem, has never been lost and still subsists. I take my stand on section 85 and section 91 of the Transfer of Property Act. In the case of *Debi Singh* v. *Jia Ram* the plaintiff did not [9] seek to redeem it was the case of a Hindu son who wanted the court to entirely ignore the sale and restore the property without any payment. In that case the mortgage was not admitted. The observations of the Chief Justice in *Bhawani Prasad's* case in I. L. R. 17 All. are not touched by the case of *Debi Singh* v. *Jia Ram*, which did not overrule the former case but only distinguished it.

I also rely upon the case of *Khairaj Mal* v. *Daim* (7), where a distinction was drawn between the case of the mortgagee himself becoming the purchaser and that of a third person being the purchaser.

(1) (1895) I. L. R. 17 All. 537.
(2) (1963) I. L. R. 25 All. 214.
(3) (1905) I. L. R. 28 All. 182.
(4) (1900) 3 A. L. J. 238.
(5) (1907) 4 A. L. J. 787.
(6) (1908) I. L. R. 30 All. 256.
(7) (1904) I. L. R. 32 Cal. 296.

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Dr. *Tej Bahadur Sapru* was not heard in reply.

CHAMIER, J.:—This was a suit by the respondent for redemption of a mortgage made by his great-grandfather, Pirthi Singh, in favour of the appellants. The latter brought a suit upon the mortgage, impleading as defendants his son and grandsons, including Mulayam Singh, the father of the respondent, and they obtained a decree for sale, in execution of which they purchased the property themselves. The respondent based the present suit on the allegations that he was born before the appellants instituted their suit; that they were aware of his existence; that they should have impleaded him as a defendant, and as they failed to do so, his right to redeem the mortgage still subsists. The appellants contended that the respondent had no right to sue for redemption of the mortgage. The first court dismissed the suit on the ground that it was barred by the proceedings in and consequent upon the suit upon the mortgage. The lower appellate court reversed that decision and remanded the suit for trial on the merits. The defendants have appealed.

We have been referred to a large number of cases bearing more or less on the point at issue. The first case to which I think it necessary to refer is that of *Bhawani Prasad* v. *Kallu* (1), in which it was held by five Judges (BANERJI, J., dissenting) that if a mortgagee institutes a suit for sale upon a mortgage made by a father in a joint undivided Hindu family without joining as defendants the sons of whose interests in the property he has **[10]** notice, and obtains a decree and an order absolute for sale against the father alone, the sons may obtain a declaration that the mortgagee, decree-holder, is not entitled to sell the interests of the sons in the mortgaged property in execution of his decree, although the sole ground of their suit is that they were not parties to the suit brought by the mortgagee. The next case is that of *Debi Singh* v. *Jia Ram* (2). There the sale had taken place before the sons brought their suit, and it was held by a Bench of three Judges that in such circumstances the sons could not succeed merely upon the ground that they had not been made parties to the suit by the mortgagee, but must establish some ground which under the Hindu law would free them from liability as sons to pay their father's debts. Both the learned Chief Justice (with whom KNOX, J., concurred) and BANERJI, J., pointed out that all that was held in the case of *Bhawani Prasad* v. *Kallu* was that before a sale has taken place the sons may have their interests excluded from the sale simply on the ground that the mortgagee who had brought the suit had notice of their interests and omitted to implead them as defendants. The decision of the Court in the case of *Debi Singh* v. *Jia Ram* is avowedly based upon certain decisions of their Lordships of the Privy Council, and in particular it would seem upon the following well-known passage in the judgment in the case of *Nanomi Babuasin* v. *Modhun Mohun* (3), namely.—" It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father from disputing the liability. If his debt was of a nature to support sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure the sale of it by suit. All

(1) (1895) I. L. R. 17 All. 537.
(2) (1902) I. L. R. 25 All. 214.
(3) (1885) I. L. R. 13 Cal. 21.

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that the sons can claim is that not being parties to the sale or execution proceedings, they ought not to be debarred from trying the fact or the nature of the debt in a suit of their own." The only differences between the case of *Debi Singh* v. *Jia Ram* and the case now before us are that in that case the plaintiffs sought to recover their shares in the family property without [11] offering to redeem the mortgage, whereas in the case now before us the plaintiff admits the validity of the mortgage and seeks to redeem it, and that in that case the auction-purchaser was a stranger, whereas in the present case he was the mortgagee himself. The decision in *Debi Singh* v. *Jia Ram*, was followed by BANERJI, J., in *Banke Rai* v. *Raghubir* (1) (unreported), in which the property of the family had been put up for sale in execution of a decree upon a mortgage made by the father and *purchased by the mortgagee himself*. The son sued to redeem the mortgage on the ground that the mortgagee had had notice of his interest but had not made him a party to the suit upon the mortgage. It was, therefore, a case exactly like the one now before us. BANERJI, J., held that the son could not succeed merely upon the ground that the mortgagee had had notice of his interest and had not made him a party. To the same effect is the decision in the case of *Lal Singh* v *Pulandar Singh* (2), where also the suit was brought by sons for redemption of their interests in the family property after it had been sold in execution of a decree based on a mortgage made by their father. In that case the auction-purchaser was a stranger to the mortgage and decree. That decision was followed by BANERJI, J., in the case of *Karan Singh* v. *Razi-ud-din* (3) (unreported), and an appeal against his decision under the Letters Patent was dismissed in December, 1907. That also was a suit for redemption after a sale had taken place in execution of a decree on a mortgage of joint family property made by the plaintiff's father. The auction-purchaser was a stranger, but had transferred the property to the mortgagee before the son brought his suit.

Thus in December, 1907, there was an undisturbed current of authority to the effect that after a sale of joint family property has taken place in execution of a decree passed upon a mortgage made by a father, his sons are not entitled to sue to recover their shares in the property merely upon the ground that they were not parties to the suit brought by the mortgagee and that they cannot sue to redeem the property or their interests in the property merely upon that ground. The same rule was followed whether the auction-purchaser was a stranger or was [12] the mortgagee. But in April, 1908, in the case of *Ram Prasad* v. *Man Mohan* (4), where joint family property had been foreclosed in execution of a decree passed upon a mortgage made by the father, AIKMAN and KARAMAT HUSAIN, JJ., held that he sons and grandsons were entitled to redeem the mortgage, inasmuch as the mortgagee who had purchased the property had been aware of the interests of the plaintiffs and should have impleaded them in the suit. They distinguished the case of *Debi Singh* v. *Jia Ram*, from the case before them on the ground that the former was a suit to get back from innocent purchasers the plaintiffs' share of the family estate, whereas in the case before them all that the plaintiffs asked was that they should be given an opportunity to redeem a mortgage which had been foreclosed by the defendants who knew of the plaintiffs' interests and yet did not make them parties to the

(1) (1904) S. A. No. 641 of 1903.
(2) (1905) I. L. R. 28 All. 182.
(3) (1907) S. A. No. 712 of 1905.
(4) (1908) I. L. R. 30 All. 256.

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suit, on the mortgage. The circumstance relied upon by AIKMAN and KARAMAT HUSAIN, JJ., that it was owing to the defendants' failure, not the failure of a person not a party to the suit, to comply with section 85 of the Transfer of Property Act, that the plaintiffs did not have an opportunity to redeem the mortgage, was not, I think, a sufficient ground for not following the decision in *Debi Singh* v. *Jia Ram*. It is true that the learned CHIEF JUSTICE, with whom KNOX, J., concurred, laid stress on the fact that the defendants were strangers to the suit on the mortgage, but BANERJI, J., did not allude to this feature of the case, and in the later case of *Banke Rai* v. *Raghubir* he dismissed the son's suit for redemption against the mortgagee, who had purchased the property at the execution sale. In their judgment in *Lal Singh* v. *Pulandar Singh*, the learned CHIEF JUSTICE and BURKITT, J., refer with approval to the decision of BANERJI J., in *Banke Rai* v. *Raghubir*, and quote the following passage from the judgment of their Lordships of the Privy Council in the case of *Girdharee Lall* v. *Kantoo Lall* (1) :—"This case is an authority for these propositions, first, where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or under a sale in execution of a decree for the father's debt, his sons by reason of their duty to pay their [13] father's debt cannot recover that property unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted, and, secondly, that the purchasers at an execution sale being strangers to the suit, if they had no notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings." This passage shows that strangers who purchase at a sale in execution of a decree on a mortgage against a Hindu father may, if the debt was not originally binding on the son, have a stronger position than the mortgagees would have had if they had purchased; but it seems to afford no warrant for the view that a mortgagee who purchases is in any worse position than a stranger in a case where the debt is binding upon the son, or rather upon his interest in the property. The crucial question is whether the debt was of a nature to support a sale of the property. If it was, the son cannot recover his share of the property, and *a fortiori* he cannot redeem the property, for an offer to redeem involves an admission that the debt is binding on his interest in the property. AIKMAN and KARAMAT HUSAIN, JJ., seem to have treated the question as one not of the Hindu law but of procedure depending upon section 85 of the Transfer of Property Act, but this view was not admissible in force of the decision of three Judges in *Debi Singh* v. *Jia Ram*. The learned Chief Justice devoted a considerable portion of his judgment in that case to the question whether the decisions of the Privy Council as to the circumstances in which a son could recover his share of the family property had been superseded by section 85 of the Transfer of Property Act; and with the concurrence of KNOX, J., and in this matter of BANERJI J., also, came to the conclusion that they had not been superseded and that once the property had been sold all that the sons could claim was an opportunity of "trying the fact or the nature of the debt in a suit of their own." AIKAMAN and KARAMAT HUSAIN, JJ., refer to a passage in the judgment of BANERJI, J., in the case of *Bhawani Prasad* v. *Kallu*, where he expressed the view that a suit like the one before us could be maintained;

(1) (1874) L. R. 1 I. A. 321 ; 22 W. R. 56.

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33 A. 7=7 I. C. 112=7 A. L. J. 852.

but in the case of *Banke Rai* v. *Raghubir*, BANERJI, J., considered himself bound by the decision in *Debi Singh* v. *Jia Ram* to dismiss such a suit. [14] Dr. *Satish Chandra Banerji*, for the respondent, contended that his client was in a position analogous to that of a puisne mortgagee who has not been made a party to a suit by the first mortgagee against the mortgagor for sale of the property, but there appears to me to be an important distinction between the two cases. Generally speaking, a mortgagee is not bound by the acts of the mortgagor done after the mortgage and certainly cannot be deprived of his rights by the failure of the mortgagor to redeem the prior mortgage. A sale of the property out of court by Pirthi Singh would admittedly have been binding upon the respondent, and it seems to me impossible to hold that he is entitled to disregard the execution sale merely because he was not made a party to the suit on the mortgage. As pointed out by PONTIFEX, J., in *Pursid Narain Sing* v. *Honooman Sahay* (1), the mortagee had a right validly acquired to have the property sold. The passage was cited with approval by the Privy Council in *Daulat Ram* v. *Mehr Chand* (2), and unless the law was altered by the enactment of section 85 of the Transfer of Property Act, the decision of their Lordships in the case last cited seems to be conclusive. The decision of the three Judges in the case of *Debi Singh* v. *Jia Ram* is a clear authority by which we are bound that the law was not altered by that section. I am of opinion that the decision of AIKMAN and KARAMAT HUSAIN, JJ., is inconsistent with the principle underlying the decision in *Debi Singh* v. *Jia Ram*, and therefore we are not bound to follow it. I would allow this appeal, set aside the decree of the lower appellate court and restore the decision of the court of first instance.

TUDBALL, J.:—I concur.

BY THE COURT.—The appeal is allowed, the decree of the lower court is set aside and that of the court of first instance is restored. Appellant will have his costs here and in the lower court.

Appeal decreed.

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33 All. 15 (=7 I. C. 97=7 A. I. C. 960.)

[15] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

RIKHAI RAI AND ANOTHER (*Defendants*) *v.* SHEO PUJAN SINGH (*Plaintiff*).*

[9th June, 1910.]

Hindu law—Widow—Legal representative—Reversionary heirs—Civil Procedure Code (1908), section 2 (11)—Act Local No. II of 1901 (Agra Tenancy Act) section 202.

One S. K. filed a suit for possession of certain lands and for cancellation of a perpetual lease executed by her mother, but died during the pendency of the suit. *Held* that the reversionary heir of the last male owner of the property in suit was the proper legal representative of the plaintiff.

Held, also, that where the defendant simply alleged that he was in possession of the land in suit as a tenant but did not allege that he was a tenant of the

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* Second Appeal No. 29 of 1910, from a decree of Sri Lal, District Judge of Ghazipur, dated the 13th of October, 1909, confirming a decree of Chajju Mal, Subordinate Judge of Ghazipur, dated the 26th July, 1909.

(1) (1880) I. L. R. 5 Cal. 845, at p. 852. (2) (1887) I. L. R. 15 Cal. 70

plaintiff, the Civil Court need not require the defendant to institute a suit in the Revenue Court as directed by section 202 of the Agra Tenancy Act, 1910.
[Dist: 15 I. C 461 = 1912 M. W. N. 897 = 23 M. L. J. 719. Fol: 27 I. C. 1001 = 17 M. L. T 186; 39 Mad 488. Ref. 14 I. C. 347.]

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APPELLATE CIVIL.

33 A. 15 = 7 I. C. 97 = 7 A. L. J. 960.

THE facts of this case were as follows:—

One Musammat Sheo Kunwar sued for possession of certain lands and for cancellation of a perpetual lease executed by her mother Atrajo Kunwar in favour of the defendants. Sheo Kunwar died during the pendency of the suit. Sheo Pujan (respondent) was brought on the record as an heir to the estate of the deceased plaintiff's father. The defence was that the defendants were the tenants of Sheo Kunwar; that consequently the Court ought to have proceeded under section 202 of Act II of 1901; that the suit had abated on the death of the plaintiff (Sheo Kunwar) and that Sheo Pujan was not entitled to proceed with the suit. Both the courts below decreed the claim. The defendants appealed.

Munshi *Govind Prasad* (with him The Hon'ble Nawab *Muhammad Abdul Majid*), for the appellants, contended that Sheo Pujan being a reversioner was not the legal representative of Sheo Kunwar. He could have sued in his own right. One reversioner cannot represent another reversioner. He relied on *Bhagwanta* v. *Sukhi* (1), *Balak Puri* v. *Durga* (2) and *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib* (3).

Babu *Sital Prasad Ghosh*, for the respondent, was not called upon, but cited section 2, cl. (11), of the Code of Civil Procedure.

[16] STANLEY, C. J., and GRIFFIN, J.:—"The suit in this case was brought by the plaintiff to recover possession of 60 bighas of *sir* land which were leased in perpetuity to the defendants by one Musammat Atrajo Kunwar, the mother of the plaintiff. The plaintiff Musammat Sheo Kunwar died during the pendency of the suit, and thereupon the respondent Sheo Pujan Singh, as the reversionary heir of Baldeo Rai, the last male owner, was placed upon the record in place of Musammat Sheo Kunwar. A decree in his favour was passed by the court of first instance which was confirmed by the lower appellate court. This second appeal has been preferred, and the main ground of appeal is that the cause of Sheo Kunwar was personal and did not survive to the respondent, the reversionary heir. There appears to us to be no force in this contention. Prior to the passing of Act V of 1908 there are several authorities to be found on the point raised. In the case of *Katama Natchier* v. *The Raja of Shivagunga* (4) their Lordships of the Privy Council held that upon the death of a Hindu widow the right of action formerly vested in her devolves not upon her heirs but upon the next heirs of her husband." In the case of *Premmoyi Choudhrani* v. *Preonath Dhur* (5) it was held by MACPHERSON and HILL, JJ., that on the death of a Hindu heiress after the institution of a suit to recover property belonging to her deceased husband, the reversionary heirs of her husband were her legal representatives within the meaning of section 365 of the Code of Civil Procedure. Again in the case of *Tribhuwan Sundar Kuar* v. *Sri Narain Singh* (6) it was held by our brothers BANERJI and AIKMAN that a reversioner succeeding to the estate of a deceased person after the death of the widow of that person would be bound by a decree obtained against the widow, provided that there was a fair trial of the suit in which the decree was passed, and that consequently the widow's right to sue survives to

(1) (1899) I. L. R. 22 All. 33.
(2) (1907) I. L. R. 30 All. 49.
(3) (1904) I. L. R. 27 Mad. 588.
(4) (1863) 9 Moo. I. A. 543.
(5) (1896) I. L. R. 23 Cal. 636.
(6) (1898) I. L. R. 20 All. 341.

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33 A. 15=7
I. C. 97=1
A. L. J. 960.

and devolves upon the heir of the husband entitled to the estate, and such heir, and not her personal heirs, should be her legal representative for the purposes of section 365 of the Code of Civil Procedure. When we turn to the definition of "legal representative" contained in section 2 of [17] Act V of 1908, the question seems to us to be set at rest. Legal representative, as defined in that section, means "a person who in law represents the estate of the deceased person, and includes any person who intermeddles with the estate of the deceased, and where a person sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued." It seems to us clear from this definition that the plaintiff as the reversionary heir to the estate of Baldeo Rai was entitled to be placed on the record in the place of Musammat Sheo Kunwar and to prosecute the suit as representing the estate of Baldeo Rai. There is no force therefore in this ground of appeal.

It is contended further that a tenancy subsists between the defendants appellants and Musammat Sheo Kunwar, and that action ought to have been taken under section 202 of Act No. II of 1901 and not in a Civil Court. There appears to be equally no force in this ground of appeal. The defendant Rikhai Rai in his written statement did not allege that he was a tenant of the plaintiff. He simply stated that he was in possession of the land in question as a tenant and that the plaintiff was the owner and zamindar. We agree in the conclusion arrived at by the lower appellate court as to this. For these reasons we think the decision of the courts below is correct and dismiss the appeal with costs.

Appeal dismissed.

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33 All. 17 (=7 I. C. 98).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

JAGANNATH PRASAD AND OTHERS (*Defendants*) *v.* RUSTAM ALI AND OTHERS (*Plaintiffs*).*

[11th June, 1910.]

Lambardar and Co-sharer—Powers of lambardar—Lease of timber-bearing common land for the purpose of cutting the timber and making charcoal.

Held that a lambardar has ordinarily no authority to grant leases of timber-bearing common land of the village to lessees for the purpose of having the timber cut and converted into charcoal.

THE facts of this case were as follows:—

Four persons, lambardars of a village, gave for a term of three years, a lease to the plaintiffs of a jungle in the village on 27th [18] July, 1908, under the terms of which the plaintiffs were entitled to clear the wood, cut the timber and convert it into charcoal. The plaintiffs were to pay Rs. 12 per loaded waggon to the lambardars. Other co-sharers prevented the plaintiffs from cutting wood. The Magistrate, apprehending a breach of the peace, attached the wood under the provisions of the Code of Criminal Procedure, and left the parties to their remedy in a civil suit. Plaintiffs, the lessees, brought a suit for damages

* Second Appeal No. 17 of 1910, from a decree of F. S. Tabor, District Judge of Banda, dated the 7th of October, 1909, modifying a decree of Achal Bihari, Subordinate Judge of Banda, dated the 19th of July, 1909.

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APPELLATE CIVIL.
33 A. 17=7.
I. C. 98.

for the loss of the profit they would have made. The defendants, co-sharers, contended that the lambardars had no right to grant a lease of the kind, and as it was not executed by the remaining co-sharers, it was not binding on them. The suit was decreed by the courts below. The defendants appealed to the High Court.

The Hon'ble Pandit *Sundar Lal*, for the appellants:—

A lambardar can make a lease for cultivation and not for cutting down wood. The terms of the *wajib-ul-arz* of the mahal gave no power of the kind to the lambardar.

Dr. *Tej Bahadur Sapru* (with him The Hon'ble Pandit *Moti Lal Nehru*), for the respondents:—

The joint land in the mahal was in the hands of the lambardars and if the lease was reasonable, the other co-sharers could not impeach it. The powers of management rested with the lambardars and management did not mean management for the purposes of cultivation only. A lambardar could do things unconnected with the cultivation of the land. He relied on *Mukta Prasad* v. *Kamta Singh* (1) and *Muhammad Kazim* v. *Mian Khan* (2).

The Hon'ble Pandit *Sundar Lal*, replied.

STANLEY, C. J., and GRIFFIN, J.:—The sole question involved in this appeal is concerned with the right of lambardars in the course of management of *parti* lands in a village in which *parti* lands are timber-bearing lands, to grant a lease of that land to lessees for the purpose of cutting down timber and converting it into charcoal.

A lease was executed in this case by the lambardars on the 27th of July, 1908, for a term of three years, to give the plaintiffs, **[19]** the lessees, power to cut down wood and convert it into charcoal. The appellants, who are co-sharers in the village, objected to and interfered with the cutting down of the timber and alleged that the lambardars had power to grant a lease of the kind.

The Court below, relying upon the provisions of the wajib-ul-arz of the village, came to the conclusion that the lambardars were authorized to grant the lease. It is said that the provisions of the wajib-ul-arz do not give the lambardars such power and that under the ordinary powers of management they are not entitled to grant a lease of the kind. On the other hand it is argued that they have such power under the wajib-ul-arz, and that in any case they have such a power if the lease be not detrimental to the interests of the co-sharers.

We are not aware of any authority, and none has been cited, for the proposition that lambardars can ordinarily grant leases of timber-bearing common land of the village to lessees for the purpose of having timber cut and converted into charcoal. In the absence of authority we do not see our way to travel outside the provisions of the wajib-ul-arz. In clause 4 of the wajib-ul-arz the practice as to the management of *parti* land is set forth. The heading of the clause is as follows:—"Usage as to the management of *parti* lands capable of being cultivated and as to breaking up (for tillage) of such *parti* land." The provision then follows:—"Each co-sharer manages the *parti* land within his own *patti* and the lambardars the *shamilat*, and according to mutual agreement rent is taken, &c." The question is, whether the words "the lambardars managed the *shamilat*" in view of the context justified the lambardars in this case in

(1) (1901) Weekly Notes, 1906 p. 277; 3 A. L. J. 655.

(2) (1907) I. L. R. 29 All. 554.

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33 A. 17=7. I. C. 98.

granting the lease in question. It appears to us that this question must be answered in the negative. The power given to manage *shamilat* land is in connection, as it appears to us, with the breaking up for tillage of the land. It does not seem to contemplate the granting of a lease to lessees authorizing them to cut down at will the timber existing upon the *shamilat* lands and convert it into charcoal. In view of the language of the wajib-ul-arz we think that the Courts below were wrong in decreeing the plaintiffs' suit as against the appellants. They were not consenting parties to the lease, and [20] as co-sharers in the *shamilat* land, were entitled to prevent the plaintiffs from cutting down their timber without their consent. If the lease had been a valid lease within the powers of the lambardars, the case would have been different.

For these reasons we allow the appeal in so far that we set aside the decree of the lower appellate Court as against the defendants appellants. In other respects the decree of that Court will stand. The other co-sharers have not appealed and they may have been consenting parties to the lease. The appellants will have their costs in all Courts against the plaintiffs.

Appeal allowed.

33 All. 20 (=7 A. L. J. 342=7 I. C. 315.)

MISCELLANEOUS CIVIL.

Before Mr. Justice Tudball.

KACHERA *v.* KHARAG SINGH.*

[17th June, 1910.]

Act No. VII of 1870 (*Court Fees Act*), *sections* 5 *and* 7—*Court fee—Objections by mortgagee asking for sale of a portion of the mortgaged property exempted by the Court from sale—Reference by Taxing Judge to a Division Bench—Jurisdiction.*

Held that where a party objects by way of appeal or under the provisions of order XLI, rule 22, of the Code of Civil Procedure to a decree of a subordinate Court excluding from liability a portion of certain property, the whole of which he claims to be liable for a mortgage debt, and while accepting the correctness of the amount found due asks that the excluded portion of the property may be also declared liable, Court fees should be paid with reference to the value of the property sought to be rendered liable. *Kesavarapu* v. *Kotta Reddi* (1) followed.

Where the Taxing Judge referred to a Division Bench a question relating to Court fees referred to him by the Taxing Officer; *Held* that the Bench had no authority to entertain such reference.

[**Ref**: 3 Pat. L J. 443. **Ref**: 65 I. C. 114; **Ref**: 65 I. C. 980; 75 I. C. 871=4 P. L. T. 688.]

THIS was a reference by the Taxing Officer of the High Court to the Taxing Judge under section 5 of the Court Fees Act. The sole point for decision was, whether, when a party objected by way of appeal or under the provisions of order XLI, rule 22, of Act V of 1908 to a decree of a subordinate Court, excluding from liability a portion of certain property, while the objector wanted to make the whole property liable, but accepted the correctness of the amount due to him, and asked that the excluded portion [21] of the property should also declared liable, court fees should have been paid—(*a*) with reference to the amount found due; or (*b*) with reference to the value of the property which it was sought to render liable.

* Stamp Reference in Second Appeal No. 1193 of 1909.

(1) I. L. R. 30 Mad. 96.

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MISCELLANEOUS CIVIL.

33 A. 20=7 A. L. J. 842 =7 I. C. 315.

The facts of the case are stated in the following report by the Stamp Reporter of the Court : —

"The plaintiff in the suit claimed to recover Rs. 2,100 for principal and interest due on a bond, dated the 20th April, 1881, by sale of the property hypothecated therein. Upon the trial of the suit, the court of first instance passed a decree for Rs. 1,700-2-10 out of the amount claimed by enforcement of hypothecation lien against 7½ shares out of 11½ shares of the mortgagor's rights, thus exempting 3½ shares of Data Ram from the operation of the decree.

"From this decision both the parties appealed to the lower appellate court, and their appeals having been dismissed by that court, the defendant has come in second appeal to this Court, and the plaintiff files a cross-objection under order XLI, rule 22, of the Code of Civil Procedure, and has valued his petition of objection at Rs. 700 and paid a court fee of Rs. 2 on the same.

"I beg to submit that the object of this cross-objection being to make the share of Data Ram aforesaid jointly liable with other property for the satisfaction of the plaintiff's decree obtained by him from the first court, it should be valued at Rs. 1,700-2-10 and an *ad valorem* fee of Rs. 115 should be paid on the same under schedule I, article 1, of Act VII of 1870, as amended by section 155 and the 4th Schedule of the Code of Civil Procedure (Act V of 1908). In support of the reasons for this report, I rely upon a decision, dated the 26th April, 1901, of a Division Bench of this Court on the question of court fees in Second Appeal No. 640 of 1899, which is on all fours with the present case. That being so, an additional court fee of Rs. 113 is payable by the objector (plaintiff respondent) on this memorandum of cross objection.

"For the reasons stated above, there is a deficiency of Rs. 55 to be made good by him on the memorandum of appeal filed by him in the lower appellate court and numbered as 310 of 1909 in that court. In this connection I would further submit that the plaintiff's appeal to the lower appellate court was valued at Rs. 800, while in this Court he has valued his objection at Rs. 700 only."

Dr. *Tej Bahadur Sapru*, for the respondent, took objection to the above report on the following grounds:—

"I object to the report of the office with regard to the deficiency in the court fee on the following grounds: —

"(1) The object of the petition of objections is not to get a decree from this Hon'ble Court for any sum in excess of that allowed by the lower appellate court but to make Data Ram's share which has been exonerated from the operation of the decree equally liable with the shares of the other judgement-debtors. The appellant has already paid court fee on the amount for which the lower appellate court has passed a decree in favour of the plaintiff respondent who is the objector in this Court. Once the full amount of the court fee having been paid, it should [2d] not, I submit, be levied over again when the plaintiff respondent asks for no relief for any additional amount, but only that a certain person who had been exempted should not be so extempted. Section 7 of the Court Fees Act has no application when no amount is claimed. I submit the principle laid down by the Madras High Court in the Full Bench decision at page 96 of the I. L. R. 30 Mad., covers my case.

"I have, however, no objection to the concluding portion of the report of the Stamp Reporter where he points out that the plaintiff's appeal to the lower appellate court was valued at Rs. 800, while in this Court he has valued his objection at Rs. 700 only. I am willing to raise the valuation from Rs. 700 to Rs. 800."

The Stamp Reporter submitted a further report as under : —

"The payment of full fee by the appellant on his memorandum of appeal is no excuse for the respondent. Section 16 of the Court Fees Act (No. VII of 1870), which governed cross objections, has been repealed (*vide* Schedule V, Act No. V of 1908), and they are now like plaints and memoranda of appeal governed by article 1, schedule I, of Act VII of 1870 (*vide* Schedule IV of Act No. V of 1908).

"The law as administered by the courts in these Provinces is that laid down in the precedent cited by me in my report, dated the 28th January, 1910, and so far as I know, it has neither been dissented from nor overruled by a larger Bench of this Court."

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CIVIL.

33 A. 20=7
A. L. J. 842
=7 I. C. 316.

The Taxing Officer referred the case to the Taxing Judge with the following report:—

"In the present reference the sole point for decision is, whether, when a party objects by way of appeal or under the provisions of order XLI, rule 22, to a decree of a subordinate court, excluding from liability a portion of a certain property, the whole of which he claims to be liable for a mortgage debt, and while accepting the correctness of the amount found due, asks that the excluded portion of the property be also declared liable, court fees should be paid (*a*) with reference to the amount found due under the mortgage; or (*b*) with reference to the value of the property which it is sought to render liable.

"The second view is supported by a Full Bench decision reported in I. L. R. 30 Mad. at page 96, but the former has the support of an unreported case (*Dumber Singh* v. *Musammat Narain Kunwar*, Second Appeal No. 640 of 1899, decided by a Divisional Bench of this Court on 26th April, 1901).

submitted for orders under section 5, Act VII of 1870.

The Taxing Judge referred the case to a Bench of two Judges by the following judgment:—

TUDBALL, J:—This matter raises a question of the amount of court fees payable upon the objections raised by the respondent to the decree of the Court below. The lower Court has granted a decree to the respondent for Rs. 1,700-2-10 to be recovered by sale of a portion of the mortgaged property. Some of the defendants have appealed. The respondent has filed [23] objections under which he asks this Court to declare that the property of one Data Ram, which has been exempted from the operation of the decree in his favour is also liable to be sold in execution of that decree. According to the office report the fee which is chargeable upon the memorandum of objection is to be calculated under clause (i) section 7 of the Court Fees Act on the full amount decreed by the lower court. To this objection is taken and reference is made to the Full Bench ruling reported in I. L. R. 30 Mad. 96. In Second Appeal No. 640 of 1899 a similar point was raised and a Division Bench of this Court in the course of its judgment remarked:—" To such a case no other clause or section of the Court Fees Act appears applicable except clause (i) of section 7." It appears to me from the above language that the point was not fully discussed on that occasion. The ruling of the Madras High Court appears to me to take a more correct view. It is further contended before me that the objector, as a matter of fact, is only asking for a declaration, and his objection should at the most bear the fee of Rs. 10. In my opinion there is considerable force in this objection: but in view of the ruling in Second Appeal No. 640 of 1899, the point is one which should be referred to a Bench of two Judges, to obtain an authoritative decision on the point. I accordingly refer this matter to a Bench of two Judges.

The case then coming on before KNOX and KARAMAT HUSAIN, JJ., their Lordships held that they had no jurisdiction to decide the reference and they directed the papers to be returned to the learned Judge by whom the reference had been made. In doing so their Lordships drew attention to the case which appeared in the Allahabad Weekly Notes, 1895 page 56, and also to section 5 of the Court Fees Act 1870.

The following order was then passed by the Hon'ble Taxing Judge:—

TUDBALL, J:—The Bench to which this matter was referred finds that it has no jurisdiction to deal with it. I have had, however, the opportunity of consulting my learned brothers who constituted that Bench (KNOX and KARAMAT HUSAIN, JJ), The matter was argued before them and I find that their opinion agrees with mine, *i.e.*, that the ruling of the

Madras High Court, [24] I. L. R. 30 Mad. 96, is the correct and equitable view. The respondent in this case seeks to bring certain property within the operation of his decree. Its value is Rs. 800 (this being less than the amount of the decretal debt) and that is the value of his cross-objections. He must, therefore, pay an *ad valorem* fee on the value of this property. He seeks more than a mere declaration. There is consequential relief in his demand, *viz.*, an order that the property be sold if the decretal debt be not paid. He will, therefore, pay the *ad valorem* fee as noted above. I allow one month to make good the deficiency.

Order accordingly.

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MISCELLANEOUS CIVIL.

33 A. 20=7 A. L. J. 842=7 I. C. 315.

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33 A. 24 (=7 I. C. 101).

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Chamier.

RAM KISHAN (*Defendant*) *v.* PIARI LAL (*Plaintiff*).*

[21st June, 1910].

Act No. XX of 1847—(*Copyright Act*) *sections* 7 *and* 12—*Copyright—Suit for damages for infringement of copyright—Jurisdiction.*

A suit to recover damages for infringement of copyright does not lie in the court within the jurisdiction of which the plaintiff, but not the defendant, resides. Neither is the possessor of a pirated copy of a copyright work bound to deliver it to the owner of the copyright wherever he (the owner) may happen to reside.

THE facts of this case were as follows :—

A suit was filed by one Piari Lal in the court of the District Judge of Aligarh, on the allegation that the plaintiff had a copyright in a book entitled "*Kok Shastra*" and that the defendant, Hakim Ram Kishan, had infringed this copyright by printing, publishing and selling an imitation of his book in Urdu and also in Gurmukhi. The reliefs he sought were twofold; first, that a permanent injunction might be issued against the defendant restraining him from printing, publishing or selling the offending book; and secondly, that the defendant might be orderd to deliver up all the unlawfully printed copies of the books or failing this to pay damages to the plaintiff. The books by printing, publishing and selling which the defendant was said to have infringed the copyright of the plaintiff were printed, published and sold at Lahore, where the defendant [25] resided and carried on business. One of the defences to the suit was that the District Judge of Aligarh had no jurisdiction to try the case. It was not proved that the defendant or his agent had been in possession of the offending books within the jurisdiction of that court. The court below, however, decreed the suit, holding that it had jurisdiction to try the case. It held "that the plaintiff has a legal right to demand that the defendant shall deliver to him all copies of any book that may infringe his copyright. The place of delivery is not regulated by the Contract Act, and it is not suggested that the plaintiff gave the defendant instructions to make delivery at any particular place; neither side has brought to notice any enactment or authority on the point. In the circumstances it would appear to be reasonable to hold that the place of delivery should have been Aligarh. Now non-delivery gives a right to claim damages, and if

* First Appeal No. 146 of 1909, from a decree of H. J. Bell, District Judge of Aligarh, dated the 23rd of March, 1909.

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33 A. 24=7 I. C. 101.

the books should have been delivered in Aligarh, failure to give delivery in Aligarh gives the plaintiff one cause of action arising in Aligarh." The defendant appealed.

Babu *Purushottam Das Tandan*, for the appellant :—

The only section which gives jurisdiction to a court in matters of copyright is section 7 of the Indian Copyright Act. That section definitely lays down that all suits in respect of infringement of a copyright are to be instituted in the highest court of original civil jurisdiction within whose limits the offending books have been printed, published or sold. There is no question of contract here. In the presence of the special enactment, no general law in regard to jurisdiction would be applicable. Now there is no finding that the defendant by his agent or otherwise was in possession of the offending books within the jurisdiction of the court at Aligarh. The court, therefore, cannot try the case. The view that under section 12 of the Copyright Act, the defendant should have delivered all copies of the offending books at Aligarh and that failure to give such delivery furnished a cause of action at Aligarh, is, it is, submitted incorrect. All that section 12 says is that the proprietary right in such books shall vest in the owner of the copyright. But it is the lookout of the owner to get his property from the person in [26] whose possession it is ; it is not the duty of the latter person to find out the owner and deliver it to him wherever he may be. He relied on *MacMillan* v. *Shamsululma Moulvi Zaka* (1). That case was one under the English Copyright Act [Stat. 5 and 6, Vict., Cap. 215], but the provisions in regard to jurisdiction are exactly the same there as in the Indian Act, and section 12 of the Indian Act has also its counterpart in the English Law. The case in the Bombay High Court is on all fours with the present case.

No one appeared for the respondent.

TUDBALL and CHAMIER, JJ. :—This is an appeal by the defendant in the suit against a decree passed by the District Judge of Aligarh. The plaintiff respondent is the proprietor of the copyrght in a book called *Kok Shastra*. The defendant appellant has printed and is or was selling a work on the same subject and under the same title. The court below has found that the appellant's book is an infringement of the respondent's copyright and has decreed that the appellant shall either deliver up all the pirated copies of the book now in his possession or pay the respondent Rs. 600 as damages for the detention thereof. It has also granted an injunction restraining the appellant from further infringing the copyright.

The appellant contends that the suit was not maintainable in the Court of the District Judge of Aligarh, inasmuch as the appellant resides at Lahore and the cause of action arose there. Section 7 of the Indian Copyright Act, 1847, as it now stands, provides that "if any person shall print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright without the consent in writing of the proprietor thereof, or shall have in his possession *for sale or hire* any such books so unlawfully printed without such consent as aforesaid, such offender shall be liable to a suit in the highest local court exercising original civil jurisdiction." Upon this provision it is quite clear that a suit for damages for infringement of copyright can be brought only in the court within the local limits of whose jurisdiction the cause of action arises or in the court within whose limits the defendant resides. The respondent has not appeared [27] in this Court, but in the court below he seems to

(1) (1895) I. L. R. 19 Bom. 557.

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33 A. 25=7 I. C. 101.

have contended that the suit was maintainable in Aligarh, because, although the appellant resides at Lahore, the cause of action arose at Aligarh where the respondent resides. He relies upon section 12 of the Copyright Act, which runs as follows :—"All copies of any book wherein there shall be copyright, and of which entry shall have been made in the said Registry book, and which shall have been unlawfully printed without the consent of the registered proprietor of such copyright in writing under his hand first obtained, shall be deemed to be the property of the proprietor of such copyright and who shall be registered as such, and such registered proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same or damages for the detention thereof." The learned Judge in the court below seems to have accepted the contention of the respondent that it was the duty of the appellant to deliver up all printed copies of the book in his possession to the respondent at Aligarh because the respondent resides at Aligarh or because the demand was made from Aligarh. We are unable to take this view. It seems quite clear that the place of residence of the person who makes the demand for surrender of pirated copies of a book or other work is altogether beside the question. If the respondent was justified in bringing his suit in Aligarh, it must be reason of the fact that he called upon the appellant to deliver the books to him at Aligarh. But the law does not require a person in possession of pirated copies of a book to deliver them to the proprietor of the copyright at any place selected by him, no matter what the expense of doing so may be. It appears to us that there is no justification for imposing on a person in the position of the appellant a burden which the Legislature has not laid upon him. In this connection it must be remembered that section 12 of the Copyright Act applies as much to the innocent possessor of a pirated copy of a book as to the printer or publisher in possession of a whole edition of pirated copies of a book, and the same duty is cast upon both. We cannot think that, it was the intention of Legislature to require every person in possession of a pirated copy of a book to deliver it up to the proprietor of the copyright in the book at any place selected by the latter. [28] In our opinion the cause of action in the present case arose at Lahore, where also the defendant appellant resides, and under section 17 of the Code of Civil Procedure, 1882, which was in force when the suit was brought, the suit should have been instituted in Lahore. We therefore allow this appeal, set aside the decree of the court below, and direct that the plaint be returned to the respondent in order that he may present it to the proper court. The respondent will pay the appellant's costs in this Court. The parties will have their own costs in the court below.

Appeal allowed.

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33 A. 28 (=7 I. C. 404=7 A. L. J. 879).

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Chamier.

MUNNA LAL AND ANOTHER (*Defendants*) *v.* HAJIRA JAN (*Plaintiff*) AND ZOBAIDA JAN (*Defendant*).*

[22nd June, 1910.]

Pre-emption—Muhammadan law—Shafi-i-sharik—Shafi-i-khalit—Shafi-i-jar—Effect of perfect partition.

* First Appeal No. 193 of 1908, from a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 21st of April 1908.

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33 A. 28=7
I. C. 401=7
A. L. J. 879.

When a mahal has been perfectly partitioned, no right of pre-emption under the Muhammadan law subsists in favour of the owner of one of the new mahals in respect of the other new mahal or any portion of it on the ground of vicinage alone. *Mahadeo Sing* v. *Mussamut Zeenut-un-nissa* (1), *Sheikh Mahomed Hossein* v. *Shaw Mohsin Ali* (2) and *Abdul Rahim Khan* v. *Kharag Singh* (3) referred to. Nor will the fact that a village chaupal has remained undivided give the owner of either of the new mahals a right of pre-emption against the owner of the other as a *shafi-i-khalit*. *Rahtab Singh* v. *Tahal Misser* (4) and *Shaik Karim Buksh* v. *Kamar-ud-deen Ahamad* (5) distinguished. *Abdul Rahim Khan* v. *Kharag Singh* (3) and *Lalla Puriag Dutt* v. *Shaikh Bundek Hossein* (6) referred to.

But a right of pre-emption as *shafi-i-sharik* may subsist in relation to villages in large estates equally with houses, garden and small plots of ground. *Sheikh Mahomed Hossein* v. *Shaw Mohsin Ali* (2) and *Sheikh Karim Buksh* v. *Kamr-ud-deen Ahmad*. (5) referred to.

[Dist. 4 Pat. L. T. 420; Ref. 51 I. C. 40.]

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Pandit *Moti Lal Nehru*, Maulvi *Ghulam Mujtaba* and Dr. *Satish Chandra Banerji*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and the Hon'ble Nawab *Muhammad Abdul Majid*, for the respondents.

[29] TUDBALL and CHAMIER, JJ.—This appeal arises out of a suit for pre-emption in respect to three separate mahals, being portions of three villages, Jarthal, Rasulpur-Gadhouli and Bidhuni, in the district of Etah. The plaintiff respondent, Musammat Hajira Jan, is the own sister of Musammat Zobaida Jan, defendant No. 3.

The claim is based on Muhammadan Law. The plaintiff, while admitting that the shares of her sister and herself had in each village been partitioned and separate mahals had been formed, pleaded that the partitions had been made "*khaibat*" and not "*chakbat*"; that the village site of Jarthal had not been divided; that the mahals were contiguous to each other and that certain rights of way, water-courses and other rights had been left common to the mahals in each village. She therefore claimed the right of pre-emption.

(1) As a *shafi-i-sharik*, or co-sharer in the thing sold.

(2) As a *shafi-i-khalit*, or co-sharer in the appurtenant rights.

(3) As a *shafi-i-jar*, or contiguous neighbour.

The sale-deed which has given rise to this suit was executed on the 19th June, 1906, by Zobaida Jan in favour of the first two defendants, Munna Lal and Gulzari Lal, who are Hindus, in lieu of Rs. 17,900. The 6th and 7th grounds entered in the memorandum of appeal relating to the preliminary demands, not having been pressed in this Court, the defence, so far as we are concerned within this appeal was:—

(1) That the mahals of the vendor and the pre-emptor had been perfectly partitioned and that nothing was left joint, and therefore that the plaintiff could not claim pre-emption as a *shafi-i-sharik*.

(2) That the plaintiff was not a *shafi-i-khalit*, in that there were no common rights appurtenant to each of the mahals.

(3) That the "appurtenances" relied upon by the plaintiff were rights of a public nature and not of a private nature and could not give rise to a right of pre-emption.

(4) That the rule of vicinage or contiguity did not apply to large estates like separate mahals.

(1) (1869) 11 W. R. C. R. 169.
(2) (1870) 6 B. L. R. 41.
(3) (1898) I. L. R. 15 All. 104.
(4) (1868) 10 W. R. C. R. 314.
(5) (1874) 6 N. W. P. H. C. Rep. 377.
(6) (1871) 15 W. R. C. R. 225.

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[30] (5) That under the Muhammadan law there was no right of pre-emption except in regard to small plots of land and houses.

The lower court decreed the claim. It held that though the partition in each village was a perfect partition "there was no doubt that wells, passages and watercourses and the village site of Jarthal (*abadi*) were 'joint.'" The word "passage" is the lower court's interpretation of the word "*rasta*" or "roadway." The so-called watercourses are the small channels which cultivators make to conduct water from their wells to the fields they seek to irrigate. They are usually made annually, along the edges of their fields and sometimes across them. The lower court, therefore, held that the plaintiff was both a *shafi-i-sharik* and a *shafi-i-khalit*. In respect to the latter capacity it also remarked that the tanks do not appear to have been divided by metes and bounds. In regard to the claim on the basis of "vicinage," it held that though ordinarily when mahals had been separated no right of pre-emption on this basis could be allowed, still in the present case, as the partition had been made "*khetbat*" and the various plots constituting the two mahals in question were so intermixed that most of the plots allotted to one co-sharer were surrounded by those allotted to the other or adjoined them, their right could be claimed on the basis of vicinage also; for to decide otherwise would be to hold contrary to the principles on which the law of pre-emption is based.

It also held that in the case of large estates the rights of pre-emption could be claimed on the grounds of partnership in the estate and partnership in the common appurtenances.

The defendants vendees appeal, and the points pressed before us and which call for our decision are:—

(1) That the partition in each case was perfect, nothing was left joint;

(2) That no "appurtenances" or common rights of a private nature are in existence and those of a public nature give no rise to a right of pre-emption;

(3) That in the case of large separate estates like those in question there can be no right of pre-emption on the basis of vicinage or contiguity;

[31] (4) That the Muhammadan law of pre-emption only applies to houses, gardens and small plots of land and not to large estates. This last ground of appeal was but feebly pressed.

In the case of *Shaikh Mahomed Hossein* v. *Shaw Mohsin Ali* (1) it was held by a Full Bench of the Calcutta High Court that a partner (*shafi-i-sharik*) has a right of pre-emption in villages of large estates.

In 1874, in the case of *Shaik Karim Buksh* v. *Kamr-ud-deen Ahmad* (2), it was held that pre-emption extends to agricultural estates and is not confined to urban properties or small plots. There are numerous other decisions on the point to be found in the Law Reports, *e.g.*, 10 W. R. 314; 15 W. R., 223; 12 W. R. 484, in which pre-emption was allowed in the case of large estates. In nearly all these instances it was allowed on the ground of partnership in the thing sold. There is therefore no force in this plea.

The next question for decision relates to the nature and extent of the partition, and we have to see whether any portion of the original mahals were left undivided and whether any rights or appurtenances were left common to the two mahals into which each of the original ones was subdivided and the nature of these common rights if any.

(1) (1870) 6 B. L. R. 41.

(2) (1874) 6 N. W. P. H. C. R. 377.

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The Subordinate Judge, while stating that the partition (which admittedly was made by the Revenue Courts under the Land Revenue Act) was "perfect," held that "wells, passages and watercourses and the village site of Jarthal" were left joint. He sets forth the oral evidence on the point given by the parties, but omits to state what he accepts or rejects of that evidence, and fails even to mention the documentary evidence on the record. It is not possible to extract from his judgment the grounds on which he held the above to be joint.

The plaintiff in her plaint admitted that separate mahals had been formed. Separate mahals are only formed in partitions by the Revenue Court where the partition is "perfect."

* * * *

After discussing the evidence as to the nature of the partition which had taken place, the judgment then proceeded :—

This evidence shows clearly that the partitions were perfect **[32]** in every way, and there was nothing left to be jointly held or used by the zamindars. The latter do not reside in any of these three villages and have no *sir* lands. They have a collection house or *chaupal* in mauza Jarthal : that house was not within the scope of a partition by a Revenue Court, but the land on which it stood has been divided.

The patwari's evidence, even if it stood alone, would be amply sufficient to rebut the vague and bald statements of the plaintiff's witnesses ; but it receives corroboration and support from the partition proceeding of mauza Jarthal, and the settlement records filed by the defendant. The settlement took place after the partition, and each mahal was recorded as a separate 20 biswa mahal with a separate record of rights, and the various plots in the separate mahals were separately numbered.

The defendant produced at a late stage of the case the partition proceeding of the other two villages, but the lower court refused to accept them. They have been tendered here again, but there is no adequate reason put forward for their non-production at the proper time, and we have refused to accept them.

The essence of a perfect partition is the division of every thing that is divisible. Burial grounds and places of worship are usually not divided. In the present case there are none. In some cases wells, tanks, watercourses and embankments are of necessity left to be joint property of the co-sharers, but the court has to determine the extent to which the proprietors may use them, the proportions in which repair charges have to be borne and the manner in which the profits, if any, have to be divided.

In the present case, as the patwari shows, everything has been divided.

His evidence as to the result of the partition is worthy of all belief. It is highly improbable that he would testify falsely on points in regard to which, to his own knowledge, there existed public documents which could prove the truth. The defendants have been negligent in not having called for the partition record. We, however, accept the evidence of the patwari and hold that nothing was left, after partition, as the joint property of the **[33]** co-sharers. The village *chaupal* in Jarthal is apparently still the joint property of the parties. But the land on which it stands has been divided. The roadway and watercourses have even been divided, and the soil thereof is the property of the owners of the various mahals, but all public and private rights of way remain as before. The co-sharers are not shown to have any private rights of way or water. Public rights

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remain unaffected; so also do the rights of the tenants in respect to irrigation. The co-sharers own no wells and having no *sir* lands have no private rights of irrigation over each other's lands.

The *abadi* of Jarthal, *i.e.*, the soil, has been divided. The residents remain the owners of their houses as before, with all rights which they had acquired. The co-sharers do not reside in these villages.

As to *khalyans* and sugarcane presses, there are no lands specially set apart for these, and neither party is shown to have any rights in respect thereto over the separate mahals of the other. In our opinion the plaintiff has completely failed to establish her position as a *shafi-i-sharik* in the zamindari mahal which she seeks to pre-empt.

She has equally failed, in our opinion, to establish her position as a *shafi-i-khalit*. The fact that a tenant irrigates his field in one mahal from his well situated in another mahal does not constitute the plaintiff a *shafi-i-khalit*. Nor does the fact that she and the vendor are tenants in common of the *chaupal* put her into that position. The ownership of the house is distinct and separate from that of the zamindari. A sale of the latter does not necessarily include a sale of the former.

Reliance is placed on the ruling in *Mahtab Singh* v. *Ram Tahal Misser* (1). It was therein held that the plaintiff as a partner in the *Julkur* and *Neemuksaher* was a *shafi-i-khalit*. An examination of the judgement will show that there had been in that case an imperfect partition into *pattis*, and the *Julkur* and *Neemuksaher* had been reserved and not divided. These are rights from which part of the income of a mahal is derived. In the present case no such rights have been reserved and left undivided. There has been a complete separation of all **[34]** zamindari right. A *chaupal* is but a house and may be adapted to any other use to which a house may be put.

The case of *Shaikh Karim Buksh* v. *Kumr-ud-deen Ahmad* (2) does not help the plaintiff. That also was a case of imperfect partition in which some land and tanks and trees were left joint and undivided between the co-sharers. In the case of *Abdul Rahim Khan* v. *Kharag Singh* (3) it was held, in a case similar in many ways to the present, that no right of pre-emption arose from the fact that a burial ground and a *chaupal* had remained undivided. There had been a perfect partition, as here, and a burial ground and a *chaupal* were left common property. See also the case of *Lalla Puriag Datt* v. *Shaikh Bundeh Hossein* (4). In our opinion the plaintiff is not a *shafi-i-khalit*. She has no rights of easement over the defendant's mahal, nor do the owners of the two mahals share any rights or appurtenances.

There remains the question of "vicinage." The right of pre-emption has been allowed in the case of zamindaris and large estates in many cases on the ground of partnership and in a few cases on the ground of partnership in the rights and appurtenances by the Indian Courts, and our attention has been called to the various rulings. Not a single case has been quoted (nor have we been able to find one) in which in such a case as this pre-emption has been allowed on the ground of vicinage. On the contrary there are several reported decisions in which the claim in such cases on this ground has been repelled and disallowed.

In *Mahtab Singh* v. *Ram Tahal Misser* (1) the claim was made both as *shafi-i-khalit* and *shafi-i-jar*. It was decreed to the plaintiff only in the former capacity.

(1) (1868) 10 W. R. C. R. 314.
(2) (1874) 6 N. W. P. H. C. Rep. 377.
(3) (1893) I. L. R. 15 All. 104.
(4) (1871) 15 W. R. C. R. 225.

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In *Mahadeo Singh* v. *Mussamat Zeenut-un-nisa* (1) it was ruled that after perfect partition of a zamindari share, no claim on ground of vicinage would remain. In *Sheikh Mahomed Hossein* v. *Shaw Mohsin Ali* (2) a Full Bench of the Calcutta High Court held that in the case of villages and large estates no right of pre-emption could be claimed on the ground of vicinage, and that such a right based on vicinage was restricted to the case of houses, gardens and small plots of land.

[35] In the case of *Abdul Rahim Khan* v. *Kharag Singh*, mentioned above, it was held by a Bench of this Court that where an estate had been divided into two separate mahals no right of pre-emption under the Muhammadan law would subsist on behalf of one of such mahals in respect of the other, merely by reason of vicinage. The Subordinate Judge has tried to distinguish the present case from all these rulings on the ground that the partition of the villages in suit was " *khetbat* " and not "*chakbat*" and the fields which constitute the two mahals are all intermixed. The same plea has been raised before us, and it is urged that if the vendor had sold each field separately by a separate sale-deed, the plaintiff would have been entitled to pre-emption on the ground of vicinage if one of her plots adjoined it. The argument is specious, but has no force. The vendor has not sold each plot separately, but the mahal as a whole. In very few partitions is it possible to divide a mahal into large blocks of equal value. Where possible this is always done, but it is seldom possible. The rights of the tenants have to be considered in assessing the value of the land to the zamindar. Many have occupancy rights and many pay favourable rates of rent by reason of their caste or for other causes.

In the large majority of partitioned mahals, the fields of the resultant mahals will be found intermixed, and we do not think that this is a sufficient reason for holding that vicinage will give the plaintiff a right to pre-empt.

We would point out that there are many villages in these provinces which have fields standing right in the midst of the fields of other villages. As between such villages or between adjacent villages the right of pre-emption has never been allowed by (and probably never claimed in) the courts of this country. When a mahal is perfectly partitioned into two parts, these two new mahals stand to each other in the same relation as two separate villages. Many villages, or mauzas, have no inhabited site.

We do not deem it right to extend the right of pre-emption beyond the bounds which have been set to it by the courts in India in a long course of decisions. In our opinion when a mahal has been perfectly partitioned, no right of pre-emption [36] under the Muhammadan law subsists in favour of the owner of one of the new mahals in respect to the other new mahal or any portion of it, on the ground of vicinage alone. In this view we allow the appeal and set aside the decree of the lower court. The suit will stand dismissed with costs in both courts. The costs incurred by the respondent in the matter of printing and translating in this Court are costs in the cause and will fall on the respondent herself. The costs incurred by the appellants in the translating and printing of the rejected fresh evidence will not be the costs in the cause and must be borne by the appellants themselves.

Appeal allowed.

(1) (1869) 11 W. R. C. R. 169.

(2) (1870) 6 B. L. R. 41.

33 A. 36 (=7 A L. J. 897=11 Cr. L. J. 442=7 I. C. 186.)

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball and Mr. Justice Chamier.

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33 A. 36 =7 A. L. J. 897 =11 Cr. L. J. 442=7 I. C. 186.

EMPEROR v. IBRAHIM KHAN.*

[29th June, 1910.]

Act No. XLV of 1860 (*Indian Penal Code*), *section* 409—*Criminal breach of trust—Charge—Criminal Procedure Code, section* 222 (2).

An accused person was charged under section 409 of the Indian Penal Code with having embezzled an aggregate sum of Rs. 208-12-0 on various dates between the 1st July and the 1st November, 1909. *Held* that the charge so framed was not open to objection, notwithstanding that evidence was available as to the various items of which the aggregate sum charged was composed. *Emperor* v. *Gulzari Lal* (1), *Emperor* v. *'Ishtiaq Ahmad* (2), *Samiruddin Sarkar* v. *Nibaran Chandra Ghose* (3), *Sat Narian Tewari* v. *Emperor* (4) and *Thomas* v. *Emperor* (5) followed. *Subramania Ayyar* v. *King Emperor* (6) distinguished.

[**Ref:** 42 All. 522=18 A. L. J. 633=22 Cr. L. J. 84=59 I. C. 372;]

ONE Ibrahim Khan, a naib darogha employed in the Meerut Cantonments was charged with having embezzled a sum of money amounting to Rs. 208-12-0, which he had received as grazing fees from various persons who grazed cattle on the cantonment grass lands on various dates between the 1st of July and the 1st of November, 1909. This aggregate sum of Rs. 208-12-0 consisted of various items, some eighteen in all, which the accused was alleged to have received at various times between the dates mentioned [37] and from various persons. On this charge the accused was convicted and sentenced by the Assistant Sessions Judge of Meerut. On appeal to the Sessions Judge, however, the conviction and sentence were set aside and a retrial ordered, the Sessions Judge being of opinion that the case fell within the ruling of the Privy Council in *Subramania Ayyar* v. *King-Emperor* (6) and that the trial was an illegality in that the prosecution was able to prove the embezzlement of eighteen specific items and therefore the accused should have been charged separately in respect of separate items and not on the aggregate sum. Against this order the Local Government applied to the High Court in revision.

The Government Advocate (Mr. *W. Wallach*), for the Crown.

Mr. *G. P. Boys*, for the accused.

TUDBALL and CHAMIER, JJ.:—This is an application in revision filed by the Local Government seeking to have cancelled the order of the Sessions Judge of Meerut, whereby he set aside the conviction and sentence passed by the Assistant Sessions Judge of that district, upon Ibrahim Khan, in respect to an offence under section 409, Indian Penal Code, and ordered a retrial of the case.

The question raised in the case involves the true construction of clause (2), section 222, Criminal Procedure Code.

The accused, Ibrahim Khan, was a naib darogha, employed in the Meerut Cantonments, and the charge against him is, that in that capacity he realized the total sum of Rs. 208-12-0 as grazing fees, from various persons who grazed cattle on the Cantonment grass lands between the 1st

*Criminal Revision No. 985 of 1910 by the Local Government from an order of L. Johnston, Sessions Judge of Meerut, dated the 12th of February, 1910.

(1) (1902) I. L. R. 24 All. 254.
(2) (1904) I. L. R. 26 All. 69.
(3) (1904) I. L. R. 31 Cal. 928.
(4) (1905) I. L. R. 32 Cal. 1085.
(5) (1906) I. L. R. 29 Mad. 558.
(6) (1901) I. L. R. 25 Mad. 61.

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July and 1st November, 1909, and embezzled the same, failing to pay it into the Treasury.

The sum of Rs. 208-12-0 consists of some eighteen items, which the accused is said to have collected on dates (somewhat uncertain) between the 1st July and 1st November, 1909. Apparently he had no power to expend any money, but it was his duty to pay it in as he collected it, presumably daily. One charge in respect of the gross sum was framed against him, in view of the provision in clause (2), section 222, Criminal Procedure Code, and being **[38]** committed for trial, he was found guilty and convicted by the Assistant Sessions Judge.

On appeal the Sessions Judge held that in view of the rulings reported in I. L. R., 17 All., 153 and 18 All., 116, and the Privy Council ruling in *Subramania Ayyar* v. *King-Emperor*. (1) the trial was an illegality, in that the prosecution was able to prove the embezzlement of eighteen specific items, and therefore he should have been charged separately in regard to each item embezzled, there being in fact eighteen separate offences. In this view he set aside the conviction and sentence and ordered a retrial. It is this order which we are now asked to set aside on revision. It is contended that in view of the plain language of clause (2) of section 222, Criminal Procedure Code, and the rulings of this Court and of the High Courts of Calcutta and Madras, reported in I. L. R. 24 All., 254; 27 All., 69; 31 Cal., 928; 32 Cal., 1085; 29 Mad. 558, all of dates subsequent to the alteration of the law in 1898, the decision of the lower court is incorrect, and that the Sessions Judge has relied upon decisions which were passed prior to the Code of 1898

Section 222, clause (1) of the Code sets forth the particulars as to time, place and person which have to be entered in a charge sheet.

When the Code of 1898 became law, clause (2) was added to the section. It runs as follows: —"When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234. Provided that the time included between the first and the last of such dates shall not exceed one year."

The plain meaning of the above language appears to us to be that where a man in a certain capacity is entrusted from time to time with various sums of money and commits criminal breach of trust in respect thereto, he may be charged with an offence **[39]** in respect to the gross sum embezzled, and it is not necessary to specify the particular items embezzled, or the exact dates on which they were so embezzled, and that a charge so framed shall be deemed to be a charge of one offence, provided that the period within which such embezzlement has taken place is not more than one year.

Section 234 allows of the trial of an accused person at one trial in respect to three offences of the same kind committed within the space of twelve months. If the accused embezzled more than three separate specific items on specific dates, in the same capacity, within the period of twelve months, he could (under section 234) be tried at one trial in respect to only three of such items were it nor for clause (2) of section 222 of the Code which lays down that in such a case he may be

(1) (1901) I. L. R. 25 Mad. 61.

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charged in respect to the gross sum embezzled without specifying the particular items or exact dates, and that such a charge shall be deemed to be a charge of one offence within the meaning of section 234.

It is quite clear that the latter section is qualified by the former to a certain extent. Nor is there anything in the language of clause (2), section 222, which goes to show that where particular items and exact dates can be specified, they shall be so specified and the section shall not apply and that the accused shall be charged and tried in respect to each item or set of three items.

This is the view taken of the meaning of this section in the case of *Emperor* v. *Gulzari Lal* (1), and this was followed in the case reported in I. L. R. 27 All. 69.

The same view was adopted by the Calcutta High Court in the cases reported in I. L. R. 31 Cal. 928; 32 Cal. 1085 and by the Madras High Court in the case reported in I. L. R. 29 Mad. 558.

While admitting that the weight of authority is against him, the learned counsel for the accused has pressed the contention that the Code of Criminal Procedure of 1898 amended the law in this matter simply with a view to set at rest the conflict of decision between this Court and the Calcutta High Court in respect to those cases in which the prosecution is able only to **[40]** establish a general deficiency and has no means of proving the exact dates and particular items. Prior to 1898 this Court had held that where a general deficiency could be established, the accused could be charged and convicted in respect thereto. (*Vide* I. L. R. 17 All. 153; 18 All. 116.) The Calcutta High Court ruled otherwise in I. L. R. 24 Cal. 193.

It is further contended that the Legislature did not intend to introduce any organic change in the law by enacting the Code of 1898, that the clause in question was intended to cover cases in which the accused after receiving many sums at different times has on a certain date embezzled the whole amount thus received or part of it, *i.e.*, where there has been really only one act of embezzlement and also cases of general deficiency where it is impossible to give particular items or specific dates.

It is urged that clause (2) controls clause (1), and that an accused might be greatly prejudiced by being tried at one trial in respect to a thousand different items, or more, embezzled within the twelve months on specific dates, by reason of the complexity of the case. The contention as to the intention of the Legislature may be a correct one, but we have primarily to look to the language used by the Legislature to ascertain its meaning and intention. Where that language is plain and unambiguous, as in the present case, we are not allowed to look at extraneous matters and read other language into the section so as to give it a meaning which we may believe the Legislature intended to express.

Our attention has been called to the case of *Emperor* v. *Kashinath Bagaji Sali* (1), in which it was held by Mr. Justice CHANDAVARKAR, that where there have been defalcations in respect of different items in the course of twelve months, there the Court can try a man in respect of three offences by selecting different items combining those items into one lump sum and of making the selection so as to get at three sums, the appropriation of each constituting an offence by itself. The decision may or may not be correct, but we fail to see that it goes so far as to hold that all the sums may not be put together to form one gross sum and the

(1) (1902) I. L. R. 24 All. 354. (2) (1910) 12 Bom. L. R. 226.

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accused charged in respect to the gross sum so arrived at; such a [41] charge is clearly deemed to be a charge of one offence within the meaning of section 233 (*vide* clause 2 of section 222). If it goes so far as is contended before us, we cannot agree with it.

Nor can we see that the accused has in the present case been at all prejudiced at his trial.

In our opinion the order of the Sessions Judge is wrong. We allow this application, set aside his order and direct that the appeal be decided on its merits according to law.

Order set aside.

33 A. 41 (=7 A. L. J. 941=7 I. C. 697).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

GOPI (*Defendant*) *v.* MUSAMMAT JALDHARA (*Plaintiff*).*

[4th July, 1910.]

Hindu Law—Will—Construction—Bequest in favour of two married daughters—Joint tenancy or tenancy in common.

A Hindu died leaving a will whereby he bequeathed the whole of his property to his two married daughters without specification of shares. *Held* that the estate taken by the legatees was a tenancy in common and not a joint tenancy.

Jogeswar Narain Deo v. *Ram Chandra Dutt* (1) followed.

[Fol. 37 All. 241; Ref. 20 I. C. 756; 62 I. C. 436; 33 All. 665 : 62 I. C. 436.]

THE facts of this case were as follows:—

On the 28th of February, 1881, one Mohan Lal executed a will in favour of his two daughters, Lila and Maya, in the following terms:—

"I Mohan Lal, son of Har Dayal, Brahman by caste, alias Dubi, resident of Kasba Soron Khas, district Etah, declare as follows:—

"Life is transient, therefore it is necessary for every person to make such arrangement during his lifetime that after his death his name may be perpetuated and commemorated in this world. I am now about 55 years old and have got no son. I am in proprietary possession of the whole of the movable and immovable property up to the present time. No stranger or a relative of mine is a partner or sharer with me. No one else besides me is in possession and enjoyment of the property. Therefore, while in a sound state of body and mind, I make a will under this deed of will that after my death my daughters, Musammats Lila and Maya, shall be the owners in possession of the whole of the property in my possession specified below, like myself. If any ralative or sharer comes forward and brings any claim against my daughters, Lila and Maya, then his claim shall be false under this will. It is necessary for Musammats Lila and Maya to provide [42] with pleasure Musaminat (paper torn) with food if she lives after my death during her lifetime with her consent. I have therefore executed these few presents by way of a will in order that it may serve as evidence"

Both the daughters survived Mohan Lal. Lila subsequently died, leaving a daughter, Jaldhara, and a husband, Bhaskaran. On the 31st May, 1900, Maya, the surviving daughter, and Bhaskaran executed a mortgage of one of the houses and of the *birt jijmani* books, to Gopi, who obtained a decree on his mortgage. Jaldhara then instituted the present suit. The court below found the will proved. The question raised in appeal was whether on the death of Lila, her sister Maya became entitled to the whole property as survivor of the two legatees under the will of

* First Appeal No. 228 of 1909, from a decree of Ahmad Ali Khan second Additional Judge of Aligarh, dated the 27th of April, 1909.

(1) (1898) L. R. 28 I. A. 87 (44).

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Mohan Lal. The Court below held that the legatees were tenants in common and decreed the plaintiff's suit. The defendant appealed.

Mr. S. *Shams-ad-din*, for the appellant, contended that the principle of English law that a gift to two persons without words of division created a joint tenancy and not a tenancy in common, applied to the present case; *Mankamna Kunwar* v. *Balkishna Das* (1). He also submitted that under the Hindu Law daughters get a joint estate in the property inherited from their father. He referred to Mayne's Hindu Law, ed. 7, para. 563, *Sant Kumar* v. *Deo Saran* (2) and *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (3).

Munshi *Gulzari Lal*, for the respondent, submitted that the principle relied on by the appellant was a highly technical rule of the English law of conveyancing and did not apply to India. He cited *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (4), *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (5) and *Lakshmibai* v. *Hirabai* (6) which was affirmed on appeal in *Hirabai* v. *Lakshmibai* (7).

Mr. S. *Shams-ud-din* was heard in reply.

STANLEY, C. J., and GRIFFIN, J.—The sole question in this appeal depends upon the true construction of the will of one **[43]** Mohan Lal, dated the 28th of February, 1881. Mohan Lal had two daughters, namely, Lila and Maya. Both these daughters were married, Bhaskaran being the husband of Lila. Lila left a daughter, namely, the plaintiff Jaldhara. According to the will of Mohan Lal, which is a short document, after setting out that life was transient and therefore it was necessary for every person to make arrangements during his lifetime so that after his death his name may be perpetuated and commemorated, he directs that after his death his daughters, Musammats Lila and Maya, shall be the owners in possession of the whole of the property in his possession like himself. Nothing is to be found in the will to qualify the terms of this gift. The sole question before us is whether or not this gift to his two daughters was a gift to them as tenants in common or as joint tenants. Bhaskaran, the husband of Lila, and Maya executed a mortgage on the 31st of May, 1900, of a house which belonged to the testator, in favour of the defendant appellant Gopi, and it is his contention that the gift was a gift to the two daughters in joint tenancy, and therefore the survivor Maya was able to give a valid mortgage of the entire house. On the other hand it is contended that according to the rule of construction to be applied in the case of a Hindu will the gift in question was a gift to the two daughters as tenants in common. The court below held that it was such a gift and decreed the plaintiff's claim for a declaration that the plaintiff is the owner in possession of one-half of the property in dispute by right of inheritance from her mother Lila.

The question appears to us to be concluded by the ruling of their Lordships of the Privy Council in the case of *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (4). The testator in that case made a gift in the following terms:—"The remaining 4-anna share I give to you Srimati Rani Doorga Kumari, and the son born to your womb, Jogeswar Narain Deo, for your maintenance." This was followed by a direction in the following terms:—"Upon my death you and your son and grandsons, *et cetera*,

(1) (1905) I. L. R. 28 All. 38.
(2) (1886) I. L. R. 8 All. 365.
(3) (1902) L. R. 29 I. A. 156; I. L. R. 25 Mad. 678.
(4) (1896) L. R. 23 I. A. 37, 44; I. L. R. 23 Cal. 670.
(5) (1897) I. L. R. 24 Cal. 646 (652).
(6) (1886) I. L. R. 11 Bom. 69 (77).
(7) (1887) I. L. R. 11 Bom. 573 (579).

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in due order of succession, shall hold possession of the zamindari, *et cetera*, according to the above distribution of shares. And I give to you the power of making alienation by sale or gift." It was there [44] contended, upon the authority of *Vydinada* v. *Nagammal* (1), that by the terms of the will the Rani and her son, Jogeswar Narain Deo, became joint tenants of the 4-anna share and not tenants in common. In *Vydinada* v. *Nagammal* a Hindu by his will granted jointly to his brother's son and Nagammal, the wife of the latter, certain lands with power of alienation, and it was held in accordance with the rule of English conveyancing governing a gift of the kind that the grantees were joint tenants and not tenants in common. Their Lordships of the Privy Council overruled this decision, stating that there were two substantial reasons why it ought not to be followed as an authority, the first of these being "that the learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing." "The principle of joint tenancy," they observed, "appears to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided family." By this decision of their Lordships we are bound in the present case, the facts of which appear to be on all fours with those in the case of *Jogeswar Narain Deo* v. *Ram Chandra Dutt*. We may point out that the gift was not made to members of a joint Hindu family but to the two daughters of the testator, both of whom were married women. It is most unlikely that the testator would, under such circumstances, have given his property to his own daughters in joint tenancy. We think, therefore, that the decision of the court below was correct and dismiss this appeal with costs.

Appeal dismissed.

33 A. 45 (=7 I. C. 409.)

[45] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

HASAN ALI (*Plaintiff*) *v.* MIAN JAN KHAN AND ANOTHER (*Defendants.*)*

[6th July, 1910.]

Pre-emption—Claim of pre-emptor based on purchase by him of another share in the same mahal—Claim made before confirmation of sale in plaintiff's favour—Civil Procedure Code, section 316.

Held, with reference to section 316 of the Code of Civil Procedure, 1882, that a purchaser at auction sale in execution of a decree of a share in zamindari property does not become a co-sharer in the mahal in which such property is situate until the sale has been confirmed in his favour.

THE facts of this case were as follows:—

The plaintiff appellant purchased a share in a village on the 20th June, 1907, at an auction sale. The sale was confirmed on the 24th July, 1907. On the 23rd July, 1907, another share in the village was sold by a private sale to one Muhammad Taki by the respondent. The plaintiff sued for pre-emption with respect to this latter property as a co-sharer in the village by virtue of the former sale. Mutation of names had not been

* Second Appeal No. 728 of 1909 from a decree of Ram Autar Pande, District Judge of Azamgarh, dated the 30th of April, 1909, confirming a decree of Pratap Singh, City Munsif of Azamgarh, dated the 16th of November 1908.

(1) (1888) I. L. R. 11 Mad. 258.

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effected in the interval between the sale of the 20th June and its confirmation on the 24th July, 1907. The courts below dismissed the suit. The plaintiff appealed to the High Court.

The case came up for hearing before KARAMAT HUSAIN, J., who referred it to a Bench of two Judges by the following order:

"The suit out of which this appeal arose was for pre-emption on the basis of a *wazib-ul-arz*. The pre-emptor, on the 20th of June 1907, purchased a share which was sold by auction. That sale was confirmed on the 24th of July, 1907. The property which the pre emptor sought to pre-empt was sold under a sale-deed of the 23rd of July, 1907. The case for the pre-emptor was that he became a co-sharer on the date of the auction sale, that is the 20th of June, 1907, and that therefore he was a co-sharer for the purposes of pre-emption on the 23rd of July, 1907, when the property, the subject-matter of the suit, was sold to the defendant vendee. The case for the defendant vendee was that the pre-emptor did not become a co-sharer until the confirmation of the sale on the 24th of July, 1907. Both the courts below accepted the contention of the defendant and dismissed the plaintiff's claim. In second appeal by the plaintiff it is contended by his learned advocate that the ownership of the property purchased at an auction sale vests in the purchaser on the date of that sale, and that being the case, the pre-emptor is entitled to succeed. In support of this contention reliance is placed on the following ruling namely, second Appeal No. 194 of 1908, decided by a single Judge of this Court on the 6th of April, 1909, which in [46] very clear terms lays down that the ownership of a property sold by auction passes to the vendee on the date of the auction sale. In addition to that ruling the learned advocate relies on *Jagannath* v. *Baldeo* (1), *Chiddo* v. *Piare Lal* (2), *Bhyrub Chunder Bundopadhya* v. *Soudamani Dubee*, (3), *Chatraput Singh* v. *Girindra Chunder Roy* (4), *Durga Narain Sen* v. *Baney Madhub Mazoomdar* (5), *Dagdu* v. *Panchamsing Gangaram* (6) and *Musammat Buhuns Kowur* v. *Lalla Buhooree Lall* (7). The learned vakil for the respondents on the other hand contends that under section 316 of the old Code of Civil Procedure of 1882 the property vests in the auction purchaser on the date of the confirmation of the sale and not before. In support of this contention he relies on *Amir Kazim* v. *Darbari Mal* (8) which fully supports him. In addition to that he also relies on *Sheo Narain* v. *Hira* (9), *Gobind Ram* v. *Tulsi Ram* (10) and *Prem Chand Pal* v. *Purnima Dasi* (11). He further says that the rulings in *Naigar Timapa* v. *Bhaskar Parmaya* (12), *Banke Lal* v. *Jagat Narain* (13), *Karuna Moyi Banerjee* v. *Surendra Nath Mukerjee* (14) and *Harkisandas Narandas* v. *Bai Ichha* (15) help him in a way. Personally I am of opinion that the date of the passing of ownership to an auction purchaser ought to be the date of the auction sale, inasmuch as all the ingredients necessary to complete the sale come into existence on that date. But as there is a conflict of authority in this Court on this point, which will appear from comparing second Appeal No. 194 of 1908, decided on the 6th of April, 1909, with the case reported in I. L. R. 24 All 475, I deem it desirable that this point be considered by a Bench of two Judges. I order accordingly."

The case then came up for hearing before STANLEY, C. J., and KNOX, J.

Mr. *Abdul Raoof* for the appellant cited, *Dagdu* v. *Pancham Singh Gangaram* (6) and *Chiddo* v. *Piari Lal* (2).

Maulvi *Muhammad Ishaq*, for the respondent, relied on *Amir Kazim* v. *Darbari Mal* (8) and *Sham Lal* v. *Nathi Lal* (16).

STANLEY, C. J., and KNOX, J.—For the purposes of this second appeal it is necessary to note that the appellant, Hasan Ali, purchased a share in a certain mahal at an auction sale on the 20th of June, 1907. The sale did not become absolute until the 24th of July, 1907. On the 23rd of July, 1907 one Mianjan Khan, a share-holder in the same

(1) (1883) I. L. R. 5 All. 305.
(2) (1896) I. L. R. 19 All. 188
(3) (1876) I. L. R. 2 Cal. 141.
(4) (1880) I. L. R. 6 Cal. 389
(5) (1881) I. L. R. 7 Cal. 199, 207.
(6) (1892) I. L. R. 17 Bom. 375
(7) (1872) 14 Moo. I. A. 496.
(8) (1902) I. L. R. 24 All. 475.
(9) (1885) I. L. R. 7 All. 535
(10) (1887) Weekly Notes, 1887, p. 217.
(11) (1888) I. L. R. 15 Cal. 546.
(12) (1886) I. L. R. 10 Bom. 444.
(13) (1900) I. L. R. 22 All. 168.
(14) (1898) I. L. R. 26 Cal. 176.
(15) (1879) I. L. R. 4 Bom. 155.
(16) (1910) 7 A. L. J. 81.

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mahal, sold his share by private [47] sale to one Muhammad Taqi. The present appellant has brought the suit out of which this appeal has arisen, to enforce under the wajib-ul-arz his right to pre-empt the share sold by Mianjan Khan to Muhammad Taqi. Both the Courts below dismissed the claim, on the ground that the plaintiff was not a share-holder in the property, in respect of which he claims the right to pre-empt, at the time when the share was sold, namely, the 23rd of July, 1907.

In appeal to this Court it was contended that the appellant acquired his title from the date of sale and not from the date of confirmation of the sale. Looking to the terms of section 316 of the Code of Civil Procedure, of 1882, which was the law governing the matter at the time the suit was brought, we have no doubt that the view taken by the Courts below was the right view. The plaintiff did not become *hissedar* of the mahal until the date when the sale became absolute, and his right to pre-emption could not arise until the sale had been confirmed in his favour. We may point out that by the present Code of Civil Procedure, section 65, the law has been altered in this respect. Some misapprehension appears to us to prevail as to the meaning of the words used in section 316, *viz.*, "So far as regards the parties claiming through or under them." In *Dagdu* v. *Pancham Singh Gangaram* (1), TELANG, J., treats these words as though they meant that the Court purported to convey an absolute title to the purchaser. But a court acting under section 316 does not guarantee title; all that it does is to convey the right, title and interest in the property of the parties to the suit before it. So far as these parties are concerned it guarantees that the judgment-debtor shall not recover back the property sold, and that from the date entered in the certificate the purchaser becomes entitled to whatever interest the judgment-debtor was possessed of on the date when the sale was held. We think that the words mentioned above were used to preclude any suggestion that the interests of third parties were affected by the certificate that the title to the property sold has vested in the purchaser. The appeal is dismissed with costs.

Appeal dismissed.

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33 A. 48=(7 I. C. 412=7 A. L. J. 910=11 Cr. L. J. 480).

[48] REVISIONAL CRIMINAL.

Before Mr. Justice Tudball and Mr. Justice Chamier.

EMPEROR *v.* DHARAM DAS AND ANOTHER.*

[8th July, 1910.]

Criminal Procedure Code, section 106 (3)—*Security to keep the peace—Powers of appellate court not limited by jurisdiction of original Court—Act No. XLV of* 1860 (*Indian Penal Code*) *sections* 71, 147, 149, 325—*Separate sentences.*

The power conferred upon an appellate Court by clause (3) of section 106 of the Code of Criminal Procedure is not limited in any way by the powers exercisable by the original Court which tried the case. *Emperor* v. *Bhausing Dhumalsingh* (2) followed. *Muttiah Chetti* v. *Emperor* (3), *Paramasiva Pillai* v. *Emperor* (4), *Doraisami Naidu* v. *Emeperor*(5) and *Emperor* v. *Momin Malita* (6) dissented from.

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*Criminal Revision No. 223 of 1910, from an order of H. M. R. Hopkins, District Magistrate of Allahabad, dated the 23rd of February, 1910.

(1) (1892) I. L. R. 17 Bom. 375.
(2) (1908) I. L. R. 33 Bom. 33.
(3) (1905) I. L. R. 29 Mad. 190.
(4) (1906) I. L. R. 30 Mad. 48.
(5) (1906) I. L. R. 30 Mad. 182.
(6) (1908) I. L. R. 35 Cal. 434.

Held also that where in the course of a riot grievous hurt was committed the accused might be lawfully convicted of separate offences under sections 147 and 325 read with 149 of the Indian Penal Code and sentenced separately for each offence. *Queen-Empress* v. *Bisheshar* (1) followed.

[Fol. 2 Pat L J. 21; Ref. 37 Mad. 153=60 I. C. 998=19 A. L. J. 123=22 Cr. L. J. 310=81 I. C. 143.]

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THE applicants in this case were, with others, convicted of the offences of rioting and causing grievous hurt and sentenced by a magistrate of the second class to six months, rigorous imprisonment under section 147 of the Indian Penal Code, and to 3 months under section 325 read with section 149 of the Code. They appealed to the District Magistrate, who dismissed their appeals, and, acting under section 106 (3) of the Code of Criminal Procedure, ordered the applicants to find security to keep the peace. The applicants came in revision to the High Court, contending, first, that the order for security was bad, inasmuch as the Court which originally tried them had no power to make any such order under section 106 (1) of the Code, and, secondly, that separate sentences for offences under sections 147 and 325 of the Indian Penal Code, committed in the Course of the same transaction were illegal.

Babu *Durga Charan Singh*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

TUDBALL, J.—The facts of the case out of which this application for revision has arisen may briefly be stated as follows:—

[49] Two parties claimed title to certain *mahua* trees. One party apparently was in possession and peaceably engaged in gathering the fruit when the opposite party arrived armed with *lathis*, drove them away, and took possession. In the course of the riot grievous hurt was inflicted by some member or members of the applicants, (the aggressive) party. The two present applicants have been convicted by a Magistrate of the second class and have been sentenced for the offence of riot under section 147, I. P. C., to six months' rigorous imprisonment each, and for the offence of voluntarily causing grievous hurt under section 325, I. P. C., read with section 149. I. P. C., to three months' rigorous imprisonment each, *i. e.*, a total of nine months' rigorous imprisonment each. The applicants appealed to the District Magistrate, who dismissed their appeal, confirmed the convictions and sentences, and acting under section 106, clause (3), of the Criminal Procedure Code, ordered the present applicants to furnish security to keep the peace.

Two points are raised in this Court by the applicants. The first is that the order of the District Magistrate purporting to have been passed under section 106 of the Code of Criminal Procedure was without jurisdiction in that the Magistrate who originally tried the case had no power to pass an order under section 106, clause (1). The second point is that the sentences passed by the Magistrate are illegal. The applicants base their first contention upon a ruling of the Madras High Court in *Muthiah Chetti* v. *Emperor* (2). In that case a Bench of that Court held that "the power given to an appellate court to make an order under this section is not an unlimited power to make such an order in any circumstances, but is to be taken as giving the appellate court power to do only that which the lower court could and should have done, and therefore that the power of the court to pass such an order is confined to cases where the conviction has been by a court named in the section and in circumstances

(1) (1887) I. L. R. 9 All. 645.

(2) (1905) I. L. R. 29 Mad. 190.

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required by the section." The learned Judges gave no reason for their opinion. This was followed in another case, *Paramasiva Pillai* v. *Emperor* (1). In the case of *Dorasami Naidu* v. *Emperor* (2), though this ruling was followed, its correctness was clearly [50] doubted. The Judges who constituted that Bench remarked as follows :—" Although we are not prepared to dissent from the construction which has been placed upon clause (3) of the section, having regard to the language used, yet we think it may well be doubted whether the Legislature intended that the power of the appellate court and of the High Court when exercising its powers of revision should be confined to such narrow limits." They then proceed to give what in my opinion are very good reasons for holding that the section places no limit on the power of the appellate court. Clause (3) of the section distinctly says that an order under this section may "*also*" be made by an appellate court. There is nothing in the language of the section which in my opinion limits the power of an appellate court. This point was also considered in *Emperor* v. *Momin Malita* (3), where the ruling in 29 Madras, 190, was followed, but no reason was given. It was also considered by the Bombay High Court in *Emperor* v. *Bhausingh Dhumalsingh* (4). The Madras cases were quoted before the court. The judgement runs as follows :—" We are not prepared to accept the construction placed upon section 106 in those cases. We think that the clause (3) makes it clear that the order for security may be made in appeal whether the original court has jurisdiction to pass such an order or not. The clause runs 'An order under this section may *also* be made by an appellate court or by the High Court when exercising its powers of revision ; the word 'also' plainly implying that it may be independently made by those courts as well as by the original courts specified in the first ; and it is neither suggested nor implied that powers of the original court should in any way control or limit those of the appellate or revisional authority." The learned judges then refer to the case of *Dorasami Naidu* v. *Emperor* mentioned above, and, agree with the arguments of the learned judges therein, throwing doubt on the correctness of the decision in *Muthiah Chetti* v. *Emperor* (5). I fully agree with the opinion expressed by the Bombay High Court. In my judgement the power of an appellate court under clause (3) of the section is not limited in any way by the powers of original court which tried the case.

[51] In regard to the second point, the argument on behalf of the applicants is, that section 71 of the Indian Penal Code, applies to the circumstances of this case; and that under that section the maximum sentence which a Magistrate of the second class could pass was six month's rigorous imprisonment, and that therefore the total sentence of 9 month's imprisonment is illegal. The question whether section 71 applies to the facts of the present case is covered by authority. It was fully discussed in *Queen-Empress* v. *Bisheshar* (6). The circumstances of that case were similar to those of the present case. It was therein held that section 71 did not apply, and the Magistrate was empowered to pass separate sentences for each of the offences under sections 147 and 325, Indian Penal Code, to the full extent of his powers. That ruling has not, so far as we know, been differed from in this Court, but has been regularly followed, and I see no reason whatsoever to differ from it. I would therefore reject the application for revision.

(1) (1906) I. L. R. 30 Mad. 48.
(2) (1906) I. L. R. 30 Mad. 182.
(3) (1908) I. L. R. 35 Cal. 434.
(4) (1908) I. L. R. 33 Bom. 33.
(5) (1905) I. L. R. 29 Mad. 190.
(6) (1887) I. L. R. 9 All. 645.

CHAMIER, J :—On the first question, I entirely agree with what my learned brother has said and have nothing to add.

On the second question I consider I am bound by the previous decision of this Court to which he has referred, and which has, I understand, been consistently followed in this Court. I agree in the order proposed.

BY THE COURT.—Order of the Court is that the application for revision is rejected.

Application rejected.

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33 A. 51 (=7 I. C. 156=7 A. L. J. 361)

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Tudball and Mr. Justice Chamier.

ZAHARIA (*Plaintiff*) *v.* DEBIA AND OTHERS (*Defendants*).*

[9th July, 1910.]

Code of Civil Procedure (1908), *section* 11—*Res-judicata—Two suits—One judgment, but two decrees—Appeal against one decree, before the decision of which the other decree becomes final.*

M and *Z* each filed a suit for pre-emption in respect of the same sale, each claiming a right of pre-emption preferential to that of the other. Each plaintiff was made a party defendant to the suit brought by the other. A judgment was [52] delivered in the suit of *M* and a copy thereof was placed on the record as the judgement in the suit of *Z*; but a separate decree was framed in each suit. The suit of *M* was decreed, that of *Z* dismissed. *Z* appealed from the decree in his own suit, but not from the decree in the suit brought by *M*, which became final before *Z*'s appeal was decided.

Held that the doctrine of *res judicata* applied and *Z*'s appeal was barred. *Chajju* v. *Sheo Sahai* (1), *Bal Kishen* v. *Kishen Lal* (2), *Ram Lal* v. *Chhab Nath* (3), *Mangli* v. *Narain* (4), *Kesho Tiwari* v *Sarju Kunwar* (5), *Abdul Basit* v. *Asfaq Husain* (6) and other (unreported) cases of the Allahabad High Court approved and followed. *Damodar Das* v. *Sheo Ram Das* (7) overruled. *Abdul Majid* v. *Jew Narain Mahto* (8), *Mariammissa Bibi* v. *Joynab Bibi* (9) and *Panchanada Velan* v. *Vaithianatha Sastrial* (10) dissented from. *Gururajammah* v. *Venkatakrishnama Chetti* (11), referred to.

[Fol. 9 I. C. 667; 33 All. 151; 35 All. 187; Ref. 64 I. C. 574; 4 Lah. L. J. 344; Dis: 20 A. L. J. 784.]

THE facts of this case were as follows:—

Deba, Kesar and Jawitri sold some zamindari property to respondents 4 to 6 under a sale deed on the 9th August, 1907. Two suits were instituted in the court of the Munsif of Ghaziabad for pre-emption, with respect to the property sold. The first one was by Manphul and was registered as suit No. 1404 of 1908. The other was by Zaharia, the appellant in the present case, and was numbered 1405 of 1908. Each party claimed preferential rights of pre-emption to the other. The Munsif ordered that the plaintiff in the first case should be made defendant in the second and the plaintiff in the second, defendant in the first. He then tried both the

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* Second Appeal No. 427 of 1909 from a decree of Louis Stuart, District Judge of Meerut, dated the 20th of February, 1909, confirming a decree of Piyare Lal Katara, Additional Munsif of Ghaziabad, dated the 15th of December 1908.

(1) (1887) I. L. R. 10 All. 123.
(2) (1888) I. L. R. 11 All. 148.
(3) (1890) I. L. R. 12 All. 578.
(4) Weekly Notes, 1891, p. 190.
(5) Weekly Notes, 1893, p. 221.
(6) Weekly Notes, 1908, p. 211.
(7) (1907) I. L. R. 29 All. 730.
(8) (1888) I. L. R. 16 Cal. 233.
(9) (1906) I. L. R. 33 Cal. 1101.
(10) (1905) I. L. R. 29 Mad. 333.
(11) (1901) I. L. R. 24 Mad. 350.

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suits together, and in a judgement delivered on the 15th December, 1908, decreed Manphul's suit and dismissed that of Zaharia, in spite of the fact that although some issues were common to the two cases, some were not. One judgement was delivered, in suit No. 1404, a copy thereof being placed upon the record of the suit No. 1405, but two decrees were prepared. Zaharia appealed from the decree of the Munsif in suit No. 1405. No appeal was filed from the decree in suit No. 1404. When the appeal came on for hearing before the District Judge of Meerut, the period for appeal from the decree in suit No. 1404 had expired. A Preliminary objection was taken by the respondents before the District Judge that as the decree in the connected suit 1404, [53] had not been appealed against and had become final, it operated as *res-judicata* in the appeal before him. The District Judge upheld the objection and dismissed the appellant's suit. The plaintiff appealed.

Babu *Surendra Nath Sen*, for the appellant :—

There was no warrant in the Civil Procedure Code for disposing of two suits by one judgement. There was one judgement in the two cases and practically one decree; its being written out, in duplicate made no difference. Section 13 of the Code of Civil Procedure was an exhaustive statement of the doctrine of *res judicata*; *Gokul Mandar* v. *Pudmanund Singh* (1). The essentials of *res judicata* were that there should be a former adjudication which had to be final. There was no judgment which could be said to be anterior to the other, inasmuch as only one judgment was delivered.

A judgment could not be regarded as final when it was under appeal. He cited *Mariamnissa Bibi* v. *Joynab Bibi* (2), *Panchanada Velan* v. *Vaithinatha Sastrial* (3), *Damodar Das* v. *Sheo Ram Das* (4), *Abdul Basit* v. *Ashfaq Husain* (5), *Gajadhar Parshad* v. *Musammat Lachmin* (6), *Baldeo Singh* v. *Dharam Kunwar* (7), and *Chunder Koomar* v. *Bakur Ali* (8).

Dr. *Tej Bahadur Sapru*, for the respondents :—

If issues are common to two suits, then in a case like the present the decree not appealed against and allowed to be final, would operate as *res judicata* in an appeal in the other suit. An appeal was filed against a decree and not against a judgment, as the decree was the only operative part. He cited *Chajju* v. *Sheo Sahai* (9), *Bal Kishan* v. *Kishan Lal* (10), *Ram Lal* v. *Chhab Nath* (11), *Mangli* v. *Narain Das* (12), *Abdul Basit* v. *Ashfaq Husain* (5), *Gururajammah* v. *Venkatakrishnama Chetti* (13), and *Mariamnissa Bibi* v. *Joynab Bibi* (2).

[54] The provisions of section 13 were not exhaustive; *Ram Kirpal* v. *Rup Kuari* (14) and *Mangal Pershad Dichit* v. *Girja Kant Lahiri* (15).

Babu *Surendra Nath Sen* was heard in reply.

STANLEY, C. J.:—The question for our determination in this appeal is one of the application of the rule of *res judicata*. The appeal has been laid before a Bench of three judges owing to the recent decision in *Damodar Das* v. *Sheo Ram Das* (4), which is in conflict with the earlier decisions of this Court.

(1) (1902) I. L. R. 29 Cal. 707, 715.
(2) (1906) I. L. R. 33 Cal. 1101, 1109, 1115, 1117.
(3) (1905) I. L. R. 29 Mad. 333, 335.
(4) (1907) I. L. R. 29 All. 730.
(5) Weekly Notes, 1908, p. 211, 213.
(6) (1902) 5 Oudh Cases, 384.
(7) Weekly Notes, 1904, p. 6.
(8) (1868) 9 W. R. 598.
(9) (1887) I. L. R. 10 All. 123.
(10) (1890) I. L. R. 11 All. 148.
(11) (1888) I. L. R. 12 All. 595.
(12) Weekly Notes, 1893, p. 190.
(13) (1901) I. L. R. 24 Mad. 350.
(14) (1883) I. L. R. 6 All. 269.
(15) (1881) I. L. R. 8 Cal. 51.

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The appeal arises out of a suit for pre-emption. The defendants, Deba, Musammat Kesar and Musammat Jawitri, on the 9th of August, 1907, sold certain zamindari property in the village of Newari to Bhuri Singh and two others. Thereupon two rival suits for pre-emption were instituted in the Court of the Munsif of Ghaziabad—one by Manphul, which was No. 1404 of 1908, and the other by the appellant, Zaharia, which was No. 1405 of 1908. By order of the Court Zaharia was made a defendant in suit No. 1404 and Manphul was made a defendant in suit No. 1405 with the object of having their respective rights determined. For convenience sake both suits were tried together without objection by the parties. Issues were knit, and amongst others the following :—

"Has Zaharia, rival pre-emptor, a preferential right against the plaintiff (*i.e.* Manphul) ; and if not, have both rival pre-emptors equal rights."

One judgment was delivered in the two suits, which was placed on the record of suit No. 1404, a copy being placed on the record of suit No. 1405. By this judgment the suit of Zaharia was dismissed and the suit of Manphul was decreed. A decree in each suit was passed. Zaharia filed an appeal in suit No. 1405, but did not appeal against the decree passed in suit No. 1404. When his appeal came on for hearing the time for appeal against the decree in suit No. 1404 had expired and a preliminary objection was raised to the hearing of the appeal, namely, that it was barred by the decree passed in suit No. 1404. It will be observed that it was necessary for the determination of [55] suit No. 1404, that the court should find whether or not Zaharia had a preferential right, or any right to pre-empt as against Manphul. The lower appellate court allowed the preliminary objection and dismissed the appeal. The learned District Judge in his judgment observes :—"It is obvious that even under the provisions of rule 33, order XLI, I could not set aside the decree in Manphul's favour to which Zaharia was a party. Thus if Zaharia's appeal were decreed, there would be in existence two contradictory decrees. Manphul has, I have ascertained, already paid in the money and secured the right of pre-emption over the property. If Zaharia's appeal were decreed, to which of the two, Manphul or Zaharia, should a court award the property ?" Against the decree this second appeal has been preferred.

In the case of *Chajju* v. *Sheo Sahai* (1), which is a case on all fours with the present, the question before us was considered. In that case two rival suits for pre-emption were instituted, in each of which each pre-emptor was made a defendant in the other suit. The suits were tried together upon the same evidence and were disposed of by a single judgment, but by separate decrees. In one of the suits the pre-emptor obtained a decree in the terms of section 214 of the former Code of Civil Procedure. In the other the pre-emptor obtained a decree subject to the condition that in the event of the first pre-emptor failing to execute his decree, the second pre-emptor should be entitled to execute it. There was no appeal against the decree in the first suit. The second pre-emptor appealed from the decree in his own suit upon certain grounds. It was decided in that case by STRAIGHT and BRODHURST, JJ., that the appellant, if he wished to get rid of the decision regarding the first pre-emptor's preferential right, should have appealed against the first pre-emptor's decree, and that, that decree having become final, the questions between the two pre-emptor's could not be re-opened on appeal from the second pre-emptor's decree. This decision

(1) (1887) I. L. R. 10 All. 123.

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was followed without, so far as I am aware, a note of dissent in a number of cases up to the time of the ruling in *Damodar Das* v. *Sheo Ram Das*.

[56] In the case of *Bal Kishan* v. *Kishan Lal* (1), the same qustion was considered by a Full Bench consisting of EDGE, C. J., STRAIGHT and MAHMOOD, JJ. It was held that the rule of *res judicata* contained in section 13 of the Code applies equally to appeals and miscellaneous proceedings as to original suits ; that having regard to its main object, so far as it relates to the retrial of an issue, it refers, not to the date of the commencement of the litigation, but to the date when the Judge is called upon to decide the issue, and that where after the commencement of the trial of an issue a final judgment upon the same issue in another case is pronounced by a competent court (the identity of parties and other conditions of section 13 being fulfilled), such judgment operates as *res judicata* upon the decision, original or appellate, of the issue in the later litigation.

In *Ram Lal* v. *Chhab Nath* (2) Sir JOHN EDGE, C. J., and BRODHURST, J , in a case in which the plaintiff and defendant in a suit each appealed separately, and the defendant's appeal first came on for hearing and an issue as to whether the plaintiff or the defendant had title to certain lands in dispute was decided on the facts by the appellate court adversely to the defendant, held that the plaintiff's appeal involving the same issue which came on for hearing before the same court was barred by the principle of *res judicata*. The Subordinate Judge treated the finding in the first appeal as operating as *res judicata* and the learned Judges in their judgment approve of his ruling, saying that although section 13 (of the former Code of Civil Procedure) would not apply, still the principle of *res judicata* applied, and that section 13 of the Code is not exhaustive, as was pointed out by their Lordships of the Privy Council in the case of *Ram Kirpal* v. *Rup Kuari* (3).

The rule laid down in *Chajju* v. *Sheo Sahai* was followed in *Mangli* v. *Narain* (4), *Kesho Tiwari* v. *Sarju Kunwar* (5), *Munna* v. *Nisar Ali* (6), *Ajab Ali Khan* v. *Musammat* [57] *Ashraf Jahan Begam* (7), *Musammat Aziman* v. *Abdullah* (8) and *Abdul Basit* v. *Ashfaq Husain* (9).

The only conflicting authority in our Court, so far as I am aware, is that of *Damodar Das* v. *Sheo Ram Das*. In that case none of the authorities of the Court appear to have been cited, and no reference whatever is made to any such, but reliance is placed upon two decisions of the Calcutta and Madras High Courts respectively.

I shall now refer to these cases, but first I would refer to the case of *Abdul Majid* v. *Jew Narain Mahto* (10). In that case MITTER and MACPHERSON, JJ., held that the decision of an issue in one of two suits tried together, which is not appealed against cannot be treated as *res judicata* so far as the same issue was concerned in an appeal against the decision in the other suit.

In *Mariamnissa Bibi* v. *Joynab Bibi* (11) the facts were these :—Two Muhammadan co-widows—Mariamnissa Bibi and Joynab Bibi—brought two separate suits for the recovery of their dowers from the estate of their

(1) (1888) I. L. R. 11 All. 141.
(2) (1890) I. L. R. 12 All. 578.
(3) (1883) L. R. 13 I. A. 37 ; I. L. R. 6 All. 269.
(4) Weekly Notes, 1893, p.190.
(5) Weekly Notes, 1893, p. 221.
(6) S. A. No. 764 of 1891, decided on the 9th of August, 1893.
(7) S. A. No. 140 of 1899, decided on the 15th of February, 1901.
(8) S. A. No. 208 of 1907, decided on the 3rd of January, 1908.
(9) Weekly Notes, 1908, p. 211.
(10) (1888) I. L. R. 16 Cal. 233.
(11) (1906) I. L. R. 33 Cal. 1101.

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deceased husband. A question was raised in these suits whether two houses belonged to the estate of the husband. By consent of the parties the Subordinate Judge tried both of the suits together and disposed of them in one judgement, it being found that the two houses belonged to Mariamnissa as her separate property. Two separate decrees were drawn up in accordance with that judgement. The other widow, Joynab, preferred an appeal against the decree in her own suit mainly on the ground that the conclusion arrived at by the Subordinate Judge in the suit of Mariamnissa Bibi respecting the title to the two houses was erroneous, but no appeal was preferred in Mariamnissa's suit. At the hearing of the appeal a question was raised on behalf of Mariamnissa that the judgement in her suit not having been appealed against operated as *res judicata*. It was held by GHOSE, C. J., and HARINGTON, J. (RAMPINI, J., dissenting) that there was no bar of *res judicata*. [58] RAMPINI, J., in his judgement referring to section 13 of the former Code observes, at p. 1107 of the Report:— "It has also been said that the words 'former suit' in section 13 cannot relate to Mariamnissa Bibi's suit, as both suits were tried simultaneously and disposed of by one judgement. But there were two distinct suits, two sets of pleadings and issues, and though the two suits were disposed of by one judgement, this is an irregular procedure sanctioned only by consent but not expressly allowed by any section of the Code of Civil Procedure. In the eye of the law there were two judgements, one in each suit, though the Subordinate Judge may have delivered the same judgement in both suits. Hence there were necessarily two appeals. Mariamnissa Bibi's suit was certainly the one first instituted, but, be that as it may, as laid down in *Gururajammah* v. *Venkatakrishnama Chetti* (1), it is the date of the decision which is the "former" and which is the "second" suit, and Mariam Bibi's suit was certainly finally decided on the 30th of November, 1903. while Joynab's suit is still pending final decision in this appeal I therefore consider that *Abdul Majid* v. *Jew Narain Mahto* was wrongly decided, and I would accordingly refer the question of the correctness of the decision in it to a Full Bench." I agree in this view. GHOSE, C. J., in his judgement refers approvingly to the decision in *Bal Kishan* v. *Kishan Lal*. He remarks at page 1116: "It may be accepted as correct that the expression 'former suit,' as occurring in that section, as the Allahabad High Court has held in the case of *Bal Kishan* v. *Kishan Lal*, and which has been approvingly quoted by the Madras High Court in the case of *Gururajammah* v. *Venkatakrishnama Chetti* (1), does not relate to the date of commencement of the litigation, but to the time when the Judge is called upon to decide the issue, and 'that the rule contained in section 13 is not limited to the Courts of first instance, and that it equally applies to the procedure of the first and second appellate Courts by reason of sections 582 and 587 respectively, but still the question here is which is the judgement that operates as a bar in this case?'" The learned Chief Justice seems to have based his decision entirely upon section 13 of the Code of Civil Procedure of 1882. At page 1114 he says: [59]— "section 13 of the Code of Civil Procedure, upon which the decision of the question referred to rests."

In *Gururajammah* v. *Venkatakrishnama* (1) the decision in *Bal Kishan* v. *Kishan Lal* was approved of and followed by SIR ARNOLD WHITE, C. J., and DAVIES, J.

(1) (1901) I. L. R. 24 Mad. 350.

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In the later case, however, of *Panchanada Velan* v. *Vaithinatha Sastrial* (1) a different view was taken. In that case cross suits between the same parties on the same facts were tried together and judgement was given on the same day, but separate decrees were passed, and an appeal was preferred against one of the decrees alone. It was held by Sir ARNOLD WHITE, C. J., and SUBRAMANIA AYYAR and DAVIES, JJ., that the decree unappealed did not operate as a bar under section 13 of the Code of Civil Procedure, 1882, so as to preclude the appellate Court from dealing with the decree appealed against. We find no reference in the judgement to the earlier decision of the Court in *Gururajammah* v. *Venkatakrishnama Chetti* (2). The judgment is very short. The learned Judges observe that technically no doubt the appeal ought to have been in both suits, but no weight is given to the technicality. The learned Judges say :—" We do not think that, either under section 13 of the Code of Civil Procedure or on general principles, the doctrine of *res judicata* has any application to the facts of this case. The doctrine does not apply when, as here, the very object of the appeal, in substance if not in form, is to get rid of the adjudication which is said to render the question which the appellate Court is asked to decide *res judicata*." Later on they observe :—" It would lead to startling results if we were to hold that an appellate tribunal is precluded from dealing with the question which comes before it on appeal because an inferior court, upon the same facts, but in a case other than the case under appeal had given a decision which had not been appealed against, at the same time as the decision in the case under appeal." The learned Judges do not point out what would be the startling results to which they apprehended a contrary conclusion would lead. An appellate court is bound to apply the rule of *res judicata* even though the decision is **[60]** the decision of an inferior Court, provided that that Court was competent to decide the case.

I am of opinion after careful consideration of the arguments which have been addressed to us by the learned vakil and advocate for the respective parties that the case of *Chajju* v. *Sheo Sahai* (3) and the subsequent decisions of this Court which followed it were rightly decided. The decree obtained by Manphul stands unreversed and is binding upon the appellant. The time for impeaching it has expired, and I am not aware of any procedure by which this decree can now be rendered nugatory. It was suggested during the argument that if the appeal of Zaharia be heard and a decision be obtained in his favour, the appellate decree in his favour will have the effect of superseding the former decree, but this cannot be. A decree, unless it be a decree which is a nullity by reason of, for example, fraud, cannot be superseded except it be upon appeal in the regular course. This being so, if we acceded to the argument addressed to us, we should have two inconsistent decrees on the files of the Court. This would be a most serious anomaly, and in execution proceedings would cause a complete *impasse*. I would therefore dismiss the appeal.

TUDBALL, J.—I concur.

CHAMIER, J.—I concur. The Court of first instance wrote only one judgement, but a copy of that judgement was placed upon the record of the second suit. The case must be treated in my opinion as if two separate judgements had been prepared. There were, of course, two separate decrees. The Code of Civil Procedure requires a separate judgement and decree for each suit or appeal and two or more decrees cannot

(1) (1905) I. L. R. 29 Mad. 333.
(2) (1901) I. L. R. 24 Mad. 350.
(3) (1887) I. L. R. 10 All. 183.

be challenged by one appeal. In the absence of a provision enabling the Court to consolidate suits and appeals and pass one judgement and one decree instead of as many judgements and decrees as there are suits or appeals, I see no escape from the conclusion that in a case like the one before us or in a case like that of *Abdul Basit* v. *Ashfaq Husain* (1) the appellant must file two appeals if he wishes to avoid the bar of *res-judicata*.

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[61] BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

33 A. 61 (=3 I. C. 1098).

APPELATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Sir William Burkitt.

SHEO DIHAL SINGH (*Plaintiff*) *v.* BADRI NARAIN SINGH AND OTHERS (*defendants*).*

[27th January, 1905.]

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *sections* 102 *and* 198—*Landlord and tenant—Suit for rent—Jus tertii—Intervenor to whom tenant has not actually paid rent.*

Held that section 198 of the Agra Tenancy Act, 1901, does not apply to the case of an intervenor, whose *jus tertii* the tenant defendant in a suit for rent has set up, and who has been made a party to the suit, but to whom the tenant has not actually and in good faith paid rent.

THIS was a suit for rent under section 102 of the Agra Tenancy Act, 1901, to recover arrears amounting to Re. 1, as. 11. The principal defendant, Ram Das, admitted that the arrears were due, but pleaded that one Badri Narain Singh, who was no party to the suit, had purchased the share of the property in respect of which the arrears had accrued and had prohibited him from making any payment of rent. At his own instance Badri Narain Singh was made a party to the suit. The court of first instance (Assistant Collector of the first class of Benares) decreed the claim. From this decision Badri Narain Singh appealed, and the District Judge modified the decree, awarding to Sheo Dihal Singh 1 anna, 10 pies, out of the rent claimed and to Raj Narain who was a co-plaintiff, 9 annas 3 pies. Sheo Dihal Singh appealed to the High Court, and his principal contention was that the intervenor Badri Narain Singh had no right of appeal and therefore the appeal to the lower appellate court should not have been entertained.

Dr. *Satish Chandra Banerji*, for the appellant.

The Hon'ble Pandit *Sundar Lal* (for whom Mr. *M. L. Agarwala*), for the respondents.

[62] STANLEY, C. J., and BUBKITT J.:—The sum involved in this appeal is 9 annas, 3 pies, but the learned vakil on behalf of the appellant stated to us that there was an important question of principle involved in the appeal, and we have heard the arguments at very considerable length. The suit was brought under section 102 of Act No. II of 1901 to recover arrears of rent amounting to Re. 1-11. The principal defendant Ram Das

* Second Appeal No. 59 of 1903 from a decree of J. Sanders, District Judge of Benares, dated the 23rd of December, 1902, modifying a decree of Shibban Lal Assistant Collector, 1st class, of Benares, date the 28th of October, 1902.

(1) Weekly Notes, 1908, p. 208.

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APPELLATE CIVIL.

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8 I. C. 1098.

admitted that the arrears were due, but he pleaded that one Badri Narain Singh, who was no party to the suit, had purchased the share of the property in respect of which the arrears had accrued and that Badri Narain Singh had prohibited him from making any payment of rent. The meaning of the defence of Ram Das is that he was quite willing to pay his rent, but that he really did not know to whom he should pay it and therefore had not paid it. At his own instance Badri Narain was made a party to the suit. The court of first instance decreed the claim and from this decision Badri Narain appealed, the result of the appeal being that the learned District Judge modified the decree and awarded to Sheo Dihal, the plaintiff before the Court, 1 anna, 10 pies, out of the rent claimed, and to Raj Narain, who was a co-plaintiff, 9 annas, 3 pies. From this appellate decree the present appeal has been preferred by the plaintiff Sheo Dihal Singh.

The important question of principle which we are told is involved in this appeal is that the person who preferred the appeal to the lower appellate court is Badri Narain, who was not a party to the original proceedings, but had been placed in the array of parties by the court at his own instance. It is contended that an intervenor, such as he, under the circumstances has no right to appeal and that therefore the appeal ought not to have been entertained. For this contention reliance is placed upon section 198 of the Agra Tenancy Act, Act No. II of 1901, it being contended that the only remedy which was open to Badri Narain was to institute a suit in the civil court to have his rights established. That section applies to a case where a tenant who has been impleaded by a landlord, and who has *actually and in good faith paid the rent* of his holding to some third person, pleads such payment. The court in such case is bound to entertain the question of the alleged payment and to enquire into it, **[63]** and if the question is decided in favour of the defendant, dismiss the suit. That section has no application to the present case, for the simple reason that the defendant Ram Das did not in this case plead that the relation of landlord and tenant did not subsist between the plaintiff and himself; and he has not paid to any body any portion of the rent of the holding which is the subject matter of the suit. It appears to us therefore that there is no substance in the question of principle which has been raised and that the appeal in this respect has no force. As regards the important question of fact as to whether or not the plaintiff is entitled to the few annas which is claimed in the appeal, we have read with very great care the judgements of the lower court and having given our best consideration to those judgements we see no reason to differ from the conclusion at which the learned District Judge arrived. We therefore dismiss the appeal with costs.

Appeal dismissed.

33 A. 63 (=7 I. C. 65).

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APPELLATE CIVIL.

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7 I. C. 65.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

SHIAM LAL AND OTHERS (*Defendants*) *v.* NATHE LAL (*Plaintiff*).*
[3rd June, 1910.]

Civil Procedure Code (1882), *section* 316—*Execution of decree—Purchase at auction sale—Date of accrual of auction-purchaser's title.*

Held that under the Code of Civil Procedure, 1882, the title of a purchaser of immovable property at a sale in execution of a decree to mesne profits arising therefrom does not accrue until the date of the confirmation of such sale. *Amir Kazim* v. *Darbari Mal* (1) and *Prem Chand Paul* v. *Purnima Dasi* (2) followed.

[Dist. 1915 M. W. N. 15=26 I. C. 353=28 M. L. J. 666.]

CERTAIN shops and premises of the firm of Thakur Das Dhani Ram were sold on the 29th June, 1907, in execution of a decree. The sale was confirmed on the 22nd August, 1908. A sum of Rs. 700 alleged to be due by way of arrears of rent was sold in execution of another decree against Thakur Das Dhani Ram and purchased by the plaintiff Nathe Lal on the 18th December, 1908. The plaintiff sued to recover arrears of rent from the tenants, but was met by the defence that the person entitled was the purchaser at the sale held on the 29th of June, 1907, and not the plaintiff.

[64] The court below decided that the purchaser of the premises had no interest till confirmation of sale and gave a decree in favour of the plaintiff. The defendants appealed.

Mr. *M. L. Agarwala*, for the appellants :—

The question would not arise under the present Code of Civil Procedure. Section 65 would meet the requirements of the case. But the new Code had not come into operation at the time. Section 316 of the old Code declared that title did not vest in purchaser until date of confirmation of sale. But even if the property did not vest in the first purchaser, he would still have an inchoate title to it.

Munshi *Gulzari Lal*, for the respondents relied on *Amir Kazim* v. *Darbari Mal* (1) and section 36 of the Transfer of Property Act.

STANLEY, C. J. and GRIFFIN, J.:—This appeal arises out of a suit for recovery of arrears of rent. A shop and premises belonged to the firm of Thakur Das and Dhani Ram. This shop and premises were sold by the Court in execution of a decree on the 29th of June, 1907, and purchased by Jaggi Lal. The sale was not confirmed until the 22nd of August, 1908, Prior to the 22nd of August, 1908, rents of tenants fell into arrear and in the aggregate a sum of Rs. 700 was due for such arrears on that date. In execution of a decree obtained against Thakur Das and Dhani Ram these arrears were sold on the 18th of December, 1908, and were purchased by the plaintiff. He instituted the suit out of which this appeal has arisen for recovery of these arrears. The defence set up by defendants was that the plaintiff was not entitled to them, but that the purchaser under the purchase of the 29th of June, 1907, was so entitled.

Both the courts below gave a decree to the plaintiff.

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* Second Appeal No. 986 of 1909 from a decree of Muhammud Siraj-u-din, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, of Cawnpore, dated the 13th of July, 1909, confirming a decree of Pirthi Nath, Munsif of Cawnpore, dated the 28th of April, 1909.

(1) (1902) I. L. R. 24 All. 475.

(2) (1888) I. L. R. 15 Cal. 516.

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7 I. C. 65.

This second appeal was then preferred, and the contention of the learned counsel for the appellants is that Jaggi Lal by virtue of his purchase became entitled to the rent as from the 29th of June, 1907, the date of his purchase, notwithstanding that the sale to him was not confirmed until the 22nd of August, 1908. We are unable to accede to this contention. The question is disposed of by section 316 of the former Code of Civil Procedure, [65] which was in force at the time of the sale. That section provides for the granting by the court of a sale certificate, and declares that, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate, and not before. We may here point out that the law has been modified by the present Code of Civil Procedure. Section 65 of the present Code provides that where immoveable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property was sold and not from the time when the sale becomes absolute. In view of the provisions of the former Code, to which we have referred, it appears to us that this appeal must fail. In the case of *Amir Kazim* v. *Darbari Dal*, (1) it was decided by a Bench of this Court of which one of us was a member, that when immoveable property in sold in execution of a decree the title of the auction-purchaser to mense profits or to possession does not accrue until the sale has been confirmed. In that case the court followed the authority of several other cases; in one of which, *Prem Chand Paul* v. *Purnima Dasi* (2), the contention was raised that though under section 316 property does not vest in the purchaser until the date of the confirmation of the sale, yet this only applies as between the parties to the suit and persons claiming through or under them and does not apply to other parties. This contention was in that case repelled, and, we think, rightly so. For these reasons the appeal fails and is dismissed with costs.

Appeal dismissed.

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33 A. 66 (=6 I. C. 794.)

[66] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

TULSHA (*Plaintiff*) *v.* MATHURA PURI AND ANOTHER (*Defendants*).*

[4th June, 1910.]

Construction of document—Will—Devise of one kind of property accurately described exclusive of other somewhat similar property not mentioned in the will.

By his will a testator devised to his wife shares in certain pattis, of which the numbers were given, in the village of Harihar, describing the property as in his separate possession. *Held* that this description would not pass shares in *shamilat* pattis in the village which were not mentioned or referred to in the will.

The facts of this case are as follows:—

The plaintiff's husband died leaving a will, which, *inter alia*, contained the following devise in favour of the plaintiff: —" whereas 3 biswas,

* Second Appeal No. 1114 of 1909 from a decree of C. Rustomji, Additional Judge of Mainpuri, dated the 9th August, 1909 reversing a decree of Chhajju Mal, Subordinate Judge of Mainpuri, dated the 7th of March, 1908.

(1) (1902) I. L. R. 25 All. 475. (2) (1888) I. L. R. 15 Cal. 516.

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APPELLATE CIVIL.

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6 I. C. 794.

13 biswansis, 1 nanwansi, 14½ anwansis of zamindari property, written in pattis Nos. 1, 6, 9, 26, 29, 32, 64, 72, 78, 110, 131, and 133, lying in mauza Hariha, is my own property purchased by me * * * and is still in my proprietary possession * * * I devise, agree and write that so long as I shall live I shall remain the owner and in possession of the said property, and after my death Musammats Tulsha and * * my wives shall be the owners of the property in equal shares."

Appurtenant to the pattis so dealt with there were certain *shamilat* pattis bearing distinct numbers in which also the testator held shares. After the death of the testator Musammat Tulsha sued for a declaration that she was entitled to the profits of her late husband's shares in these *shamilat* pattis also. The defence was that the shares in the *shamilat* pattis did not pass under the devise referred to above. The court of first instance (Subordinate Judge of Mainpuri) found in favour of the plaintiff. On appeal the District Judge reversed the decree of the court below and dismissed the plaintiff's suit. The plaintiff appealed to the High Court.

Munshi *Govind Prasad*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, for the respondents.

STANLEY, C. J and GRIFFIN, J.:—We are of opinion that the construction put upon the will of Chhote Puri by the learned [67] District Judge is correct. By his will the testator gave to the appellant 3 biswas 13 biswansis, 1 nanvansi, 14½ anwansis of zamindari property comprised in certain parties in the village of Hariha, the numbers of which are stated in the plaint. These pattis are described as being in the separate possession of the testator. In addition to the property so described the testator was entitled to property in other villages and also to *shamilat* pattis in the village of Hariha. These *shamilat* pattis in the khewats have numbers assigned to them, different and distinct from the numbers of the pattis specifically given to the appellant. The pattis given by the testator by his will are *asli* pattis and they alone are assessed to revenue. The *shamilat* pattis are owned in shares by proprietors of *asli* pattis in common, and are not assessed to revenue. The Court of first instance held that under the bequest in the will the testator's interest in the *shamilat* pattis which belonged to him passed to the donee. But upon appeal the learned District Judge reversed this decision and held in view of the specific and clear language of the will that only the *asli* pattis deseribed therein passed to the appellant.

We have carefully considered the language of the will, and there is nothing to lead us to think that the testator intended to dispose of the *shamilat* pattis in which he was a co-sharer with others .The *asli* pattis described therein are given in specific terms and there are no general words such as " with the appurtenances " or "land appertaining thereto " to justify us in holding that the testator intended to dispose of his shares in the *shamilat* pattis or any land outside the *asli* pattis. It is a well settled canon of construction that where a given subject is devised and there are found two species of property, the one precisely corresponding to the description in the devise and the other not completely answering thereto, the latter will be excluded. Here the *asli* pattis precisely correspond with the description in the gift and the *shamilat* pattis in no way answer to that description and *a fortiori* the *shamilat* pattis are excluded. The presumption which arises in favour of testacy has no application in this case, because the testator had property in other villages, and as to that property he certainly intended to die intestate as there is no [68] reference in his will

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to any property whatsoever save and except the *asli* pattis in the village of Hariha.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

33 A. 68 (=7 I. C. 100).

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

BADRI PRASAD (*Auction-purchaser*) *v.* TEJ SINGH (*Objector.*)*

[17th June, 1910.]

Civil Procedure Code (1882), *section* 170—*Appeal—Contempt of court—Property of person in contempt sold to realize a fine, but sale afterwards set aside on the submission of the person in contempt.*

No appeal lies from an order refusing to confirm a sale held by the Court to realize a fine imposed by it for contempt under section 170 of the Civil Procedure Code, 1882.

The Court has power to refuse to confirm such a sale if the fine and costs are paid in by the person guilty of contempt, and the Court considers that the contempt is purged.

The facts of this case were as follows:—

Tej Singh and Baldeo Das were summoned as witnesses in a case. They failed to comply with the summons and warrants were issued against them. The warrants could not be served. Thereupon a proclamation was made against them under section 168 of the former Code of Civil Procedure They failed to appear on the date fixed by the proclamation, and were fined Rs. 100 each in realization whereof their zamindari property was put up to sale, under section 170 of the Code and sold in one lot to the appellant. On the date of the sale Tej Singh proposed to pay up the fine and costs due from him, but the amin refused to accept it because he had been directed to sell both persons' properties in one lot for the aggregate sum of Rs. 200. After the sale, Tej Singh made an application, purporting to be under section 311 of the Code, to set aside the sale on the ground of material irregularities; and the sale was set aside by the Subordinate Judge. The auction-purchaser appealed.

Babu *Jogindro Nath Chaudhri* (with him Munshi *Gulzari Lal*), for the respondents, took a preliminary objection to the hearing of the appeal:—There is no appeal from an order setting aside a sale held under section 170. Section 588, clause (16), provides an appeal from an order setting aside or refusing to set [69] aside sales held under certain specified sections. Section 170 is not included among them. Section 311 speaks of sales held "under this chapter." It is clearly not applicable to the sale held in this case. The order of the Subordinate Judge was not, therefore, one under section 311. He expressly acted under section 151 of the new Code. The sale had not yet passed a title to, or conferred a right upon, the purchaser; before that, it had to be confirmed, and a certificate had to be obtained; and the Court, acting under section 151, set it aside. Neither the old nor the new Code gives a right of appeal from such an order. By order XVI, rule 13, what is made applicable is the procedure which relates to attachment in execution of decree, up to

* First Appeal No. 130 of 1909 from an order of Banke Behari Lal, Subordinate Judge of Aligarh, dated the 17th of September, 1909.

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sale, and confirmation of sale. All that the new Code has done is to assimilate the procedures in the two cases. But it does not confer a right of appeal, which has to be given specifically by the Legislature; section 647 of the old Code cannot be called in aid for such a purpose; *Ghasiti Bibi* v. *Abdul Samad* (1).

Mr. *G. W. Dillon* (with him Munshi *Govind Prasad*), for the appellant:—

A sale held under section 170 does not require confirmation or a sale certificate. It is only sales in execution of decrees that do so (*vide* section 316). The purchaser at once got an absolute title; and section 151 (new Code) was misapplied. The Court had no jurisdiction to deal with the application. The application to set aside the sale was in terms one under section 311. It was only under that section that the Court could listen to him; he was a person in contempt and the court could not listen to him at all otherwise. In disposing of the application the Court treated the matter exactly as if it were an application under section 311 and went into exactly the same questions which would have to be decided in a case under section 311. An order passed on an application under, and purporting to be under, section 311 is appealable. It is doubtful if the lower court acted at all under section 151 (new Code). The order is really one made under order XXI, rule 92: in effect it is so; it is therefore appealable. He then addressed the Court on the merits of the case.

[70] Babu *Jogindra Nath Chaudhri* was not heard in reply.

KNOX and GRIFFIN, JJ.:—Tej Singh and Baldeo Das were summoned as witnesses in a civil suit. It appears that they did not attend in answer to the summons, with the result that first a warrant of arrest was issued to enforce their attendance, and, when that did not suffice, a fine was imposed upon them in their absence, their property was attached and an order was passed to sell the same for the purpose of satisfying the fine imposed and the costs incurred in consequence of the attachment. Although the Court ordered the attachment of both the immovable and movable property, only immovable property was attached. The amount of immovable property attached was far in excess of the fine imposed and the costs incurred. The property was put up to sale and purchased by the appellant for Rs. 250. There is no dispute that the property attached is of far greater value than the amount paid by the appellant at the sale. The learned counsel, who appears for the appellant, boldly and frankly allowed that his client was in the position of a fortunate purchaser who has at an auction sale purchased property at a price much below its real value. The fact that the property attached consists of 599 bighas, 6 biswas of land, bearing a jama of Rs. 597-12-10, is quite enough to show that Rs. 250 was an absurdly low price. The court before which the sale officer submitted his report, refused to accept the sale as a sale. In a very careful judgment, that court has given good reasons for the position it took. It ordered Tej Singh to pay in Rs. 100 the fine imposed, and all the costs of the attachment and sale within 15 days from the date of its order. That sum was duly paid in and the court considered that, as far as Tej Singh was concerned, he had purged himself of any contempt in which he may have stood. In appeal before us it is urged that the Court had no jurisdiction to set aside the sale which according to the law had become final. The contention is that neither section 311 of the old Code, nor order XXI, rule 90, of the new Code applied to this case. We

(1) (1907) I. L. R. 29 All. 596.

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38 A. 68=
7 I. C. 100.

think that there is considerable force in this contention. The result then is that the Code of Civil Procedure, previous to the present Code, appears to have intended that any order passed under section 170 of that Code should not be open to appeal. That section contains a [71] special provision that if a person whose attendance was required pays into court the fine and costs, then the Court shall order the property to be released from attachment. The very existence of this provision shows that the Court may, before the sale becomes final, accept from the person guilty of contempt the costs and fine and release the property intended for sale from attachment. It may be said that it is somewhat straining the language of the section to hold that if a sale officer has put up the property for sale and a purchaser has come forward, still the Court is empowered to order the release of property from attachment. We do not think there is much force in this contention. It appears to us to be a novel idea that the action of a ministerial officer should have such finality. It is for the Court to say whether the action of its ministerial officer amounts to a sale by putting its confirmation upon that act. That stage was never reached in the present case. The order passed by the Court below was an order under section 170 of the Code of 1882 which governs the procedure in the present case and no appeal is provided from that order. We therefore hold that no appeal lies, and we dismiss the appeal with costs.

Appeal dismissed.

38 A. 71 (=7 I. C. 902=7 A. L. J. 945).

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Chamier.

JADDO KUNWAR (*Defendant*) *v.* SHEO SHANKAR RAM AND OTHERS (*Plaintiffs*) AND RADHA KISHAN SINGH AND OTHERS (*Defendants*).*

[8th July, 1910].

Hindu Law—Mitakshara—Joint Hindu family—Joint family property sold in execution of mortgage executed by managing member—Suit by other members for redemption—Act No. IV of 1882 *(Transfer of Property Act), section* 85*—Parties—Representative capacity of managing member.*

Although the manager of a joint Hindu family is not as a rule entitled to sue or liable to be sued on behalf of the family—*Padmakar Vinayak Joshi* v. *Mahadev Krishna Joshi* (1) and *Kashinath Chimnaji* v. *Chimnaji Sadashiv* (2) —nevertheless in certain circumstances the whole family may be bound by the result of suits brought by or against the manager, notwithstanding that some members of the family were not made parties thereto. *Balwant Singh* v. *Aman Singh* (3), *Debi Singh* v. *Jia Ram* (4), *Sundar Lal* v. *Chhitar Mal* (5), *Dhurm Das Pandey* v. *Mussumat Shama Soondri Dibiah* (6), *Hari Saran Moitra* v. [72] *Bhubaneswari Debi* (7), *Narayan Gop Habbu* v. *Pandurang Ganu* (8), *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut* (9), *Bissessur Lall Sahoo* v. *Maharaja Luchmessur Singh* (10), *Ram Krishna Narain* v. *Vinayak Narayan* (11) and *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (12), referred to.

* First Appeal No. 83 of 1909 from a decree of Chhajju Mal, Subordinate Judge of Ghazipur, dated the 18th of December, 1908.

(1) (1885) I. L. R. 10 Bom. 21.
(2) (1906) I. L. R. 30 Bom. 477.
(3) (1910) *Supra* p. 7.
(4) (1902) I. L. R. 25 All. 214.
(5) (1906) 3 A. L. J. 614 ; 4 A. L. J. 17.
(6) (1843) 3 Moo. I. A. 229.
(7) (1883) I. L. R. 16 Cal. 40.
(8) (1881) I. L. R. 5 Bom. 685.
(9) (1871) 14 Moo. I. A. 367.
(10) (1879) L. R. 6 I. A. 233 ; 5 C. L. R. 477.
(11) (1891) 12 Bom. L. R. 219.
(12) (1883) I. L. R. 7 Bom. 467.

[Affirm : 36 A. 383; Appr. 19 C. W. N. 565=29 I. C. 156; Fol : 1 Pat. L. W.197=37 I. C. 833; Ref : 34 All. 549; 9 A. L. J. 86; 62 I. C. 610; 72 I. C. 722=36 C. L. J. 234.]

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APPELLATE CIVIL.

33 A. 71 = 7 I. C. 902=7 A. L. J. 945.

THE facts which gave rise to this appeal were as follows :—

One Bhuabal Bhagat and his descendants, who were joint in every respect, carried on an ancestral business in saji, sugar and groceries under the style of Bhuabal Bhagat Bhoj Ram. They also did a little money lending and owned some zamindari property. After the death of Bhuabal Bhagat and five of his sons, the management of the family business and property came into the hands of Hira Ram and Dhondhi Ram, respectively, son and grandson of Bhuabal Bhagat. On the 4th July, 1894, the two last named advanced money belonging to the family upon a mortgage of some villages already mortgaged to one Jaddo Kunwar, and on the 26th July, 1894, they purchased with family funds another village which also had been previously mortgaged to Jaddo Kunwar. Both transactions were only in their own names. In 1895 Jaddo Kunwar sued upon her mortgages and obtained two decrees, one for sale and the other for foreclosure. Both decrees were made absolute, and in execution of the decree for sale Jaddo Kunwar purchased the property covered by that decree. Hira Ram and Dhondi Ram were parties to the suits brought by Jaddo Kunwar, but not the other members of the family. The present suit was brought by the surviving members of the family who were not parties to the previous suits of Jaddo Kunwar, and they sought redemption of the property to which the mortgage deed of the 4th July, 1894, and the sale-deed of the 26th July, 1894 related. The court of first instance (Subordinate Judge of Ghazipur) gave the plaintiffs a decree. The Defendant Jaddo Kunwar appealed to the High Court.

Mr. *B. E. O'Conor*, with him The Hon'ble Nawab *Muhammad Abdul Majid* (for whom Mr. *M. L. Agarwala*), for the appellant.

[73] The Hon'ble Pandit *Moti Lal Nehru* (for whom The Hon'ble Pandit *Sundar Lal*) and Munshi *Haribans Sahai* for the respondents.

CHAMIER, J.—The following table will help to elucidate the statement of facts :—

BHUABAL BHAGAT.

Bhoj Ram.	Kunji Ram.	Bisheshar Ram.	Hira Ram.	Jawahir Ram.
		Sheo Shankar Ram, plaintiff No. 1.	Dwarka Ram, plaintiff No. 5.	Dhondhi Ram, defendant No. 14
		Mathura Ram, plaintiff No. 2.		Sheo Prasad Ram, plaintiff No. 4.
		Bishnath Ram, plaintiff No. 3.		

Bhuabal Bhagat and his descendants, who were joint in every respect, carried on an ancestral business in saji, sugar and groceries under the style of Bhuabal Bhagat of Bhoj Ram. They also did a little money lending and owned some zamindari property. After the death of Bhuabal Bhagat and four of his sons the management of the family business and property came into the hands of Hira Ram and Dhondhi Ram. On July 4th, 1894, the two last named advanced money belonging to the family

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upon a mortgage of some villages, already mortgaged to the appellant, and on July 26th, 1894, they purchased with family funds another village which also had been previously mortgaged to the appellant. In 1895, the appellant sued upon her mortgages and obtained two decrees, one for sale and the other for foreclosure. Both decrees were made absolute, and in execution of the decree for sale the appellant purchased the property covered by that decree. Hira Ram and Dhondhi Ram were parties to the suits brought by the appellant, but the plaintiffs were not made parties. In the present suit they claimed a decree for redemption of all the property mortgaged to the appellant, on the ground that they ought to have been made parties to the suits for sale and foreclosure and not having been made parties are not bound by the decrees which were passed. The court below has given them a decree for redemption of so much of the property as is covered by the mortgage-deed of July 4th, [74] 1894, and the sale-deed of July 26th, 1894. Jaddo Kunwar has appealed on the ground that the entire suit should have been dismissed. The plaintiffs have filed cross-objections on the question of costs.

The court below has found, and the finding has not been challenged before us, that Hira Ram and Dhondhi Ram were the managers of the family property and business, that when the appellant brought her suits she was not aware of the existence of the plaintiff; that Hira Ram and Dhondhi Ram defended the suits by authority of the adult members of the family, who were aware of what was being done in them, as all expenses incurred were entered in the family accounts, and that the plaintiff Bishnath Ram had not been born when the appellant brought her suits. To this finding it may be added that the plaintiffs, Mathura Ram, Dwarka Ram and Sheo Prasad Ram, were minors when those suits were brought.

As purchasers and mortgagees of the properties already mortgaged to the appellant, the family of the plaintiffs were obviously bound by the mortgages held by the appellant. Dhondhi Ram in his evidence says that they decided not to redeem the appellant's mortgages because they anticipated that a suit would be brought by the minor son of Radha Kishan, a member of the mortgagor's family, to challenge the sale and the mortgages. He says that he did not consult the plaintiff, Sheo Shankar Ram, but it is difficult to believe this. It is quite clear that the adult members of the family other than Hira Ram and Dhondhi Ram, acquiesced in, if they did not take part in the decision of the managers not to redeem the appellant's mortgages. The sole ground upon which the plaintiff's claim to be entitled to redeem the property is that they were not parties to the suits brought by the appellant. The plaintiff, Bishnath Ram, may be disregarded as he was not in existence when the previous suits were brought. The case of the plaintiffs Dwarka Ram and Sheo Prasad seems to be covered by our decision in *Balwant Singh* v. *Aman Singh* (1), which is based upon several decisions of this Court, including that of the Full Bench in *Debi Singh* v. *Jia Ram* (2). Indeed the position of the plaintiffs Dwarka Ram and Sheo Prasad Ram is much [75] weaker than that of the plaintiff in the case first mentioned, for in the present case there cannot at any time have been any doubt that the plaintiffs were bound to pay the sum due to the appellant if they wished to retain the properties sold and mortgaged to their family. Pandit *Sundar Lal*, on behalf of the plaintiffs-respondents, relied upon the case of *Sundar Lal* v. *Chhitar*

(1) (1910) *Supra* p. 17.

(2) (1902) I. L. R. 25 All. 214.

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33 A. 71=
7 I. C. 302=7
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Mal (1), in which it was held that sons in a Hindu family could maintain a suit for redemption of their shares in the family property, although a previous suit by their father for redemption of the whole property had been dismissed on his failing to pay the amount found to be due on the mortgage. The decision in that case would probably have been the other way if the previous suit for redemption had resulted, as apparently it ought to have resulted, in a foreclosure or an order for a sale followed by a sale. For when property mortgaged by a father in a Hindu joint family has passed away from the family either by means of a foreclosure against the father or by means of a sale in execution of a decree against him upon a mortgage, it cannot signify whether the suit which resulted in the foreclosure or sale was instituted by the mortgagor or by the mortgagee. In neither case, consistently with the principle upon which the case of *Debi Singh* v. *Jia Ram* was decided, can the sons recover the family property or their interests in it merely because they were not parties to the suit brought by or against their father. So far then as the plaintiffs Dwarka Ram and Sheo Prasad Ram are concerned, I think it is clear that the suit should have been dismissed.

There remains the case of the plaintiffs Sheo Shankar Ram and his son Mathura Ram. The principle upon which the case of *Debi Singh* v. *Jia Ram* rests does not apply to them but I am nevertheless of opinion that their claim also should have been dismissed. It was contended on their behalf that the provisions of section 85 of the Transfer of Property Act were imperative and that they were in the position of ordinary puisne mortgagees who had not been made parties to a suit by a prior mortgagee and who therefore must be given an opportunity of redeeming the prior mortgage. Section 85 does not in terms apply to the case, for the appellant was not aware of the existence of the [76] plaintiffs when she brought her suits. But a person may be a necessary party to a suit upon a mortgage, although the plaintiff is not aware of his existence, in the sense that if he is not impleaded he cannot be concluded or his rights affected by the decree passed in the suit. *Prima facie* all persons interested in the right to redeem must be made parties to a suit by a mortgagee but the rule is not inflexible, for example, it is settled law that in certain circumstances a son in a joint family is bound by a decree upon a mortgage obtained against his father, and it would no doubt be held that an adopted son was sufficiently represented by his adoptive mother in a suit upon a mortgage in circumstances similar to those found in the cases of *Dhurm Das Pandey* v. *Mussumat Soondri Dibiah* (2) and *Hari Saran Moitra* v. *Bhubaneswari Debi* (3). In the present case there can be no doubt that Sheo Shankar Ram and his son Mathura Ram were in fact represented by the managers of the family property in the suits brought by the appellants. With the consent express or implied, of Sheo Shankar Ram and other adult members of the family the mortgage deed of July 4th, 1894, and the sale deed of July 26th, 1894, had been executed in favour of the managers alone and they alone were recorded as mortgagees and proprietors. With the same consent the managers had defended the suits and abstained from redeeming the appellant's mortgages. In somewhat similar circumstances the Bombay High Court held that all the members of a joint family were bound by a decree obtained against the *karta* of the family see *Narayan Gop Hatbu* v. *Pandurang Ganu* (4). In that case the defendant had obtained a decree for

(1) (1906) 3 A. L. J. 644 ; 4 A. L. J. 17.
(2) (1843) 3 Moo I. A. 229.
(3) (1888) I. L. R. 16 Cal. 40.
(4) (1881) I. L. R. 5 Bom. 685,

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33 A. 71=
7 I. C. 902=7
A. L. J. 945.

possession of land against one Anant, who was at the time the *karta* of a joint family consisting of his two nephews and himself. It was found that the uncle and nephews had been living together when the suit was brought and that the nephews had assisted their uncle to defend the suit. In the circumstances the High Court held that the nephews had been effectively represented in the suit by their uncle and a suit by the nephews for recovery of their shares in the property was held not to be maintainable. WESTROPP, C. J., referred to and relied upon [77] the following passage in the judgment of their Lordships of the Privy Council in *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut* (1):—" Their Lordships think that this case cannot be likened to those which sometimes occur in India wherein, the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit." In *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (2) the facts were as follows:—One Nath Das died in 1853, leaving a son, Ram Nath Das, who died in 1855. Ram Nath Das left two sons, Mosahib and Chooman Nath Das. Ram Nath Das had taken a lease of a village called Rudarpur. The landlord brought a suit for the rent against the widows of Nath Das and Ram Nath Das as guardians of Mosahib and Chooman. A second suit was brought against Mosahib for the rent of a village called Ramnagar, the lease of which stood in the name of Nath Das. A third suit was brought against the widow of Ram Nath Das as guardian of Mosahib. In execution of the decrees in the three suits a village called Madanpur was put up for sale and brought by the plaintiff in those suits. Madanpur had been acquired in the name of Ram Nath Das for the benefit of the family. A suit having been brought by the assignee of the rights of Mosahib and Chooman, their Lordships held on an examination of the proceedings that as all three decrees were in respect of a joint debt of the family and had been passed against a representative of the family property, they had properly been executed against the joint family property, and they concluded their judgement with a reference to two cases, the effect of which is that in dealing with execution proceedings the Court should look at the substance of the transaction and should not set aside an execution upon mere technical grounds when the Court found that it was substantially right. In the case before them they came to the conclusion that the circumstances warranted the assumption that the defendant or defendants in [78] each of the previous suits had been sued as representing the family and, as the claim in each suit had been for money due from the family, joint property of the family had rightly been taken in execution. These cases show, I think, that where a joint family has been effectively represented in a suit and substantial justice has been done, the Court is not always bound to set aside the execution proceedings merely because every member of the family was not formally made a party. A loose interpretation of this rule might easily lead to disastrous results and cause great confusion; but in the case before us, I think, we are justified in holding that the plaintiff, Sheo Shankar Ram, was effectively represented in the suits brought by the appellant and should not be permitted to reopen the foreclosure or have the sale set aside.

(1) (1871) 14 Moo. I. A. 367, 376. 477.
(2) (1879) L. R. 6 I. A. 133; 5 C. L. R.

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The learned counsel for the appellant referred us to the recent decision of the Bombay High Court in *Ramakrishna Narayan* v. *Vinayak Narayan* (1), in which it was held that the defendant-appellant had been effectively represented by his undivided uncles, who were managers of the family property, in a suit brought upon a mortgage made by several members of the family. CHANDAVARKAR, J., said:—"The present appellant was no doubt omitted from the suit, but the adult members of the family represented him. They were the managing members of the family; therefore, according to Hindu law, we must hold, in the absence of any other circumstance, that the present appellant had been substantially represented upon the record and was virtually a party to the suit." As the remainder of the judgement shows, these remarks went beyond what was necessary for the decision of the appeal and there were other grounds upon which the same conclusion might have been arrived at. In former days, when the same strictness of procedure did not prevail as now, it was a common practice for the manager of joint family to sue and be sued on behalf of the family, see *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (2), where West, J., discussed the state of the law as it was in 1853, but it is generally recognized now that the manager is not, as a rule, entitled to sue or liable to be sued on behalf of the family, see *Padmakar Vinayak Joshi* v. *Mahadev* **[79]** *Krishna Joshi* (3) and *Kashinath Chimnaji* v. *Chimnaji Sadashiv* (4). Nevertheless, it seems that in certain circumstances the whole family may be held bound by the result of suits brought by or against the manager. In the particular circumstances of the present case, I think that we may properly hold that the plaintiff Sheo Shankar Ram, is bound by the proceedings taken against the managing member of the family by the appellant. If Sheo Shankar is bound, so also is his son, Mathura Ram. I would allow the appeal, dismiss the cross-objections with costs and dismiss the suit with costs in both courts.

TUDBALL, J.—I concur.

BY THE COURT.—The order of the Court is that the appeal is allowed, the cross-objections are dismissed with costs, and the suit stands dismissed with costs in both Courts.

Appeal allowed.

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33 A. 79 (=7 I. C. 183.)

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Tudball.

ABDULLAH KHAN AND ANOTHER (*Appellants*) *v.* BANKE LAL AND ANOTHER (*Respondents*).*

[11th July, 1910.]

Civil Procedure Code (1908), *order XXXIX, rule* 1—"*Wrongfully sold in execution of a decree*"—*Temporary injunction*—*Civil Procedure Code* (1882), *section* 492—*Act No. X of* 1877, *section* 492—*Act No. VIII of* 1859, *section* 92.

Held that when the words "wrongfully sold in execution of a decree" were added by the Legislature to the Civil Procedure Code of 1877, it was clearly intended that an injunction might be granted when property which the claimant

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* Application in F. A. No. 330 of 1909.

(1) (1901) 12 Bom. L. R. 219.
(2) (1883) I. L. R. 7 Bom. 467.
(3) (1885) I. L. R. 10 Bom. 21.
(4) (1906) I. L. R. 30 Bom. 477.

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33 A. 79 = 7 I. C. 183.

claimed to be his was in danger of being sold in execution of a decree against another person or even against himself. *In the matter of the petition of Chando Bibi* (1) and *Meghraj Singh* v. *Lala Mal* (2) overruled. *Brojendra Kumar Rai Chowdhuri* v. *Rup Lal Doss* (3) *Ganga Nand* v. *Balgobind Das* (4) and *Kirpa Dayal* v. *Rani Kishori* (5) followed.

THE facts of this case were as follows :—

The defendant, Banke Lal, got a decree against the defendant, Sheo Narain, on the 8th June, 1907. In execution of the decree [80] he attached certain property, which he alleged belonged to his judgement-debtor, on the 17th July, 1907. The same day the plaintiff, Abdullah Khan, obtained a sale-deed of the property from Sheo Narain. He preferred objections to the attachment under section 278 of Act XIV of 1882. His objections were rejected on the 1st August, 1908. He then brought the present suit to establish his title to the property purchased from Sheo Narain. The suit was dismissed on the 16th August 1909. The defendant appealed, and during the pendency of the appeal applied for an injunction to stay the sale of the property in dispute under order XXXIX, rule 1, of Act No. V of 1908. The application came on for hearing before STANLEY, C. J., and BANERJI, J., who referred it to a larger bench. The order of reference was as follows :—

"This is an application for a temporary injunction to restrain the sale of certain immoveable property under order XXXIX, rule 1, which corresponds substantially with section 492 of Act XIV of 1882. This last mentioned section provides that if in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wrongfully sold in execution of a decree, the court may grant a temporary injunction to restrain such sale. It is contended on behalf of the opposite party that such an injunction cannot be granted in view of the decisions of this court, first, in *In the matter of the petition of Chando Bibi* (1) and next in the case of *Meghraj Singh* v. *Lala Mal* (2). In the first mentioned case our brothers KNOX and AIKMAN, adopting the view expressed by Justice Sir WILLIAM BURKITT in an unreported case, held that "in a case like the present it is impossible to say that the property mentioned is in danger of being wrongfully sold in execution of the decree held by the opposite party." Our brothers then say that "section 492 requires that it must be proved that the property in dispute is in danger of being wrongfully sold. To hold in an application like the present that this was proved would be to decide the appeal, which is not before us. "We are disposed to think that the interpretation put upon section 492 in this case is not strictly accurate. The Legislature as it appears to us contemplated that a temporary injunction might be granted in a case in which a party alleged and satisfied the Court by affidavit or otherwise that the property in dispute was in danger of being wrongfully sold in execution of a decree. The word "proved" does not apparently mean conclusive proof, but such proof as is referred to in the Evidence Act, which is in *pari materia* with the Civil Procedure Code. In section 3 of that Act, "proved" is defined as follows :—"A fact is said to be proved when considering the matters before it the court either believes it to exist, or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act under the supposition that it exist." In this view [81] we have some doubt as to the propriety of the decision in *In the matter of the petition of Chando Bibi*, and think that this application ought to be referred to a larger Bench. We therefore refer the case to the Chief Justice with a view to the selection of a larger Bench to determine the case."

The matter then came up for hearing before STANLEY, C. J., BANERJI, J., and TUDBALL, J.

Dr. *Satish Chandra Banerji*, for the respondents, showed cause against the application. He submitted that an application under order XXXIX, rule 1, of Act No. V of 1908, lay only in cases where there was danger of property being wrongfully sold in execution of a decree. Where

(1) (1903) I. L. R. 26 All. 311.
(2) (1907) 4 A. L. J. 342 (Reporter's Diary).
(3) (1886) I. L. R. 12 Cal. 515.
(4) Weekly Notes, 1884 p. 349.
(5) (1885) I. L. R. 10 All. 80.

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33 A. 79 = 7 I. C. 183.

property was being sold under the orders of a competent court, how could it be said that there was an apprehension of a 'wrongful' sale? He relied on *In the matter of the petition of Chando Bibi* (1), *Kirpa Dayal* v. *Rani Kishori* (2) and *Ganga Nand* v. *Balgobind Das* (3).

The current of opinion at one time was in favour of granting an injunction. But since 1903 the current of opinion has been the other way. He then argued upon the affidavits filed by the parties that no sufficient grounds were established for the issue of an injunction.

Maulvi *Ghulam Mujtaba* (for Mr. *Abdul Raoof*), for the applicant, was not heard.

BANERJI J.—This is an application under order XXXIX, rule 1, of the Code of Civil Procedure for an injunction restraining the respondent from proceeding with the sale of certain property which he has caused to be attached in execution of a decree. The decree was obtained by him against one Sheo Narain, and in execution of it he caused certain immoveable property to be attached. The plaintiffs applicants preferred an objection to the attachment on the allegation that the property had been sold to them by the judgment-debtor Sheo Narain and that it was not liable to sale in execution of the decree obtained by the respondent. Their objection having been overruled, they instituted a suit under section 283 of Act No. XIV of 1882 for a declaration of their title to the property. The suit was dismissed by the court of first instance, and from the decree of [82] that court a first appeal has been preferred to this Court, which is now pending.

The applicants have presented this application for an *ad interim* injunction for stay of the sale of the property in suit pending the decision of the appeal.

Dr. *Satish Chandra Banerji* in showing cause against the application contended that the application was not maintainable under order XXXIX, rule 1, inasmuch as property which is about to be sold in execution of a decree cannot be said to be in danger of "being wrongfully sold in execution of a decree" within the meaning of the rule. In support of his contention he relied on the decision of this Court in *In the matter of the petition of Chando Bibi* (1), which was followed in *Meghraj Singh* v. *Lala Mal* (4). As the Bench before which the application came for hearing had doubts as to the correctness of the view taken in those cases, the application has been referred for disposal to this Bench. With great respect to the learned Judges who decided the cases referred to, I am of opinion that the application is maintainable under order XXXIX, rule 1, which corresponds to section 492 of the old Code of Civil Procedure. That section provides that where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged,or alienated by any party to the suit, or wrongfully sold in execution of a decree the Court may by order grant a temporary injunction to restrain such act. It is clear from the language of the section that the Legislature contemplated that property might be in danger of being wrongfully sold in execution of a decree. The words "wrongfully sold in execution of a decree" were added in the Code of Civil Procedure of 1877 (Act X of 1877). They did not exist in section 93 of Act VIII of 1859, and it is manifest that when the words "wrongfully sold in execution of a decree" were added by the Legislature,

(1) (1903) I. L. R. 26 All. 311.
(2) (1885) I. L. R. 10 All. 80.
(3) Weekly Notes, 1884, p. 319.
(4) (1907) A. L. J. 342. (Reporter's Diary.)

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it was clearly intended that an injunction might be granted when property, which the claimant claimed to be his, was in danger of being sold in execution of a decree against another person or even against himself. In certain circumstances it might be in danger of being wrongfully sold in [83] execution of a decree against the plaintiff himself. For instance, if the plaintiff has instituted a suit for a declaration that the decree obtained against him was obtained by fraud, the property would be in danger of being wrongfully sold in execution of such a decree. Other instances are given in Dr. *Satish Chandra Banerji's* elaborate work on *Specific Relief*, at page 741. The view I have expressed above is supported by the ruling of the Calcutta High Court in *Brojendra Kumar Rai Chowdhuri* v. *Rup Lall Doss* (1), and also by the decision of OLDFIELD, J., in *Ganga Nand* v. *Balgobind Das* (2), which was followed in *Kirpa Dayal* v. *Rani Kishori*(3).

As regards the merits of the case, I am of opinion that the case is one in which a temporary injunction ought to be granted, as the question whether the property was under attachment at the date of the sale in favour of the applicants is one which should be determined in the appeal now pending. I would therefore allow the application as prayed.

STANLEY, C. J.—I concur in the judgment which has been pronounced by my brother BANERJI. In an earlier case I was a member of a Bench which expressed approval of the decision *In the matter of the petition of Chando Bibi*, namely, in the case of *Meghraj Singh* v. *Lala Mal* (4). At that time I was not aware of the amendment of the law by Act X of 1877. As has been pointed out, under section 92 of Act VIII of 1859, the words "or wrongfully sold in execution of a decree" did not exist in the earlier statute. These words, it appears to me, were obviously added to meet a case such as the present, and in view of this it appears to me that the words "in danger of being wrongfully sold" were not correctly interpreted in the case of *Chando Bibi*. After reconsideration of the matter I am of opinion that in the judgment which has just been pronounced, the section has been rightly interpreted. I would therefore allow the application.

TUDBALL, J.—I fully concur and have nothing to add.

[84] BY THE COURT.—The order of the Court is that a temporary injunction be issued for the stay of the sale ordered in the execution proceedings, pending the disposal of the appeal in this Court.

Let the hearing of the appeal be expedited.

Application allowed.

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33 A. 84 (=7 I. C 389).

REVISIONAL CRIMINAL.

Before Mr. Justice Chamier

EMPEROR *v.* MUHAMMAD ALAM.*

[15th July, 1910.]

Bengal Regulation No VI of 1825, *section* 2—*Joint Magistrate—Jurisdiction—Criminal Procedure Code, section* 435—*Power of Sessions Judge to make a reference.*

It is only the Collector who can take action aud impose a fine under Bengal Regulation VI of 1825. A Joint Magistrate has no jurisdiction under section 2

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* Criminal Reference No. 328 of 1910.

(1) (1886) I. L. R. 12 Cal. 515.
(2) Weekly Notes, 1884, p. 349.
(3) (1885) I. L. R. 10 All. 80.
(4) (1907) 4 A. L. J. 342 (Reporter's Diary)

of the Regulation, even though the case may have been made over to him by the District Magistrate.

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REVISIONAL CRIMINAL.

33 A. 84= 7 I. C. 389.

IN this case one Muhammad Alam, a petty zamindar in the Kanauj tahsil was convicted by the Joint Magistrate of Farrukhabad of an offence under section 2 of Regulation No. VI of 1825, and was sentenced to a fine of Rs. 50. He applied in revision to the Sessions Judge, who referred the case to the High Court, being of opinion that the Joint Magistrate had no jurisdiction to try the case.

Babu *Piari Lal Banerji* (with him Babu *Satya Chandra Mukerji* and Maulvi *Muhammad Ishaq*), for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

CHAMIER, J.—This is a reference by the Sessions Judge of Farrukhabad in which he recommends that an order of the Joint Magistrate of Farrukhabad ordering one Muhammad Alam to pay a fine of Rs. 50 under section 2 of Bengal Regulation No. VI of 1825 be set aside. The case was taken up at the instance of the Sub-Divisional Officer, on whose report the District Magistrate directed that Muhammad Alam should be prosecuted under the section of the Regulation mentioned above. The case was made over to the Joint Magistrate, by the District Magistrate, who was also of [85] course the Collector of the district. According to section 2 of the Regulation it is only the Collector or other officer acting in that capacity that can impose a fine under that section. Section 4 provides for the levying of fine by the Collector as if it were arrears of public revenue, and section 5 of the Regulation gives a right of appeal to the Board of Revenue. It seems to be quite clear that proceedings cannot be taken under the Regulation by a Magistrate as such. The Joint-Magistrate was not a Collector or other officer acting in that capacity within the meaning of the Regulation, and therefore had no jurisdiction under that section. But as he dealt with the case as a Magistrate. the Sessions Judge was entitled to deal with the case under section 435 of the Code of Criminal Procedure and this Court has power to set aside the order of the Joint-Magistrate. The order of the Joint-Magistrate is therefore set aside as having been passed without jurisdiction. The fine, if realized, will be refunded.

Order set aside.

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33 A. 85. (=7 I. C. 181.)

FULL BENCH.)

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Chamier.

BHIM SEN AND OTHERS (*Plaintiffs*) *v.* MOTI RAM AND ANOTHER (*Defendants*).*

[19th July, 1910].

Pre-emption—Wajib-ul-arz—Construction of document—Contract or custom—Presumption in absence of evidence that the record is one of custom.

* Second Appeal No. 900 of 1909 from a decree of B. J. Dalal, District Judge of Shahjahanpur, dated the 16th of April, 1909, confirming a decree of Muhammad Mubarak Husain, Subordinate Judge of Shahjahanpur, dated the 24th of November, 1908.

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FULL BENCH.

33 A. 85=
7 I. C. 181.

Where it is not apparent, either from the language of the wajib-ul-arz itself or from other evidence, that the pre-emption clause of a wajib-ul-arz is merely the record of a new contract between the co-sharers, the presumption is that it is the record of a pre-existing custom. *Majidan Bibi* v. *Sheikh Hayatan* (1) followed.

The pre-emptive clause of a wajib-ul-arz was headed, "Relating to the right of pre-emption" and ran as follows :—"If a co-sharer has to sell and mortgage his *haqiat*—then at the time of transfer it will be incumbent that he should, after giving information, sell and mortgage for a proper price, &c., &c." *Held* that this, in the absence of evidence to the contrary, indicated a pre-existing custom of pre-emption rather than a contract.

[86] THIS was a suit for pre-emption based on the wajib-ul-arz. The question was whether the record in the wajib-ul-arz was one of custom or contract. The clause of the wajib-ul-arz relating to pre-emption was worded as follows :—

Dafa chahardahum—dar-bab haq shafa:—Agar kisi hissedar-ko haqiat apni bai wa rahn aur murtahin (ko) haq murtahni rahn dar rahn karni ho to barwaqt intiqal-ke lazim hoga ke pahle apne hissedar garib-ko aur darsurat inkar uske dusre hissedar deh-ko khabar dekar ba-qimat wajib bai wa rahn kare ; agar woh na lewe ya qimat wajib na de to usko ikhtiar hoga ke jiske hath chahe mutaqqil kare :—Section fourteenth —relating to the right of pre-emption. If a co-sharer has to sell and mortgage his *haqiat* and a mortgagee (has to) sub-mortgage, then at the time of transfer (it) will be incumbent that (he) should after giving information sell and mortgage for proper price (*qimat*) first to his near co-sharer and in his case of his refusal, to another co-sharer of the village (*deh*) ; should he not take it or not give the proper price then he (the vendor) will have the power to transfer (it) to whomsoever he likes."

Both the courts below construed this as the record of a contract for pre-emption and accordingly dismissed the suit. The plaintiff appealed to the High Court.

Munshi *Govind Prasad*, for the appellant, contended that the wajib-ul-arz recorded a custom and cited *Majidan Bibi* v. *Sheikh Hayatan* (1), *Faizullah Khan* v. *Lok Nath* (2), *Manu Singh* v. *Hira Lal* (3), *Moti Ram* v. *Balwant Singh* (4) and *Ali Nasir Khan* v. *Manik Chand* (5).

Babu *Durga Charan Banerji* (for Dr. *Tej Bahadur Sapru*), for the respondent :—There was nothing to show that a right of pre-emption had existed before. On the contrary there was an indication of the record being that of a contract. In the heading the words are "relating to the right of pre-emption," which indicate a contract rather than a custom. Then if the record in the wajib-ul-arz were looked to, it would show that throughout the future tense was used, which again indicated that the practice was being introduced for the first time.

STANLEY, C. J.—This appeal arises out of a pre-emption suit. The court of first instance dismissed the plaintiffs' claim on the ground that the right set up by them was a right existing by **[87]** contract and not by custom, and that the period for which the contract was entered into having expired, the right came to an end. The same view was taken by the learned District Judge upon appeal to him. Hence this appeal to the High Court.

In consequence of a conflict in the decisions of the Court in regard to the construction of wajib-ul-arzes in the district of Shahjahanpur, corresponding to the wajib-ul-arz before us in this case, the appeal was sent to a larger Bench, so that there might be a binding decision of the Court

(1) Weekly Notes, 1897, p. 3.
(2) S. A. No. 641 of 1906 ; decided on the 15th of August, 1908.
(3) S. A. No. 822 of 1908, decided on the 25th of May, 1909.
(4) F. A. F. O. No. 113 of 1908, decided on the 27th of May, 1909.
(5) (1902) I. L. R. 25 All. 90.

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upon the true meaning of the pre-emption clause in the wajib-ul-arz before us and similar clauses in other wajib-ul-arzes in regard to the right of pre-emption. The wajib-ul-arz runs thus:—"If a co-sharer has to sell and mortgage his *haqiat* and a mortgagee has to sub-mortgage, then at the time of transfer it will be incumbent that he should, after giving information, sell and mortgage for a proper price, first, to a near co-sharer, and in case of his refusal to another co-sharer in the village: should he not take it, or not give a proper price, then he (the vendor) will have power to transfer it to whomsoever he likes." This translation is admitted by the parties to be an accurate translation of the wajib-ul-arz in regard to pre-emption. The paragraph in which this right is set forth is headed "Relating to the right of pre-emption" (*dar-bab haq shafa*). It has been suggested that this heading indicates that the right was not one existing by custom, but arising out of contract, as the word "custom" is not used in the heading. I am not disposed to attach any importance to the omission of the word "custom" in the heading of paragraph 14. It appears to me that the words "relating to the right of pre-emption" would apply equally well to a right of pre-emption existing by custom as to a right of pre-emption arising out of contract. In the Full Bench case of *Majidan Bibi* v. *Sheikh Hayatan* (1) it was laid down that "if a wajib-ul-arz did not itself show, or if it was not otherwise proved that the pre-emption clause was merely the embodiment of a new contract as to pre-emption, the reasonable and proper construction of such a document would be that the pre-emption clause was merely the recital of a pre-existing custom in force in the village; and in such a case it would be for the [88] defendant in a suit for pre-emption to prove by clear evidence that no such custom had existed in the village, and that the vendor and the plaintiff had not agreed to be bound by the recital."

This rule I fully approve of. It has been followed in a number of cases [see *Baldeo Sahai* v. *Nagai Ahir* (2), also *Sewak Singh* v. *Girja Pande* (3)].

From the language of the wajib-ul-arz before us there is nothing to indicate that the pre-emption clause is merely the embodiment of a new contract. On the contrary, the language in which the paragraph is couched is equally applicable to a right of pre-emption existing by custom as it is to a right of pre-emption existing by contract. Applying, therefore, the rule that the presumption is in favour of custom, as there is nothing in the wajib-ul-arz to indicate that the right recorded therein is one arising from the contract of the parties, the words used in this wajib-ul-arz should be interpreted as recording a right existing by custom.

As regards the decisions of this Court, we find that in *Faizullah Khan* v. *Lok Nath* (4) (not reported), it was held that the right of pre-emption embodied in a wajib-ul-arz, of property in the Shahjahanpur district, similar to the record before us, was a right arising from contract. We have examined the judgment in that case, and we find in it that reliance was placed on the fact that nowhere in the plaint was custom set up. The learned Judges seem to have based their decision to some extent at all events upon this omission in the plaint.

In the case of *Manu Singh* v. *Hira Lal* (5) (not reported), the question before us was not raised. The learned Judges in their judgment point to

(1) Weekly Notes, 1897, p. 3.
(2) (1906) 3 A. L. J. 850.
(3) (1904) 2 A. L. J. 6.
(4) S. A. No. 641 of 1906, decided on the 15th of August, 1908.
(5) S. A. No. 822 of 1908, decided on the 25th of May, 1909.

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33 A. 85=
7 I. C. 118.

the fact that it was not disputed by the parties that the right recorded in the wajib-ul-arz then before the Court, was a right existing by contract. This therefore may be treated as a decision of no account.

In three later unreported cases, namely, *Moti Ram* v. *Balwant Singh* (1), *Mohan Lal* v. *Bhola Nath* (2) and *Gopal Singh* v. *Dwarka Prasad* (3), it was held that language in the wajib-ul-arzes [89] in those cases similar to the language in the wajib-ul-arz before us should be interpreted as the record of a custom and not the record of a contract. I think these three last mentioned cases were rightly decided, and in the present case I would hold that the right recorded in the wajib-ul-arz is a right existing by custom.

I would therefore set aside the decrees of both the lower courts and remand the case to the court of first instance through the lower appellate court for decision upon the merits.

BANERJI, J.—I am of the same opinion. The rule as to the construction of documents of this nature was laid down in the case of *Majidan Bibi* v. *Sheikh Hayatan* (4). According to that rule a record in the wajib-ul-arz must be deemed to be the record of a custom unless the document itself indicates, or it is otherwise proved, that the pre-emption clause was the embodiment of a new contract. The rule has been adopted and followed in many subsequent cases. The wajib-ul-arz in the present case does not clearly show that it is the record of a contract relating to pre-emption. It must therefore be deemed to be the record of an existing custom.

As to the rulings in which a contrary view was held in regard to wajib-ul-arzes the terms of which are similar to those of the wajib-ul-arz in this case, I was a party to one of them, namely, Second Appeal No. 822 of 1908. As pointed out by the learned Chief Justice, it was not disputed in that case that the right recorded in the wajib-ul-arz was a right arising by contract. The lower court held that the wajib-ul-arz contained the record of a contract and this view of the lower Court was not questioned in second appeal. Therefore it was not necessary in that appeal to consider whether the wajib-ul-arz contained the record of a contract or of a custom. That case is therefore no authority as to the interpretation to be put on the wajib-ul-arz in question. I agree in the order proposed by the learned Chief Justice.

CHAMIER, J.—There is nothing in the extract from the wajib-ul-arz before us which indicates that it was intended to record a contract. It is therefore presumably the record of a custom. I agree in the order proposed by the learned Chief Justice.

[90] BY THE COURT.—The order of the Court is that the appeal be allowed, the decision of the lower court set aside, and the case remanded to the court of first instance through the lower appellate court, with directions that it be reinstated in the file of pending suits in its proper number and be disposed of on the merits, regard being had to the observations made by us in our judgements this day delivered. Costs here and hitherto will abide the event.

Appeal decreed : Cause remanded.

(1) F. A. F. O. No. 113 of 1908, decided on the 27th of May, 1909.
(2) S. A. No. 1148 of 1908, decided on the 23rd of February, 1910.
(3) F. A. F. O. No. 96 of 1909, decided on the 18th of January, 1910.
(4) Weekly Notes, 1897, p. 8.

33 A. 90 (=7 I. C. 352=7 A. L. J. 956).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

AMIN BEG (*Plaintiff*) *v.* SAMAN (*Defendant*).*

[20th July, 1910.]

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APPELLATE CIVIL.

33 A. 90=7 I. C. 352=7 A. L. J. 956.

Marriage—Muhammadan law—Conversion of wife to Christianity—Dissolution of marriage—Suit for restitution of conjugal rights.

Under the Muhammadan Law a wife's conversion from Islam to Christianity effects a complate dissolution of marriage with her Muhammadan husband. The fact of such a conversion is therefore a bar to a suit by the husband for restitution of conjugal rights. *Zuburdust Khan* v. *His wife* (1) and *Imamdin* v. *Hasan Bibi* (2) followed.

[Rel: 71 I. C. 830 ;]

THE plaintiff and defendant in this case had been Muhammadans married to each other according to the Muhammadan law. The wife became a convert to Christianity and left her husband. Thereafter the husband brought a suit for restitution of conjugal rights. Both the courts below dismissed the suit as unmaintainable.

The plaintiff appealed to the High Court.

Mr. *Ishaq Khan*, for the appellant, contended that under the Muhammadan law a wife who abandoned Islam should be forced to embrace it. This was, however, not possible now. If she was converted to Christianity, the previous relation did not come to an end, since there was no bar to a Muhammadan marrying a Christian lady. He relied on Ameer Ali's *Mahomedan Law*, 3rd edn., p. 432.

[91] If the marriage were taken to be dissolved it would open a very wide door to wives who would desire to renounce Islam and the whole Muhammadan community would be seriously affected. The mere fact that there was a conversion could not dissolve a Muhammadan marriage.

Maulvi *M. Shafi-uz-zaman*, for the respondent, cited *Zuburdust Khan* v. *His wife* (1); Baillie's *Digest*, p. 182; Wilson's *Anglo-Mahomedan Law*, pp. 159 and 179; Ameer Ali's *Mahomedan Law*, 2nd edn., Volume II, p. 343; Hamilton's *Heday*, p. 66; *Khan Bibi* v. *Pir Shah* (3), *Nowroz Ali* v. *Aziz Bibi* (4), *Allah Bakhsh* v. *Amir Begum* (5) and *Imamdin* v. *Hasan Bibi* (6).

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for restitution of conjugal rights. The plaintiff and the defendant both being Muhammadans were married a number of years ago. The defendant Musammat Saman has apostatized from Islam and become a Christian and has since left the protection of her husband. He now sues for restitution of conjugal rights and the defence is that by the fact of her apostacy the marriage tie became dissolved and a decree cannot be passed for restitution of such rights. Both the lower courts have held that the suit cannot be maintained in view of the authorities upon the subject.

We have heard the argument of the learned counsel for the plaintiff appellant, which was based on a passage to be found in the third edition of

*Second Appeal No. 1260 of 1909 from a decree of Banke Behari Lal, Additional Subordinate Judge of Aligarh, dated the 9th of October, 1909, confirming a decree of Kunwar Sen, Munsif of Bulandshahr, dated the 9th of August, 1909.

(1) (1870) 2 N. W. P. H. C. Rep. 370.
(2) (1906) Punj. Rec. 309.
(3) (1884) Punj. Rec. No. 132.
(4) (1876) Punj. Rec. No. 124.
(5) (1899) Punj. Rec. No. 61.
(6) (1906) Punj. Rec. No. 85.

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APPELLATE CIVIL.

33 A. 90=7
I. C. 342=7
A. L. J. 956.

Mr. Ameer Ali's work on Muhammadan Law. Mr. *Ishaq Khan* admits that there is no authority to be found in support of his contention outside the writings of the jurists of Balkh and Samarkhand, and this apparently is so. In the second edition of Mr. Ameer Ali's work it is definitely stated that " under the Muhammadan Law if a Moslem husband or a Moslem wife apostatize from Islam, the apostacy has the effect of dissolving the marriage tie between the parties." Baillie in his digest of Muhammadan Law at page 182 also states that " apostacy from Islam by one of a married pair is a cancellation of their marriage." In Hamilton's translation of the Hedaya at page 66 **[92]** is the passage:—"If either husband or wife apostatize from the faith a separation takes place without divorce according to Haneefa and Aboo Yoosuf." Sir Roland Wilson in his work on Anglo-Mahomedan Law, at page 156, writes as follows :—" It seems that the effect of either or both of the parties to a Mahomedan marriage renouncing the Mahomedan religion is to dissolve the marriage *ipso facto*, so far as the British Courts are concerned, leaving it open to the parties to solemnize a fresh marriage under the Christian Marriage Act, XV of 1872, according to circumstances. In the case of *Zuburdust Khan* v. *His wife* (1) TURNER, officiating C. J., and TURNBULL, J., expressed the opinion that the effect of the apostacy of a Muhammadan wife was to dissolve the marriage contract and that according to the Muhammadan Law if either party to a marriage becomes a convert to Christianity, a claim for restitution of conjugal rights cannot be supported. In addition to these authorities, we have the ruling in the case of *Imam Din* v. *Hasan Bibi* (2). In that case it was also held that according to the Muhammadan Law a wife's conversion from Islam to Christianity effects a complete dissolution of her marriage with her Muhammadan husband. There is thus a great mass of authority in support of the view taken by the courts below. The only ground, as we have said, upon which the learned counsel for the appellant supports his argument is the statement of Mr. Ameer Ali in the third edition of his work at page 432. The learned author directs attention to the divergence of opinion as to the effect of the wife's abjuration of Islam on the status of marriage, and points out that the lawyers of Bokhara have always taken a narrow view of the law but that the law of the jurists of Balkh and Samarkhand "laid down that when a woman abjures Islam for a scriptural or revealed religion like Judaism or Christianity, her renunciation of the faith does not dissolve the marriage." Then the learned author refers to the arguments in support of their contention and to the decision which we have just cited from the Punjab Chief Court Records and submits that "the British Indian Courts are by their constitution bound to follow the more reasonable enunciations of the jurists of Balkh and Samarkhand." We find ourselves unable to **[93]** disregard the authorities in support of the view taken by the courts below and depart from the course of decision hitherto prevailing. However weighty be the view expressed by Mr. Ameer Ali, we do not think that we should be justified in doing so. We therefore dismiss the appeal with costs.

Appeal dismissed.

(1) (1870) 2 N. W. P. H. C. Rep. 370. (2) (1906) Punj. Rec. 309.

33 A. 93 (=7 I. C. 503=7 A. L. J. 937.)

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APPELLATE CIVIL.

APPELLATE CIVIL.

33 A. 93=7 I. C. 503=7 A. L. J. 937

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

KISHORI LAL AND ANOTHER (*Plaintiffs*) *v.* KUBER SINGH (*Defendant*).*

[21st July, 1910.]

Act No. XV of 1877 (*Indian Limitation Act*), *section* 3; *schedule II, articles* 13, 14—*Civil Procedure Code* (1882), *section* 310*A*.—*Execution of decree—Suit involving the cancellation of an order setting aside a sale—Limitation.*

A Civil Court acting under section 310A of the Code of Civil Procedure, 1882, set aside a sale on an application made about 14 months after the sale. The auction-purchaser more than a year after this order sued for possession of the property and for a declaration that the order under section 310A was passed without jurisdiction. *Held* that the order whether passed rightly or wrongly was not a nullity, and that the order having been passed in a proceeding other than a suit, article 13 of the second schedule to the Indian Limitation Act, 1877, barred the present suit, inasmuch as the plaintiff could not obtain a decree for possession without first having the order set aside.

[Dis: 69 I. C. 326=41 M. L. J. 334=14 L. W. 334=1921 M. W. N. 775=45 Mad. 70.]

THIS was an appeal under section 10 of the Letters Patent from a judgment of KARAMAT HUSAIN, J. The facts of the case are stated in the judgment under appeal, which was as follows :—

"The facts necessary for the disposal of this appeal are briefly these :—The suit under appeal was brought for the possession of the property bought in execution of a decree on the 20th September, 1901, and the sale of that property was set aside by the learned Munsif on the 26th of September, 1901. On appeal the order of the learned Munsif setting aside the sale was reversed by the lower appellate court on the 16th of January, 1902. That order of the lower appellate court was upheld by the High Court on the 4th of December, 1902. The judgment-debtor again on the 23rd of December, 1902, applied under section 310A to have the sale set aside. The learned Munsif on the 20th of April, 1903, allowed the application and set aside the sale. On appeal to the lower appellate court the order of the Munsif setting aside the sale was again reversed on the 17th of July, 1903. On second appeal to the High Court it was held that no appeal lay to the lower appellate court. After the above-mentioned proceedings a fresh suit was instituted by the plaintiff for possession of the property sold. The result of the above proceedings, it is to be noticed, was, that the property sold on the 20th of September, 1901, passed to the possession of the judgment-debtor. The decree-holder therefore brought the suit under appeal for the recovery of [94] possession on the allegation that the Munsif had no jurisdiction to set aside the sale of the property by his order, dated the 28th of April, 1903. The court of first instance dismissed the claim on the ground that it had jurisdiction, and the decree of that court was affirmed by the lower appellate court. That court (the lower appellate court) in its judgment remarks :—'The word jurisdiction is not defined by the legislature, and it is used in different senses. In my opinion the Munsif had jurisdiction to entertain the application, dated the 23rd of December, 1902, in the sense that it was the proper court where it could lie, but it was barred by limitation [vide *Chowdhry Kesri Sahay* v. *Giani Roy* (1)] and he had no lawful authority to grant it, hence he may be said to have had no jurisdiction to grant it. But the question is, whether a separate suit like the present is maintainable under the circumstances ?' He, however, came to the conclusion that the suit was barred by limitation. He relied on *Malkarjun* v. *Narhari*, (2) and on *Raghunath Prasad* v. *Kaniz Rasul*, (3) and held that the learned Munsif had jurisdiction to pass the order which he passed on the 28th of April, 1903, and the suit ought to have been brought within one year from that date. The plaintiffs come here in second appeal, and it is argued by the learned vakil for the appellant that the suit is not barred by limitation. In my opinion the view taken by the lower appellate court is right. The learned Munsif had jurisdiction to pass the order dated the 28th of April, 1903, and that order was not a nullity. The suit on the authority of the rulings mentioned above is barred. The result is that the appeal fails and is dismissed with costs.'

* Appeal No. 161 of 1909 under section 10 of the Letters Patent.

(1) (1902) I. L. R. 29 Cal. 626.
(2) (1900) I. L. R. 25 Bom. 337.
(3) (1902) I. L. R. 24 All. 467.

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33 A. 93=7
El. C. 503=7
A. L. J. 937.

Munshi *Gulzari Lal*, for the appellants, submitted that article 14, of the second schedule to the Indian Limitation Act, 1877, had no application, as the order complained of was not merely an "order of an officer of Government in his official capacity," but an order passed by a Civil Court. Article 13 was also not applicable as an order under section 310A of the Code of Civil Procedure, 1882, was an order passed in the suit. He relied on *Shankar Sarup* v. *Mejo Mal* (1) and *Govinda Bala* v. *Ganu Abaji* (2). The suit would be governed by Article 120 of the Limitation Act.

Mr. *G. W. Dillon*, for the respondent, contended that the case in 10 Bombay Law Reporter, 749, was opposed to the ruling in *Raghunath Prasad* v. *Kaniz Rasul* (3) and that section 3 of the Limitation Act clearly laid down that a 'suit' did not include an 'application,' and therefore an order under section 310A which was passed on an application would be covered by Article 13 of the Limitation Act.

[95] Munshi *Gulzari Lal* was heard in reply.

STANLEY, C. J., and BANERJI, J.—The facts of this case are these:—The suit is one for the recovery of property which was bought by the plaintiffs at a sale in execution of a decree on the 20th of September, 1901. This sale was set aside by the Munsif on the 26th of September, 1901. On appeal the order of the Munsif setting aside the sale was reversed by the lower appellate court on the 16th of January, 1902, and this order was upheld by the High Court on the 4th of December, 1902. Then the judgment-debtor, on the 23rd of December, 1902, applied to the Munsif under section 310A of Act XIV of 1882 to have the sale set aside, and his application was granted on the 28th of April 1903, and the sale was set aside. An appeal was preferred, and the order of the Munsif setting aside the sale was reversed on the 17th of July, 1903, but on second appeal to the High Court, it was held that no appeal lay to the lower appellate court and the decision of that court was reversed. The order of the Munsif of the 28th of April, 1903, accordingly stood affirmed.

The suit out of which this appeal has arisen was then preferred by the plaintiffs on the 6th of August, 1907. They claimed possession of the property which had been sold to them, alleging that the Munsif had no jurisdiction to set aside the sale to them by the order of the 28th of April, 1903.

The learned Judge of this Court, from whose decision this appeal has been preferred, agreeing with the lower courts, dismissed the plaintiffs' claim, holding that the Munsif had jurisdiction to pass the order of the 28th of April, 1903, and that the plaintiffs' suit was barred by limitation, it not having been brought within one year from the date of that order.

We are of opinion that the decision of the learned Judge of this Court is correct, and that Article 13 of Schedule 11 of the Limitation Act is applicable to this case. It is obvious that the plaintiffs cannot obtain a decree for possession without first having the order of the Munsif of the 28th of April, 1903, set aside. This order, whether it was passed rightly or wrongly, cannot be treated as a nullity. We have then to see what period of limitation is prescribed for a suit to have such an order set aside. It is contended on behalf of the appellants that a period **[96]** of limitation is not expressly provided in the schedule to the Limitation Act, and that Article 120 which allows a period of six years within which

(1) (1901) I. L. R. 23 All. 313, 323.
(2) (1908) 10, Bom. L. R. 749.
(3) (1902) I. L. R. 24 All. 467.

to bring a suit is applicable. We are of opinion that the article which is applicable is article 13. Article 12 provides a period of one year's limitation for a suit to set aside, amongst others, a sale in execution of a decree of a Civil Court. Article 13 provides the same period of limitation for a suit to alter or set aside a decision or order of a Civil Court in any proceeding other than a suit. "Suit" is defined in section 3 of the Act as not including an appeal or an application. "Suit" therefore in the article does not include an application in a suit. The article applies to an order in any proceeding other than a suit, and as an application is excluded from a 'suit,' it applies to an order in a proceeding on an application. If after the words "other than a suit" the words "or application in a suit" had been added to the article, it would be different. Now the order of the Munsif setting aside the sale was an order in a proceeding other than a suit and article 13 is in our opinion applicable. If this were not so, we should have a period of one year allowed for the institution of a suit to have a sale in execution of a decree of a Civil Court set aside, while for a suit to have an order setting aside a sale cancelled, the period would be six years. This was clearly, we think, never intended. This is unlike the case of *Shankar Sarup* v. *Mejo Mal* (1). In that case the suit was brought under the provisions of section 295 of the Code of 1882, and it was not therefore necessary to set aside the order for distribution passed under that section.

We think that the decision of the learned Judge of this Court, which is in agreement with the decisions of the courts below, is correct and dismiss this appeal with costs.

Appeal dismissed.

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APPELLATE CIVIL.

33 A. 93=7 I. C. 503=7 A. L. J. 987.

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33 A. 97 (=7 I. C. 385=9 A. L. J. 963.)

[97] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

SUDARSHAN DAS SHASTRI (*Defendant*) *v.* RAM PRASAD AND OTHERS (*Plaintiffs*) AND BALDEO SAH AND OTHERS (*Defendants*).*

[21st July, 1910.]

Mortgage—Redemption—Bengal Regulation No. XV of 1793, *s.* 10—"*Redeemed*", *meaning of—Jurisdiction—Act No. XII of* 1887 (*Bengal, N.-W. P. and Assam Civil Courts Act*), *s.* 19—*Competence of court to pass a decree for an amount exceeding the pecuniary limits of its jurisdiction.*

Held that the word "redeemed" as used in section 10 of Regulation XV of 1793, was not used in the sense that the mortgage had been redeemed in the full sense of that word, that is, satisfied and possession given to the mortgagor. So long, therefore, as the property remains in the hands of the mortgagee, the mortgagor can bring a suit for redemption even if the mortgage had been satisfied over 12 years before suit.

Held also that where a suit as filed is within the pecuniary jurisdiction of a court, the jurisdiction of the court is not ousted by the subsequent discovery that a sum is in fact due to the plaintiff exceeding the pecuniary limits of the jurisdiction. *Madho Das* v. *Ramji Patak* (2) followed. *Golap Singh* v. *Indra Coomar Hazra* (3) dissented from.

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* Second Appeal No. 979 of 1909 from a decree of Jagat Narain, Second Additional Judge of Aligarh, dated the 12th of August, 1909, confirming a decree of Abdul Ali, Munsif of Jalesar, dated the 4th of August, 1908.

(1) (1901) I. L. R. 23 All., 313.

(2) (1894) I. L. R. 16 All. 286.

(3) (1909) 13 C. W. N. 493.

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APPELLATE CIVIL.

33 A. 97=7 I. C. 385=9 A. L. J. 963.

[Diss: 21 I. C. 783=15 Bom. L. R. 1021; Dist: 34 All. 261; Fol: 83 I. C. 740; Not Fol: 40 Mad. 1.]

THE plaintiffs in this case sued to redeem a usufructuary mortgage of the 7th June, 1847. The principal sum secured was 100 rupees, and the plaintiffs stated that the mortgage had been satisfied out of the profits of the property and that probably about another 100 rupees would be found due to them on taking an account, but if more was due they were ready to pay court fees on the amount. The suit was brought in the Court of a Munsif, who gave the plaintiffs a decree for Rs. 4,267-12-2. This decree was affirmed on appeal by the Second Additional Judge of Aligarh. The defendants thereupon appealed to the High Court.

Mr. *W. Wallach* (with him Babu *Satya Chandra Mukerji* and Babu *Piari Lal Banerji*), for the appellant.

Munshi *Govind Prasad*, for the respondents.

STANLEY, C. J., and BANERJI, J.:—This appeal arises out of a suit for redemption of a mortgage of the 7th June, 1847. The mortgage is a usufructuary mortgage, and the principal sum secured by it is only 100 rupees. The court of first instance [98] gave a decree to the plaintiffs for redemption and awarded them a sum of Rs. 4,267-12-2 as representing rents and profits which came into the hands of the mortgagee during his possession of the mortgaged property, over and above the interest chargeable on the mortgage Upon appeal this decree was affirmed. This second appeal has been preferred and two points have been argued before us by Mr. *Wallach*, the learned counsel for the appellant. The first of these is based on the provisions of section 10 of Regulation XV of 1793. This section provides for the interest which is to be allowed on mortgage securities executed subsequent to the 28th March, 1780, and prescribes that "all such mortgages are to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum with simple interest due upon it, shall have been realized from the usufruct of the mortgaged property etc., etc." The court of first instance found that the mortgage debt in this case was satisfied in the year 1856 and the contention on behalf of the appellant is that from that date the mortgage must be deemed to have been satisfied and cancelled and thereafter the mortgagee must be deemed to have remained in adverse possession of the mortgaged property, and any claim now for the recovery of that property is barred by limitation. This point does not appear to have been brought, definitely at least, to the notice of the lower courts, but it is said that a question of limitation is one which an appellate court is bound to entertain even though it was not raised in the lower courts. This is no doubt so. We have considered the provisions of section 10 of the Regulation relied on and we are of opinion that it lends no support to the argument addressed to us. The section which is relied on simply means that once a mortgage debt has been satisfied by receipt of rents and profits, the mortgage is to be considered as satisfied and discharged. The word "redeemed" as used in the section was clearly not used in the sense that the mortgage had been redeemed in the full sense of that word, that is, satisfied and possession given to the mortgagor. So long as the property remains in the hands of the mortgagee it cannot be said that the mortgage has been redeemed. A right to redeem is a right to pay or tender the mortgage money, and where the mortgagee is in possession, to obtain from him delivery [99] of possession. See as to this section 60 of the Transfer of Property Act. There is therefore no force in this contention.

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33 A. 97=7
I. C. 385=9
A. L. J. 963.

The next point raised is that the jurisdiction of the Munsif only extended to a pecuniary limit of Rs. 1,000. The plaintiffs were unable accurately to estimate the amount which should be found to be recoverable by them in respect of surplus rents and profits. They fixed the amount at Rs. 100, but stated that if a larger amount was awarded to them, they would pay any additional court fee which might be payable. The learned Munsif found that a sum of Rs. 4,267-12-2 was the amount of rents and profits received by the defendant appellant after satisfaction of the mortgage debt. It is now contended that the Munsif had no jurisdiction to pass a decree for this amount, and that the plaint ought to have been returned to the plaintiffs for presentation to the court having jurisdiction to award that amount. This argument is largely based upon the ruling of a Bench of the Calcutta High Court in *Golap Singh* v. *Indar Coomar Hazra* (1). In that case a suit for accounts and the recovery of certain papers was brought in the court of a Munsif, who had jurisdiction to try suits up to Rs. 1,000 in value. The suit was valued at less than Rs. 1,000. It was found by the Munsif that the amount due to the plaintiff was Rs. 8,424. It was held that the plaintiff could not obtain a decree for a sum above Rs. 1,000 and must relinquish the excess, that is, that the plaintiff could not obtain a decree for a sum beyond the pecuniary limit of the jurisdiction of the Munsif. This decision is opposed to a ruling of this Court, to which one of us was a party, in the case of *Madho Das* v. *Ramji Patak* (2). In that case it was held that the pecuniary jurisdiction of a Civil Court on its original or appellate side is, ordinarily speaking, governed by the value stated by the plaintiff in his plaint, and if a suit having regard to the valuation in the plaint is within the jurisdiction, such jurisdiction is not ousted by the court finding that a decree for a sum exceeding the limits of its pecuniary jurisdiction should be given to the plaintiff. The ruling in this case has not been the subject of any hostile criticism in this Court, so far as we are aware. On the contrary, it has been quoted **[100]** without disapproval in the Full Bench ruling in *Zair Husain Khan* v. *Khurshed Jan* (3). That was a suit for restitution of conjugal rights and it was argued in it that the suit was of necessity excluded from the jurisdiction of the Munsif as the suit could not be adequately valued. It was held by a Bench, of which one of us was a member, that a suit for restitution of conjugal rights is not a suit which is of necessity excluded from the jurisdiction of a Munsif ; that the value of such a suit as a rule, is the value which the plaintiff chooses to put upon it, provided that the suit be not unwarrantably undervalued or overvalued from improper motives. The same view was taken in the Madras High Court in the case of *Arogya Udayan* v. *Appachi Rowthan* (4). In that case the suit was for an account and the usual valuation for purposes of court fees was made in the plaint, which was filed and received in the Munsif's Court. The Munsif appointed a commissioner to take an account and the result was that the plaintiff was found by the commissioner to be entitled to a much larger sum than that at which the suit was valued. The plaintiff then applied for leave to amend the plaint, which was granted, and the valuation of the suit was accordingly increased. As the amount claimed in the amended plaint was greater then that over which the court of a Munsif ordinarily has jurisdiction, the Munsif

(1) (1909) 13 C. W. N. 493.
(2) (1894) I. L. R. 16 All. 286.
(3) (1906) I. L. R. 28 All. 545.
(4) (1901) I. L. R. 25 Mad. 543.

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33 A. 97=7 I. C. 385=9 A. L. J. 963.

ordered the plaint to be returned for presentation to the proper court. It was held by BENSON and BHASHYAM AYYANGAR, JJ., that the Munsif had acted with material irregularity in permitting the valuation of the suit to be revised and that he ought to have tried the case. In their judgement the learned Judges observe : —" This is a suit for an account, and in such a suit the valuation for purposes of court fees and jurisdiction does not disentitle the plaintiff to recover in the suit such higher amount as the evidence may show he is entitled to. The only restriction is that he cannot execute the decree without paying such additional court fee as may be due on the amount decreed. The valuation of the suit in the present case was made by the plaintiff in the *bona fide* belief that his valuation was correct, and, **[101]** in law, that valuation determined the grade of Court which had jurisdiction to entertain and try the suit." We are unable to agree with the decision in *Golap Singh* v. *Indra Coomar Hazra*.

These were the only two points which were argued before us by the learned counsel for the appellant. We dismiss the appeal with costs.

Appeal dismissed.

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33 A. 101 (=7 I. C. 200).

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice. Mr. Justice Banerji and Mr. Justice Chamier.

MUHAMMAD SADIQ (*Defendant*) *v.* GHAUS MUHAMMAD (*Plaintiff*).*

[26th July, 1910.]

Mortgage—Private sale of mortgaged property—Consideration left with purchaser for discharge of two mortgages—First mortgage alone discharged—Suit for sale by second mortgagee—Purchaser not entitled to hold up first mortgage as a shield.

Where a purchaser of mortgaged property undertook to discharge out of the purchase money two subsisting mortgages, and in fact discharged only the earlier one; *Held*, that it was not competent to him to hold up this mortgage as a shield against the suit of the puisne mortgagee for sale *Gopal Das* v. *Puran Mal* (1) referred to.

[**Ref**. 14 C. L J. 500=11 I. C. 649; **Fol**: 74 I. C. 640=21 A. L. J. 382.]

THE facts of this case were as follows:—

The property in dispute was mortgaged on the 19th January, 1886, to one Chet Ram, who was alleged to be a *benamidar* for the plaintiff's vendors. It had also been mortgaged on 21st June, 1881, to one Kadheri Mal. A part of the mortgaged property was sold by the heirs of the mortgagors to one Wilayati Begam on the 13th July, 1886, In the sale-deed it was provided that the consideration for the sale was to be left with the vendee for the discharge of the two mortgages of 1881 and 1886. Wilayati Begam made a gift of the property purchased to the defendant. The defendant discharged the mortgage of 1881 in favour of Kadheri Mal, but did not discharge that of 19th January, 1886, in favour of Chet Ram, the predecessor in title **[102]** of the plaintiff. The plaintiff brought this suit for sale upon his mortgage. The defendant appellant resisted it on

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* Second Appeal No. 14 of 1910 from a decree of B. J. Dalal, District Judge of Shahjahanpur, dated the 24th of August, 1909, confirming a decree of Muhammad Mubarak Husain, Subordinate Judge of Shahjahanpur, dated the 29th of April, 1909.

(1) (1884) I. L. R. 10 Cal. 1035, 1046.

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the ground that he having paid off a prior mortgage was in the position of the prior mortgagee. The suit was decreed by the courts below which held that in paying off the prior mortgage, the defendant had acted as an agent of the mortgagors and could not therefore claim the benefit of the payment as against the plaintiff. The defendant appealed.

Moulvi *Muhammad Ishaq*, for the appellant, relied on *Matiullah Khan* v. *Banwari Lal* (1), *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi* (2) and *Gokal Das Gopaldas* v. *Puran Mal Premsukhdas* (3). The defendant was in the position of a prior mortgagee. The fact that money was left with the defendant did not alter his position. He meant the prior mortgage to be kept alive in his favour.

Maulvi *Shafi-uz-zaman*, for the respondent, was not called upon.

STANLEY, C. J. and BANERJI and CHAMIER, JJ.—This appeal arises out of a suit for sale upon a mortgage, dated the 19th of January, 1886, executed in favour of one Chet Ram. It has been found that Chet Ram was only *benamidar* for the vendors of the plaintiff and that those persons were the real mortgagees. On the 13th of July, 1886, the heir of the mortgagors sold a portion of the mortgaged property to Wilayati Begam, the mother of the appellant, Muhammad Sadiq. The consideration for the sale was Rs. 875, and it was stated in the sale-deed that the vendors had received the whole of the amount of the consideration in cash, but had left it with the vendee to pay off debts due to Chet Ram and Kadheri Mal, and that the vendee was to pay those debts and obtain receipts from the creditors. One of the debts which the vendee undertook to discharge was the debt due under the mortgage deed of the 19th of January, 1886, of which Chet Ram was the nominal mortgagee. Wilayati Begam made a gift of the property to the appellant Muhammad Sadiq. His contention is that the mortgage in favour of Kadheri Mal was discharged by Wilayati Begam, and **[103]** that as the said mortgage was dated the 21st of June, 1881, and was thus of a date prior to the date of the mortgage on foot of which the plaintiff has brought this suit, he (the appellant) has priority over the plaintiff to the extent of the amount which was paid to Kadheri Mal and can hold up the mortgage so discharged as a shield against the claim of the plaintiff. In the court of first instance no such plea was put forward in the written statement, nor was any issue joined on the point, but in the lower appellate court, the plea was advanced. That court overruled it on the ground that the appellant or his predecessor in title had acted in the matter of the payment of Kadheri Mal's mortgage as the agent of the mortgagors and could not therefore claim the benefit of the payment as against the plaintiff. The correctness of this view of the learned Judge is questioned in this appeal.

In all cases where a subsequent purchaser claims priority over a puisne mortgagee by reason of his having discharged a prior mortgage, the question is always one of intention, that is, whether it was the intention to keep the prior mortgage alive as against the puisne mortgagee. As observed by their Lordships of the Privy Council in *Gokal Das* v. *Puran Mal* (4), the first question is, is there express evidence of the intention, and if there is no such evidence what intention should be ascribed to the person who makes the payment? In this case it seems to us that, having regard to the circumstances, the intention clearly was, at the time when the

(1) (1910) I. L. R. 32 All. 138.
(2) (1901) I. L. R. 29 Cal. 154.
(3) (1884) I. L. R. 10 Cal. 1035.
(4) (1884) I. L. R. 10 Cal. 1035 (1046).

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sale in favour of Wilayati Begam was executed, that the prior mortgages in favour of Kadheri Mal and Chet Ram should be extinguished by payment out of the consideration for the sale in the hands of the purchaser. The purchaser, as has been said above, undertook to discharge not only the debt due to Kadheri Mal but also the debt due under the mortgage upon which the present suit is based. He paid Kadheri Mal, but he did not pay Chet Ram, and he kept in his own pocket the portion of the consideration which should have been appropriated to the discharge of the mortgage debt in favour of Chet Ram. Not having paid that debt, he seeks to hold up as a shield against the claim made for the recovery of the debt, which he was also bound to pay, the payment of the prior debt. **[104]** We are of opinion that he cannot do so. It was clearly the intention at the time when the sale was effected that the prior mortgage in favour of Kadheri Mal would be extinguished and not kept alive. Now what was the intention at the time when that mortgage was discharged? We think that the evidence of the intention of the parties, as afforded by the sale-deed of the 13th of July, 1866, at the time of that sale, negatives the idea that at the time when the prior mortgage was discharged, it was intended to keep it alive for the benefit of the subsequent purchaser. This is further manifest from the fact that when the defendant appellant filed his written statement, he did not assert that he had priority over the plaintiff by reason of his having discharged the earlier mortgage. This was clearly an afterthought. Under the circumstances we are of opinion that the appellant cannot hold up as a shield the mortgage which he has paid off against the debt which he undertook to pay but which he did not discharge. In this view the plea of the appellant is untenable and we disallow it, though not on the ground set forth in the judgement of the court below. We dismiss the appeal with costs.

Appeal dismissed.

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33 A. 104 (=7 I. C. 930=7 A. L. J. 1022).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

LALJI MISR AND OTHERS (*Plaintiffs*) *v.* JAGGU TIWARI AND ANOTHER (*Defendants*).*

[27th July, 1910.]

Pre-emption—Wajib-ul-arz—Construction of document—"Intiqal"—Perpetual lease.

Held that that word "intiqal" used in the pre-emptive clause of a *wajib ul-arz* was wide enough to include a perpetual lease. *Jugdam Sahai* v. *Mahabir Prasad* (1) and *Ahmed Ali Khan* v. *Ahmed* (2) referred to.

[Dist: 75 I. C. 404=21 A. L. J. 731:]

THIS was a suit for pre-emption based on the terms of the village wajib-ul-arz, the pre-emptive clause of which ran as follows:—"Whenever any co-sharer transfers (*intiqal*) his share in any mahal, he shall transfer it first to a near co-sharer and after that to a remote co-sharer in his patti,

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* Second Appeal No. 831 of 1909 from a decree of Chhajju Mal, officiating District Judge of Ghazipur, dated the 14th of December, 1909, reversing a decree of Gobind Sarup Mathur, Munsif of Muhammadabad, dated the 7th of August, 1909.

(1) (1905) I. L. R. 28 All. 60.

(2) (1866) 1 N.-W. P. H. C. Rep. 101.

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&c." The transaction sought to be pre-empted was a perpetual lease with a substantial [105] premium but a nominal rent It was in fact apparently a sale under the guise of a lease, this device having been adopted in the hope of evading pre-emption. The Court of first instance decreed the claim, but upon appeal this decree was reversed by the District Judge, who considered that the transaction in question was not an "*intiqal*" within the meaning of the wajib-ul-arz. The plaintiffs appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellants.

Munshi *Gobind Prasad*, for the respondents.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a pre-emption suit. The defendant Hazari executed in favour of the defendant Jaggu a perpetual lease, which purports to be a lease of a share in Mauza Bichhanpur, district Ghazipur, at a yearly rent of Rs. 5-14-6 on payment of a fine of Rs. 1,436. The plaintiffs, who are shareholders in the village claim the right to pre-empt this transaction, relying on a custom prevailing in the village and recorded in the wajib-ul-arz of the village. The custom is that " whenever any co-sharer transfers (*intiqal*) his share (*haqiat*) in any mahal, he shall transfer it first to a near co-sharer and after that to a remote co-sharer in his patti, etc." The plaintiffs claim the right to pre-empt the transfer made to the defendant Jaggu on the allegation that it is a transfer within the meaning of the wajib-ul-arz. The Court of first instance decreed the plaintiffs' claim, but upon appeal the learned District Judge reversed the decision of the court below on the ground that the transaction carried out by the document of the 14th May, 1909, was not a transfer within the meaning of the word 'transfer' as used in the wajib-ul-arz. In his judgment he says the oral evidence shows, " that they (*i.e.*, the parties) intended to effect a sale, but for fear of pre-emption they changed their minds and effected the transfer by a lease. This is not sufficient to change what is a lease into a sale," and, later on : —" They, the parties, were within their rights, if they adopted this device to defeat the claim of the pre-emptor." The decision of the learned District Judge is impugned in this second appeal, and we have to determine whether or not the so called lease of 14th May, 1909, is a transfer (*intiqal*) by the defendant Hazari of his interest in the village to the defendant Jaggu. The word *intiqal* is, it is to be noted, a word of very wide signification [106] and covers all kinds of transfers. See *Jagdam Sahai* v. *Mahabir Prasad* (1). The lease purports to create a perpetual interest, reserving merely a nominal rent, and was granted by Hazari in consideration of the payment of the substantial fine of Rs. 1,436. There can be little doubt that this transaction was entered into with a view to defeat the rights of pre-emptors and that the transaction was in reality a sale. A similar question came up for decision before a Bench of this Court in the case of *Ahmed Ali Khan* v. *Ahmed* (2). That was also a suit for pre-emption. A usufructuary lease was executed by co-sharers in a village for a term of 8 years with a provision that the lessees should remain in possession during its term and on its expiration should surrender the lands making no demand for the money advanced by them to the lessors, etc. The plaintiffs claimed a right to pre-empt this transaction relying upon the provision of the wajib-ul-arz of the village to the effect that in all cases of transfer by sale, etc., the co-sharers would have a

(1) (1905) I. L. R. 28 All. 60.

(2) (1866) N. W. P. H. C. Rep. 101.

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33 A. 104=7 I. C. 930=7 A. L. J. 1023.

preferential right to the same. It was held by SPANKIE and TURNBULL, JJ. that the co-sharers were entitled by right of pre-emption to take over the usufructuary lease. In the course of their judgment the learned Judges observe:—"We do not think it necessary to determine here whether this transaction be strictly speaking a mortgage or not. The terms of the administration paper are that in cases of transfer by sale, &c., a preferential claim may be raised," and later on they observe:—"In our opinion we should rather regard the object, for which prohibitions against transfer are made in the administration papers of village communities. The object clearly is to keep out strangers and to retain the property in the hands of the brotherhood: a transfer of proprietary right for a term of 8 years to a stranger may be as mischievous to the brotherhood as a mortgage for the same or a longer term. In this point of view an usufructuary lease for 8 years is as much a transfer, as a mortgage for the same term; and if the condition of the administration paper includes all transfers, permanent and temporary, which we hold it to do, then co-sharers have a preferential right over a stranger." The principle of this ruling applies to this case. In fact the case before us is a stronger case, inasmuch as here the **[107]** possession of the property is given over to a stranger in perpetuity subject to the payment of a merely nominal rent. For these reasons we are of opinion that the court of first instance was right in the conclusion at which it arrived. We therefore set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs of this appeal and also the costs of the lower appellate court. We extend the time for payment of the price for three months from this date.

Appeal decreed.

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33 A. 107 (=8 I. C. 570=7 A. L. J. 1078).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

CHINTAMAN AND ANOTHER (*Defendants*) *v.* DULARI (*Plaintiff*).*

[28th July, 1910]

Mortgage—Construction of document—Liability for deficiency in interest whether personal merely or a charge on the mortgaged property.

A mortgage deed provided that the mortgagee should take possession of the mortgaged property and out of the rents and profits pay the Government revenue and appropriate Rs. 132 per annum on account of interest at the rate of 11 annas per cent. per mensem. It further provided that should the amount of profits, calculated on the basis of the patwari's accounts, be found insufficient to cover the whole amount payable for interest, the deficiency would be made good by the mortgagor together with interest at the rate of Rs. 2 per cent per mensem. *Held* that deficiency in the stipulated interest was realizable as well from the mortgaged property as from the mortgagor personally. *Muhammad Husain* v. *Sheodarshan Das* (1) referred to.

[**Rel**: 63 I. C. 297=2 P. L. T. 229; **Ref**: 65 I. C. 819=20 A. L. J. 86; 72 I. C. 987=16 L. W. 743.]

The facts of this case are fully stated in the judgment of the Court.

Dr. *Satish Chandra Banerji*, for the appellants.

The Hon'ble Pandit *Sundar Lal*, for the respondent.

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* Second Appeal No. 1294 of 1909 from a decree of Muhammad Ishaq Khan, District Judge of Farrukhabad, dated the 30th of September, 1909, modifying a decree of Daya Nath, Subordinate Judge of Farrukhabad, dated the 31st of March, 1909.

(1) (1907) 4 A. L. J. 176.

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APPELLATE CIVIL.

33 A. 107=8
I. C. 570=7
A. L. J. 1087.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for the redemption of two mortgages dated respectively the 13th of December, 1870, and the 24th of June, 1871, made by one Ganjan Ram. The first mortgage secured a sum of Rs. 1,600 and in it a four biswa share was mortgaged. Under the second mortgage Rs. 400 was borrowed and an additional one biswa share was mortgaged. The plaintiff has acquired the mortgagor's [108] rights in a portion of the mortgaged property and he brought the suit which has given rise to this appeal to redeem the two mortgages offering to pay the principal amounts secured thereby. The mortgagees claimed a further sum of Rs. 14,867-10-9 on account of deficiency of interest.

The first mortgage deed provides that the mortgagees should take possession of the mortgaged property and out of the rents and profits pay the Government revenue and appropriate Rs. 132 per annum on account of interest at the rate of 11 annas per cent. per mensem. It further provides that should the amount of profits, calculated on the basis of the patwari's accounts, be found to be insufficient to cover the whole amount payable for interest, the deficiency would be made good by the mortgagor together with interest at the rate of Rs. 2 per cent. per mensem. There is a similar clause in the second mortgage deed also. The defendants alleged that the rents and profits of the mortgaged property were insufficient for the realization of the full amount of interest at the stipulated rate of 11 annas per cent. per mensem and that under the terms of the mortgage deeds, a large amount was due to them on account of deficiency of interest. The court of first instance found in their favour and made a decree for redemption upon payment of Rs. 14,634-2-3. The plaintiff appealed against this decree to the lower appellate court. The learned Judge of that court was of opinion that for the amount of deficiency in interest there was no charge on the mortgaged property; that the mortgagors undertook only a personal liability for the payment thereof and that the defendants were only entitled to get the amount of deficiency due for the six years preceding the date of the suit. The learned Judge accordingly made a decree for redemption upon payment of the principal amounts of the mortgages and of the amount which he found to be due on account of deficiency in interest for six years preceding the date of the suit. If the view taken by the learned Judge, namely, that there was no charge on the mortgaged property for deficiency of interest, is correct, the decree made by him for payment of the deficiency which arose during the six years preceding the date of the suit is clearly erroneous. It was the mortgagor who according to the learned Judge incurred a personal liability [109] for the payment of the amount of deficiency. If it was not a charge on the property the plaintiff, who is the purchaser of the property, could not be saddled with the payment of that amount and such payment could not be declared to be a condition precedent to the redemption of the property. We are of opinion that the learned Judge is in error in holding that the mortgaged property was not security for deficiency of interest. The mortgage deeds provide for payment of interest at the rate of 11 annas per cent. per mensem. The mortgaged property therefore was security not only for the principal amounts of the mortgages but also for the interest stipulated to be paid. The whole amount of stipulated interest being thus chargeable on the mortgaged property that property was security for any portion of such interest which remained unrealized out of the rents and profits. It is thus manifest that the mortgaged property was security for the amount of deficiency. It is deficiency

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in the stipulated amount of interest which was recoverable by the mortgagee, under the terms of the mortgage, in the event of the rents and profits being found to be insufficient to cover the whole amount of interest. It is true that the mortgagor undertook a personal liability also for the amount of deficiency, but this he did not only for the amount of deficiency but also for interest thereon at the rate of Rs. 2 per cent. per mensem. The fact of his undertaking a personal liability for the stipulated interest did not relieve the mortgage property from liability to satisfy the deficiency. This amount of deficiency the mortgagees are in our opinion entitled to get for the whole period of the mortgage and not for six years only. This case cannot be distinguished in principle from that of *Muhammad Husain* v. *Sheodarshan Das* (1). In that case the mortgagor was entitled to a *malikana* allowance from the mortgagee. This allowance was not paid and it was held that the amount of the *malikana* allowance should be deducted from the mortgage money for the full period of the mortgage, although the mortgagor might have sued and recovered the arrears of *malikana* separately. The principle of this case clearly applies to the present case and the mortgagees are entitled to obtain the deficiency of interest for the [110] full period during which the mortgage money remained unsatisfied. The case of *Ganga Sahai* v. *Lochan Singh* (2) relied upon by the learned Judge is not in point. There it was held that additional interest was not payable as the mortgagee waived his right to it, but the mortgagor was declared to be liable for the interest originally agreed to be paid. As to the additional interest claimed in the present case at the rate of Rs. 2 per cent. per mensem on the amount of deficiency, it is not according to the terms of the mortgages a charge on the mortgaged property. Therefore the defendants, in our opinion, are not entitled to obtain further interest on the amount of deficiency in interest. It is stated by the defendants that the amount of deficiency in interest for 39 years during which the mortgage remained undischarged is Rs. 2,100-7-9. They have claimed further interest on that amount but in view of the opinion expressed above they are not entitled to it. As to Rs. 2,100-7-9 the accounts produced by them was found by the Court of first instance to be in accordance with the patwari's account and the learned Judge accepted this finding and held the accounts to be correct. There can be no objection, therefore, to the correctness of the principal amount claimed as deficiency in interest. This amount we hold the defendants are entitled to get from the plaintiff in addition to the principal amounts of the two mortgages: that is to say, the plaintiff can obtain redemption upon payment of Rs. 4,100-7-9. The result is that we allow the appeal, vary the decree of the Courts below and make a decree for redemption upon payment within six months from this date, of Rs 2,000 for principal and Rs. 2,100-7-9 for deficiency of interest, in all Rs 4,100-7-9, together with interest, at the rate of 11 annas per cent. per mensem on Rs. 2,000, the principal amount secured by the mortgage, from the date of the suit, to the date fixed for payment and further interest on the amount decreed at the rate of 6 per cent. per annum from such date to the date of actual payment; as also, of the costs of the suit as hereinafter provided. The respective parties will pay costs in all courts in proportion to failure and success. The objections taken by the respondent under order XLIV, [111] rule 22 of the Code of Civil Procedure, fail and are dismissed with costs.

Decree modified.

(1) (1907) 4 A. L. J. 176.

(2) Weekly Notes, 1886, p. 50.

33 A. 111 (=7 I. C. 231=7 A. L. J. 1011.)

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FULL BENCH.

33 A. 111=7 I. C. 231=7 A. L. J. 1011

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox and Mr. Justice Banerji.

TULSHI RAM SAHU AND ANOTHER (*Plaintiffs*) *v.* GUR DAYAL SINGH AND ANOTHER (*Defendants*).*

[28th July, 1910.]

Act No. IV of 1882 (*Transfer of Property Act*), *section* 91—*Redemption—Mortgage of fixed-rate tenancy by tenant—Death of tenant without heirs—Right of zamindar to redeem—Escheat to Crown—Act* (*Local*) *No. II of* 1901 (*Agra Tenancy Act*), *sections* 5, 18, 20 57.

Held that on the death of a fixed-rate tenant without heirs his tenancy does not escheat to the Crown but reverts to the zamindar. *Ram Dihal Rai* v. *The Maharaja of Vizianagaram* (1) overruled. *Rance Sonet Kowar* v. *Mirza Himmut Bahadoor* (2) distinguished.

[Fol : 22 I. C. 891; 75 I. C. 621.]

THE facts of this case were as follows :—

On Ram Dhian Koeri was a fixed-rate tenant of the holding in dispute. In 1870 he usufructuarily mortgaged the holding to the respondents, Gurdial Singh and others. Ram Dhian disappeared and was not heard of for more than seven years. The zamindars of the village, thereupon, brought this suit for redemption on the ground that Ram Dhian having died heirless, the tenancy lapsed to them. Among other defences, it was pleaded that on the death of Ram Dhian, the tenancy went to the Crown and not to the zamindar, and the zamindar consequently had no interest to redeem the mortgage. This plea found favour with both the courts below and they dismissed the plaintiff's suit. The plaintiffs appealed to the High Court. At the hearing of the appeal before the Single Bench the correctness of the ruling in *Ram Dihal Rai* v. *The Maharaja of Vizianagram* (1) was not discussed, the learned Judge having stated that he considered himself bound by that ruling. It was, however, contended that as there was no finding by the lower Appellate Court that the tenant was in fact dead, the ruling could not apply. This contention was met [112] by the argument that, as it was the plaintiff's case that the tenant was dead, no specific finding was necessary. It was further contended that the case fell under section 87 of the Agra Tenancy Act, 1901.

The following judgment was delivered by ALSTON, J. :—

" In my opinion the suit out of which this appeal arises was rightly dismissed. A zamindar claimed the right to redeem a usufructuary mortgage which had been executed by a tenant at fixed rates. The lower appellate court dealt very shortly indeed with the appeal, holding that the case was covered by the ruling of *Ram Dihal Rai* v. *The Maharaja of Vizianagram* (1). It has been contended here by the learned counsel for the appellant that the ruling has no application, because it was based on the fact that the fixed rate tenant had died without heirs, and that in consequence the rights which he possessed in the land had become vested in the Crown. Whether that circumstance did or did not lie at the foundation of the ruling, I need not decide, for it was the appellant plaintiff's case that the tenant, not having been heard of for a long time must be presumed to be dead. That view was pleaded in the third paragraph of the plaint. It was repeated in the prayer for relief. It was reiterated in the first ground of appeal to the lower appellate court. There is nothing in the plaint to suggest as it is now argued that the zamindar's case was that there had been an abandonment of the land within the meaning of section 87 of the Tenancy Act. Moreover, having

* Appeal No. 132 of 1909 under section 10 of the Letters Patent.

(1) (1908) I. L. R. 30 All. 488.
(2) (1876) L. R. 3 I. A. 92; I. L. R. 1 Cal. 391.

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regard to the fact that the zamindar had himself admitted the existence of a usufructuary mortgagee in possession, and to the further fact that he made no attempt to show that the tenant had " left the neighbourhood, without arranging for the payment of his rent as it fell due and giving notice to the landholder of such arrangement," he had not even laid the foundation for the case of abandonment which is now set up. The first Court found that the tenant was still alive, but the lower appellate court said nothing on this point. It is in my opinion, however, unnecessary to remand the case for a finding on the point ; for upon any view of the case set up by the plaintiff in his plaint the suit must fail. The appeal is dismissed with costs."

The plaintiffs appealed under section 10 of the Letters Patent.

The appeal came on for hearing before the Chief Justice and Mr. Justice BANERJI who referred the case to a Full Bench.

Mr. *M. L. Agarwala*, for the appellants :—

On the death of a fixed rate tenant, the tenancy lapsed to the zamindar and not to the Crown. The ruling in *Ram Dihal Rai* v. *The Maharaja of Vizianagram* (1) did not lay down the correct law. It purported to follow the precedent of *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (2), but that dealt with a case different from that of a fixed **[113]** rate tenancy. There the question was in respect of a *mukarrari* tenure which was a lease in perpetuity, the grantor reserving no right of re-entry in himself. Whereas in the case of a fixed rate tenure, the zamindar had such right. He could eject the tenant if he failed to pay the rent or was guilty of any other breach of contract. It was only freehold that went to the Crown ; *Attorney General* v. *Sir George Sands* (3), *Walker* v. *Denne* (4) and *Downe* v. *Morris* (5).

Munshi *Govind Prasad* for the respondents :—

Section 20 of the Agra Tenancy Act, 1901, laid down that the interest of a fixed rate tenant was both heritable and transferable. It contemplated that the tenant had absolute interest in the tenancy. Fixed rate tenure was of the nature of *mukarrari* tenure. The ruling in 1 Cal. 391 did apply to the case.

STANLEY, C. J. :—The plaintiffs are zamindars of the village of Karmanpur in the district of Ballia. There is a small cultivatory holding which was held from the plaintiffs by one Ram Dhian as a tenant at fixed rates. In the year 1870 he executed a usufructuary mortgage of this holding in favour of the respondents, which contained a provision for redemption in any Jeth. Ram Dhian is said to have disappeared a number of years ago, and according to the plaintiffs he has not been heard of for more than seven years and must be presumed to have died. It is also alleged that he died without heirs. The plaintiffs instituted the suit for redemption of the usufructuary mortgage, out of which this appeal has arisen. The right of the plaintiffs to redeem is contested and the defendants further allege that Ram Dhian is alive. The lower appellate court held, relying upon the decision of a Bench of this Court in the case of *Ram Dihal Rai* v. *The Maharaja of Vizianagram* (1), that the plaintiffs had no interest in the equity of redemption of the property and could not maintain a suit for redemption. A second appeal was preferred to this Court and the learned Judge, before whom it came for disposal, dismissed it. An appeal under the Letters Patent was then preferred, and the correctness of the decision in *Ram Dihal Rai* v. *The Maharaja of Vizianagram* is challenged. My **[114]** brother Banerji and myself, before

(1) (1908) I. L. R. 30 All 488.
(2) (1876) I. L. R. 1 Cal. 391.
(3) Freeman (Chancery cases) 129; Hardres, 188-89.
(4) (1793) 2 Ves (Jun) 170.
(5) (1844) 3 Hare, 394.

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33 A. 111=7 I. C. 231=7 A. L. J. 1011.

whom the appeal came for hearing, were of opinion that the question raised was one of importance and should be decided by a larger Bench. Accordingly the appeal has come before us.

The sole question for determination is whether or not the lower appellate court and the learned Judge of this Court were right in holding that the plaintiffs had no such interest in the mortgaged property as entitled them to maintain a suit for redemption of the defendants' mortgage. The contention on behalf of the appellants is that Ram Dhian died without heirs and that thereupon his tenancy became extinguished and that the plaintiffs are entitled to possession of the holding, or at least to possession of it on redemption of the mortgage of 1870.

In *Ram Dihal* v. *The Maharaja of Vizianagram* the facts were these :—A zamindar brought a suit to redeem a mortgage made by a fixed rate tenant alleging that the fixed rate tenant had died without heirs and that his interest had thereby lapsed to him. The court of first instance held that, in the event of the tenant having died childless, his interest went to the Crown and not to the plaintiff, and dismissed the suit. His decision was reversed by the lower appellate court and a second appeal was preferred to the High Court. The learned Judges before whom it came for disposal held that the tenancy did not lapse upon the death of the tenant without heirs, but that the tenancy became vested in the Crown. They relied on the ruling of their Lordships of the Privy Council in *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (1). They further held that in order to redeem, the person seeking redemption must have an interest "in the mortgaged property," that the mortgaged property in that case was the interest of a fixed rate tenant, and that the mere fact that the zamindar has a proprietary interest in the land out of which this interest is carved, does not give him an interest within the meaning of section 91 of the Transfer of Property Act.

Let us see what was decided in *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor*. In that case the grantee from a Hindu zamindar of an ordinary *mokurraree istimrarce* tenure died without heirs and it was held that the Crown by the general [115] prerogative was entitled to the lease ; that the *mokurraree*, though carved out of zamindari, being an absolute alienable interest therein, could not have reverted to the grantor and that there was no authority upon which the power of taking by escheat can be attributed to the grantor. In that case it will be observed that the *mokurraree* was an absolute and alienable interest. It could not have been forfeited for the non-payment of rent. The zamindar could only in the case of non-payment of rent have caused it to be seized, put up for sale and sold to the highest bidder. It was therefore property which might have passed to any purchaser, and having so passed the estate would not have determined upon the death of the grantee without heirs if it had been sold in her life-time. The language of their Lordships is as follows :—" The *mokurraree* was clearly an absolute interest. It was also an alienable interest. It might have been seized and sold, as Mr. Doyne has shown, under Act X of 1859, even in a suit for rent. It could not have been forfeited for the non-payment of rent ; for in such a case the zamindar could only have caused it to be seized, put up for sale, and sold to the highest bidder. It is therefore property which, like that in the case above cited, might have passed to any purchaser, whatever his nationality, or by whatever law he was to be governed. It cannot, their Lordships

(1) (1876) L. R. 3 I. A. 92; I. L. R. 1 Cal. 391.

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think, be successfully argued that having so passed the estate would have determined upon the death of Sharfun-nissa (supposing it had been sold in her life-time) without heirs, for the grant contains no provision for the lease of the estate created in such event."

The grant in this case was, it will be observed, that of an absolute interest and altogether unlike the interest of a fixed rate tenant. Let us see what is the nature of the interest of a fixed rate tenant.

Section 5 of the Agra Tenancy Act, I of 1901, prescribes that when any land in a district which is permanently settled, has been held by a tenant and his predecessor in title from the time of the permanent settlement at the same rate of rent, "such tenant shall have a right of occupancy at that rate." A fixed rate tenant therefore is a tenant who has a right of occupancy at a fixed rate. Section 18 prescribes that a right of occupancy shall be extinguished **[116]** when, amongst other cases, a tenant dies leaving no heir entitled under the Act to inherit the right of occupancy. A fixed rate tenant is liable to ejectment for non-payment of rent or breach of conditions (section 57). It appears to me, therefore, that a fixed rate tenancy is but a limited interest, which cannot be the subject of escheat to the Crown. In fact, the Act provides that on the death of the tenant without heirs the interest of such a tenant, described in the Act as a right of occupancy, shall be extinguished. With all deference to the learned Judges who decided the case of *Ram Dihal Rai* v. *The Maharaja of Vizianagram*, I am of opinon that that case was wrongly decided. If then it be the case that Ram Dhian is dead without leaving an heir as defined in section 22 of the Act, the plaintiffs are clearly entitled to redeem the mortgage held by the respondents, if they are not entitled to possession of the holding without redemption. The question whether the plaintiffs are bound to discharge the mortgage debt does not arise because they are willing and have offered to do so. The first court found that Ram Dhian was still alive. If this be so, the plaintiffs' suit must fail. The lower appellate court, however, dismissed the appeal to it on the sole ground that the plaintiffs could not be regarded as having any interest in the equity of redemption of the holding, and this is the view which seems to have commended itself to the learned Judge of this Court. I would allow the appeal and set aside the decree of the learned Judge of this Court, and as the lower appellate court, decided the appeal on a preliminary point, I would remand the appeal to that court with directions that that court determine the appeal on the merits.

KNOX, J :—I have nothing to add to the judgment of the learned Chief Justice. I fully agree with the view taken by him.

BANERJI, J.:—I also concur with the learned Chief Justice. The view taken in *Ram Dihal Rai* v. *The Maharaja of Vizianagram* (1) was never adopted as far as I am aware, in any other case and seems to me to be inconsistent with the nature of a tenancy at fixed rates. Such a tenancy is carved out of the landholder's interest in the land to which it ralates and a fixed **[117]** rate tenant has no absolute interest in it. If the tenancy comes to an end it necessarily goes back to the estate which it was carved out of and lapses to the landholder. It is true that a fixed rate tenant has a heritable and transferable interest in his holding under s. 20 of the Agra Tenancy Act, but if he does not transfer the holding and dies leaving no heirs entitled to inherit it, the tenancy becomes extinct and reverts to the landlord who created it. The landlord has in certain cases a right to determine the

(1) (1908) I. L. R. 30 All. 488.

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tenancy, eject the tenant and re-enter into possession. For example, under section 57 of the Act, a tenant, not being a permanent tenure-holder, may be ejected for any of the reasons mentioned in the several clauses of the section, and as a fixed rate tenant is not a permanent tenure-holder, he may be ejected for any of those reasons. His interest in his holding is thus of a limited character and differs in material respects from an absolute hereditary *mokurrari* tenure which formed the subject of consideration by their Lordships of the Privy Council in *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (1). As pointed out by their Lordships, such *mokurrari* is an absolute interest and could not have been forfeited to the zamindar. Such is not the case with a fixed-rate tenancy. The ruling of their Lordships therefore does not support the decision in the case of *Ram Dihal Rai* v. *The Maharaja of Vizianagram*. Having regard to the incidents of a fixed rate tenancy I am unable, with great respect, to agree with that decision and to hold that a tenancy in these provinces escheats to the Crown.

BY THE COURT:—The order of the court is that the appeal be allowed and the decrees of the learned Judge of this court and of the lower appellate court be set aside and, as the case was decided by the lower appellate court on a preliminary point and we have overruled the court on that point, we remand the case under order XLI, rule 23, to the lower appellate court with directions to readmit the appeal under its original number in the register of civil appeals and proceed to determine the appeal.

Appeal decreed. Cause remanded.

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33 A. 118 (=7 I. C. 908=7 A. L. J. 980.)

[118] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Benerji.

BETI KUNWAR AND ANOTHER (*Plaintiffs*) *v.* JANKI KUNWAR AND ANOTHER (*Defendants*).*

[29th July, 1910.]

Hindu law—Mitakshara—Partition—Mother's share on partition between sons—Mother no right to share where merely legal severance of interest between sons without partition by metes and bounds.

Under the Mitakshara law upon a partition being made by sons, after the death of their father the mother is entitled to a share equal to that of a son: but she would obtain such a share only if an actual partition took place between the sons. A mere severance of interest where no actual division of the property takes place does not confer on the mother a right to a share. *Ganesh Dutt* v *Jewach* (2) distinguished.

[Ref. 67 I. C. 894]

THE facts out of which this and the connected appeal, F. A. No. 73 of 1910, decided by the same Bench on the same date, arose are stated in the judgement in the last named case, the material portion of which is as follows:—

"This appeal and the connected first appeal No. 231 of 1906 arise out of a suit brought by Musammat Duni Kunwar for possession of property

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* First Appeal No. 231 of 1906 from a decree of B. J. Dalal, District Judge of Mainpuri, dated the 7th of February, 1906.

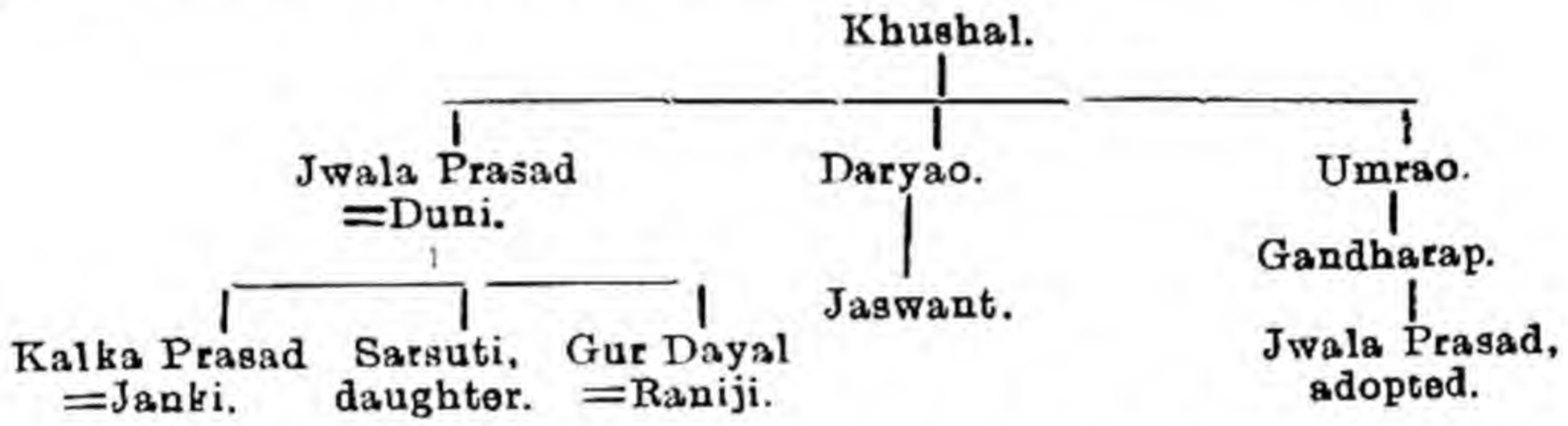
(1) (1876) L. R. 3 I. A. 92; I. L. R. 1 Cal. 391. (2) (1903) I. L. R. 31 Cal. 262.

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which she alleged she had inherited from her son Gur Dayal. She was the widow of Tiwari Jwala Prasad, who died in 1869, leaving him surviving his widow Duni Kunwar, two sons, Kalka Prasad and Gur Dayal, and a daughter Laraiti Kunwar, who is one of the appellants in the connected appeal No. 231. Jwala Prasad was one of the three sons of Kushal Singh, the other sons being Daryao Singh and Umrao Singh. Daryao Singh had a son Jaswant Singh, but with his branch of the family we are not concerned in this appeal. Umrao Singh's son was Gandharap Singh, and it is asserted by the appellant Jwala Prasad that he was adopted to Gandharap Singh. In first appeal No. 173 of 1908, decided on the 15th of December, 1909, we held for the reasons stated in the judgement in the case, that Jwala Prasad was validly adopted. For the same reasons we hold in this case that he was so adopted and must be treated as the adopted son of Gandharap Singh. Of the sons of Tiwari Jwala Prasad, Kalka Prasad died on 23rd of April, 1893, leaving a widow Janki Kunwar, who is the principal **[119]** defendant in this case. Gur Dayal Singh died about 4 months afterwards, that is, on the 7th of August, 1893, his widow Musammat Raniji died in 1899. The pedigree of the family is thus set forth in the judgement of the court bolow: —



"The suit which has given rise to this and the connected appeal was brought by Duni Kunwar on the allegation that the two brothers Kalka Prasad and Gur Dayal Singh were members of a joint family; that upon Kalka Prasad's death Gur Dayal by right of survivorship succeeded to the whole of the property; that after his death his widow inherited it, and upon the widow's death she, Duni Kunwar, as his mother inherited it. She asserts that Janki Kunwar had no interest in the said property, and that she is in unlawful possession of a half share. Duni Kunwar accordingly prayed for a declaration that Gur Dayal and Kalka Prasad were members of a joint family and that she is by right of inheritance to her son Gur Dayal the owner of that property, and she claimed possession of a half share of the property now in the possession of Janki Kunwar. The plaint contains an allegation to the effect that if it was found that a partition had taken place between the brothers, she as the mother of the two brothers obtained a third share under the partition and was therefore entitled to recover from the defendant Janki Kunwar, a sixth share of the property, being the difference between a third share and a fourth share, of which she, Duni Kunwar, was in possession. Accordingly in the alternative she claimed possession of a sixth share. There were other prayers in the plaint to which we need not refer for the purposes of these appeals.

"The court below held that the two brothers Kalka Prasad and Gur Dayal were separate; that Janki Kunwar inherited a half share of the property being share of her husband, that Duni Kunwar got no share under partition, and that her claim to a third share is not maintainable and is also barred by limitation. That court **[120]** accordingly dismissed the

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suit on the 7th of February, 1906. Duni Kunwari having died after the decision of the suit, that is, on the 18th of April, 1906, this appeal No. 73 of 1910 has been preferred by the minor Jwala Prasad, and he claims as the adopted son of Gandharap Singh to be the next reversioner to the estate after Duni Kunwar's death. The connected appeal No. 231 of 1906 has been preferred by Musammat Laraiti Kunwar, the daughter of Duni Kunwar, and her sons on the allegation that Duni Kunwar obtained a share in the property under a partition between her sons ; that the property so acquired was her *stridhan* and that it passed on her death to her (Lairati Kunwar)."

Mr. *M. L. Agarwala* (with him Mr. *W. Wallach*), for the appellants.

The Hon'ble Pandit *Sundar Lal* (with him Babu *Jogindro Nath Chaudhri*), and Munshi *Gokul Prasad* for the respondents.

STANLEY, C. J., and BANERJI, J.—The facts of this case are stated in the judgement just now delivered in F. A. No. 73 of 1910. The contention on behalf of the appellant is, that as there was a partition between the sons of Duni Kunwar she as their mother acquired a third share in the property, that such share was, in accordance with rulings of this Court, her *stridhan* and passed on her death to her personal heir, namely, the appellant Laraiti Kunwar and that the appellant is entitled to a decree for a one sixth share claimed in the alternative by Duni Kunwar in the second prayer of her plaint. In our opinion this contention is without force. As we have stated in our judgement in First Appeal No. 73 of 1910, there was no actuul partition between the sons of Duni Kunwar, although by reason of the arrangement under which they held the property after Gur Dayal Singh had come of age, there was a disruption of the joint family within the meaning of the rulings of their Lordships of the Privy Council. Indeed it was never asserted that a third share was assigned to Duni Kunwar at any such partition. On the contrary, under an agreement dated the 8th of September, 1893, entered into between Duni Kunwar and the two widows of her sons, the name of Janki Kunwar was to be recorded in respect of a half share, that of Raniji in respect of one fourth, and that of Duni Kunwar in regard to the remaining one fourth. This agreement [121] negatives the allegation that Duni Kunwar obtained a third share by partition. No doubt under the Mitakshara upon a partition being made by sons after the death of their father the mother is entitled to a share equal to that of a son. But we are of opinion that she would obtain such share only if an actual partition took place between the sons. The text of *Yajnavalkya* on this point is this :—" Of heirs *dividing* after the death of the father, let the mother also take an equal share (Mitakshara, chapter I, section 7, para. 1)." This in our opinion implies an actual division of the family property, that is, a completed partition under which there is a division of interest as well as separate possession. We do not think that a mere severance of interest where no actual division of the property takes place confers on the mother a right to a share equal to that of each of her sons. It has been held that a mother has no right to compel a partition. See *Bilaso* v. *Dina Nath* (1). It is only when the sons actually divide the property and effect a complete partition that the mother can get a share. There is nothing in the Mitakshara from which we may infer that upon a mere severance of the joint status of a Hindu family a mother can claim

(1) (1880) I. L. R. 3 All. 88.

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a share. As there was no such partition in the present case, Duni Kunwar never obtained a share. It is true that her name was recorded in regard to a fourth share after the death of her sons but that was with the consent of the son's widows and not by reason of her having obtained a share upon a partition between her sons. Further, even if it be assumed that she became entitled to a third share when her two sons agreed to hold the property in defined shares, as this severance of interest took place some time prior to 1892, that is more than 12 years before the institution of the suit, her right to the share has clearly become extinct by the operation of limitation. The learned counsel for the appellants has relied upon the decision of the Privy Council in *Ganesh Dutt Thakur* v. *Jewach Thakurain* (1). That case has in our opinion no bearing on the present question. In that case when a suit was brought for partition of the share of a son it was held that at such a partition the mother would get a share, and her share was assigned to her although she had not obtained it before. That [122] case therefore does not help the appellants. Moreover, under the agreement of the 8th of September, 1893, referred to above, Duni Kunwar acquiesced in the arrangement by which a fourth share was assigned to her and as she was admittedly in possession of a fourth share at the date of the suit she had no cause of auction. For these reasons we hold that the suit brought by her was bound to fail and has been rightly dismissed by the court below. We accordingly dismiss this appeal with costs. Janki Kunwar and Shiam Bihari respondents will get separate sets of costs.

Appeal dismissed.

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33 A. 122 (=7 I. C. 911=7 A L. J. 998).

APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Griffin.

WAJID ALI KHAN (*Plaintiff*) v. SHAFAKAT HUSSAIN (*Defendant*).*

[30th July, 1910.]

Construction of document—Sale subject to agreement executed on the same day reserving right to vendor to repurchase—Documents to be read together—Mortgage.

Two documents were executed by the same parties on the same day. The first purported to be an out and out sale of certain property, but was expressed to be "subject to the terms of the deed of agreement executed by the vendee." The agreement referred to was an agreement under certain conditions to reconvey the property purchased. *Held* that in the circumstances the two documents must be read together as constituting a mortgage by conditional sale. *Bhagwan Sahai* v. *Bhagwan Din* (2) distinguished.

[Fol. 14 M. L. T. 579=22 I. C. 4=1914 M. W. N. 222; Dist. 27 I. C. 436; Ref. 33 All. 585; 9 L. W. 365; 67 I. C. 113; 77 I. C. 572=45 All. 581=21 A. L. J. 508.]

THIS was a suit for redemption of a mortgage constituted, as alleged by the plaintiff, by two documents of even date, the first being a sale deed, the second an agreement for the repurchase of the property under certain conditions by the vendor.

The court of first instance decreed the suit. The lower appellate court reversed the decree. The plaintiff appealed to the High Court.

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*Second Appeal No. 1176 of 1909 from a decree of E. M. Nanavati, Additional Judge of Bareilly, dated the 1st of September, 1909, reversing a decree of Syed Abdul Hasan, Munsif of Havali, dated the 7th of December, 1908.

(1) (1903) I. L. R. 31 Cal. 262.

(2) (1890) I. L. R. 12 All. 387.

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7 I. C. 911=7
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The material portions of the documents upon the construction of which the case turns are set forth in the judgment of the court. The question was whether the two documents were to be read together as constituting a mortgage by conditional sale.

Maulvi *Ghulam Mujtaba*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondent.

[123] STANLEY, C. J., and GRIFFIN, J. :—The question in this appeal is whether two documents both dated the 30th April, 1897, are to be read together, and, if so read, constitute a transaction amounting to a mortgage. The lower appellate court has read them separtely and has treated the transaction as an out and out sale with an agreement to repurchase within a limited period. The suit out of which this appeal has arisen was brought for redemption of the property. The court of first instance decreed the claim, but upon appeal the lower appellate court reversed the decision of the court of first instance and dismissed the plaintiff's claim holding that the two documents in question were not to be read together, but separately, and so read constituted a sale and independent agreement for repurchase. We are of opinion that the lower appellate court was wrong in the construction which it placed on the documents. The first of the two documents purports to be an out and out sale, but at the end of the instrument the vendor declares that he has executed "this sale-deed subject to the terms of the deed of agreement executed by the vendee on the 30th April, 1897." This incorporates by reference the document of even date. By that document the vendee declares that the property was sold to him upon the condition that after the expiration of a period of six years from 1311 Fasli to 1315 Fasli whenever the consideration is repaid to him or his representative or tendered to him or deposited in his favour by the vendor or his representative with a view to take back the property sold, he (the vendee) shall without hesitation reconvey the property sold and execute a sale-deed in favour of the vendor or his representative and have it completed.

Further, in this document, the vendee undertakes that' whenever during the period from 1311 to 1315 Fasli the vendor or his representative pays or tenders to or deposits for him or his reprersentative a lump sum of Rs. 635 the remaining amount of consideration money, he shall without hesitation convey back the property. We have no doubt in view of the language of these two documents that they must be read together as constituting a mortgage by way of conditional sale. The case is unlike that which is relied on by the learned vakil for the respondent, namely, **[124]** *Bhagwan Sahai* v. *Bhagwan Din* (1). In that case it was held by their Lordships of the Privy Council that a document purporting to be one of sale, though it was accompanied by a contract reserving to the vendor a right to property sold, or repayment of the purchase money within a certain time, was not on that account to be construed as if it were a mortgage. In that case the document first executed was in terms an out and out sale. The document which was afterwards executed though of the same date was not executed in pursuance of any agreement entered into between the parties, but, on the contrary, was executed by the vendee "as a matter of favour, mercy, kindness and indulgence." Sir BARNES PEACOCK in delivering the judgment of their Lordships observed that it seemed clear from the decision of Lord Chancellor CRANWORTH in the case of *Alderson* v. *White* (2) that it was not a mortgage. He quoted the

(1) (1890) I. L. R. 12 All. 387.

(2) (1858) 2 De Gex & J. 105.

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33 A. 122=
7 I. C. 911=7
A. L. J. 998.

following words of the Lord Chancellor :—" These deeds taken together do not on the face of them constitute a mortgage, and the only question is whether, assuming the transaction to be a legal one, it has been shown to be in truth such as in the view of a court of equity ought to be treated as a mortgage transaction. The rule of law on this subject is one dictated by common sense that *prima facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase." Then his Lordship proceeds :—" In this case the vendors did not stipulate that they should have a right to repurchase." It will be at once observed how different are the facts of that case from the case which is before us. Here the deed which is alleged to be a deed of sale is made expressly subject to the condition mentioned in the contemporaneous document and the contemporaneous document is an agreement on the part of the vendee to reconvey the property to the vendor upon repayment of the purchase money.

We are of opinion that the view of the learned Additional Judge is erroneous, and as he decided the appeal before him upon this point and we have over-ruled him in regard to it, we set aside [125] the decree of the lower appellate court and remand the case to it under the provisions of order XLI, rule 23, with directions that it be re-admitted under its original number in the register and determined according to law. Costs here and hitherto will abide the event.

Appeal decreed. Cause remanded.

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33 A. 125 [=13 C. L. J. 63=8 A. L. J. 132=15 C. W. N. 273=9 M. L. T. 200=(1911) 1 M. W. N. 127=13 Bom. L. R. 75=21 M. L. J. 109=14 O. C. 95=38 I. A. 23=9 I. C. 391].

PRIVY COUNCIL.

MUHAMMAD BAKAR AND ANOTHER (*Plaintiffs*) *v.* MUHAMMAD BAKAR ALI KHAN AND ANOTHER (*Defendants*).*

[*On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.*]

[9th and 10th November and 2nd December, 1910.]

Settlement of Oudh—Taluqdar settled with on terms as to which no evidence could be given—Second summary settlement—Villages included in taluqdar's estate and not recovered by payment of money due on account of them—Trustee or lien-holder—Redemption barred by Act No. I of 1869, *section* 6—*Adverse possession.*

This appeal related to certain villages in Oudh which belonged prior to the annexation of that Province to the widow of the predecessor in title of the appellants, and were, under some arrangement of the exact nature of which there was no evidence, included in the estate of the ancestor of the respondent, a taluqdar, in whose possession they were found at the settlement in 1859. The widow at that time applied as owner for the settlement of the villages. Her claim was resisted by the agent of the taluqdar on the ground that he was entitled to possession until sums paid by him on account of the villages were paid off : and the settlement was made "in accordance with possession," the widow being directed by the settlement officer to proceed by separate application to get the villages released by payment of the money due by her; but she took no steps to get the property released; and when in 1867 she applied for regular settlement of the villages her claim was dismissed on 31st October 1868, on the ground that they were included in the sanad granted by Government to the

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* *Present* :—Lord MACNAGHTEN, Lord MERSEY, Lord ROBSON, Sir ARTHUR WILSON and Mr. AMEER ALI.

taluqdar. In a suit brought in 1905 by representatives of the widow for possession of a share of the property on the ground that the settlement proceedings in 1859 constituted the taluqdar either a mortgagee or a trustee on behalf of the widow it was admitted that the claim for redemption was barred by section 6 of Act No. I of 1869.

Held (upholding the decision of the Court of the Judicial Commissioner, that there was no warrant for the contention that the correlative obligation that lay on the taluqdar to release the villages on payment of the money due on account of them created a trust or constituted him a trustee for the widow, who took no steps to comply with the directions of the settlement officer, and allowed [126] the taluqdar to remain in possession and set up a distinctly adverse title in 1867, when she applied for regular settlement.

Hasan Jafar v. *Muhammad Askari* (1) distinguished. From the date of the dismissal of her application in 1868, possession was adverse to her, and the suit, not having been brought until 1905, was clearly barred by lapse of time.

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APPEAL from a judgement and decree (22nd July, 1907) of the court of the Judicial Commissioner of Oudh, which reversed a decree (29th August, 1905) of the Subordinate Judge of tahsil Biswan in the district of Sitapur, and dismissed the appellants' suit with costs.

The suit was brought against the first respondent and another defendant for possession of a half share in six villages in Oudh, and the main question for decision in this appeal was whether the British Government at the re-settlement of the Province of Oudh, after the confiscation of all proprietary rights in 1858, had made a settlement with Nawab Munauwar-ud-daula, the grandfather of the first respondent, and conferred upon him the proprietary title in respect of the villages in suit as a trustee for Musammat Wazir-un-nissa the widow of one Qazi Muhammad Azhar the predecessor in title of the appellants.

The appellants' case was that in 1849, Wazir-un-nissa was proprietor of the six villages, and in that year they were at her instance included in the *kabuliat* of Nawab Munauwar-ud-daula, an arrangement under which the Nawab paid the Government revenue to the King of Oudh, leaving the title and possession of Wazir-un-nissa as zamindar of the villages unaffected.

In 1856 the first summary settlement was made with the Nawab. In 1858 at the second summary settlement various claims were put forward to settlement of the villages in suit, and Wazir-un-nissa lodged her petition for settlement basing her claim on her rights as proprietor. In the course of the proceedings the statement of her agent Husain Khan was recorded, and also the statements of Syed Ali Husain the Nawab's agent, and of the kanungo of the pargana. The kanungo proved Wazir-un-nissa's proprietary title, and Syed Ali Husain asserted that the villages had been included in the Nawab's ilaqa since 1849, and that they had been settled with the Nawab in 1856 with the consent of the original zamindar. He asked for settlement on the ground that [127] eight years' arrears were due to the Nawab, and stated that whenever the original zamindar paid off what was due the villages would be released.

On the 19th February, 1859, the extra Assistant Commissioner of Sitapur made the following order on the claims:—

"The objection of the agent of Nawab Munauwar-ud-daula is that she at her own instance got the villages included into his taluqa, hence she can get the villages released on payment of the arrears and *takavi*. As the facts of the case have been recorded in detail, therefore it is ordered that the *kabuliat* shall remain as usual in accordance with possession in the name of the agent of Nawab Munauwar-ud-daula. The claim of the Thakurs, who have been out of possession for 100 years, is dismissed.

(1) (1899) I. L. R. 26 Cal. 879; L. R. 26 I. A. 229.

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The *zamindari* right of the wife of Qazi Muhammad Azhar appears to be correct. She should file a separate application to have the money due to the agent to Nawab Munauwar-ud-daula settled by arbitration and have her villages released. Whenever the villages, on payment of the money due to Nawab Munauwar-ud-daula, are released the mortgagees shall be at liberty to put forward their claim."

And on the 24th February, 1859, that order was confirmed by the settlement officer.

At the regular settlement in 1867, Wazir-un-nissa and her daughter again put forward a claim to the villages in suit, which was rejected on the 31st October, 1868, on the ground that they were included in the sanad granted to the Nawab. In 1870 they made a claim to a sub-settlement, under Act XXVI of 1866, but on the 15th March, 1871, the settlement officer refused to decree to the claimants an under-proprietary right in the villages, but on the 31st August, 1871, Wazir-un-nissa was granted a decree for under-proprietary rights in them of a limited character.

On the death of Wazir-un-nissa her daughter's sons, the second respondent and his brother Muhammad Taki, became her heirs. Muhammad Taki died in March, 1902, and the appellants, who are his son and daughter succeeded as heirs, and, on the 3rd March, 1905, they instituted the present suit, claiming, as against the heirs of the Nawab Munauwar-ud-daula, that the settlement proceedings of 1859 had constituted their ancestor either a trustee or a mortgagee in respect of the villages of which Wazir-un-nissa had been the owner, and that the plaintiffs were entitled in the alternative either to redemption or cancellation of the trust, and possession consequent thereon.

[128] The first defendant alone defended the suit. In his written statement he denied the existence of any trust or mortgage as alleged; and stated that on the 9th January, 1873, Wazir-un-nissa and her daughter executed a deed of gift of the villages in suit in favour of Muhammad Raza, the second defendant, whereby they divested themselves of all rights in the villages; and that in 1898, Muhammad Raza instituted a suit, (127 of 1898) of a nature exactly similar to the present suit in which he claimed possession of the villages in suit against this defendant, and in that suit Muhammad Taki, father of the plaintiffs, was also a defendant; that that suit was dismissed on the 7th February, 1901; that Muhammad Raza appealed against that decree, but the case was compromised by this defendant and Muhammad Raza, and a decree in terms of the compromise was made on the 4th November, 1902, in pursuance of which some of the villages in suit had been given to Muhammad Raza who was still in possession of them. The first defendant's pleas now material were that the suit was barred by lapse of time, and also by sections 13 and 43 of the Civil Procedure Code of 1882; that the effect of the settlement proceedings was to confer a proprietary title on the predecessors in title of this defendant, and on this defendant; and that the predecessors of the plaintiffs had all along admitted the title of this defendant and his predecessors and were now estopped from disputing it.

The issue so far as they are now material were :—

(1) Was the properietary right in the villages in suit conferred on Wazir-un-nissa, after the confiscation of the proprietary rights in land, as stated in paragraphs 9 and 10 of the plaint. [As to the settlement proceedings in 1859, and the orders of the Assistant Commissioner, &c.]?

(3) Is the status of Munauwar-ud-daula that of a lien-holder or mortgagee in respect of the villages in suit?

(6) Has the first defendant been in adverse possession of the villages in suit for more than 12 years before suit ?
(7) Is the suit barred by limitation ?
[129] (8) Is the suit barred by section 13 or 43 of the Civil Procedure Code ?

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In the course of the trial before the Subordinate Judge, the plaintiffs abandoned their allegation of a trust and relied on their claim to redemption as from a mortgagee.

On the above issues the Subordinate Judge held (1) that the proprietary title to the villages in dispute was conferred upon Wazir-un-nissa, and the settlement was made with the Nawab as a mortgagee or lien-holder ; (3) that the Nawab was a lien-holder ; (6) that the first defendant had not been in adverse possession of the villages for more than 12 years ; (7) that the suit was not barred by limitation ; (8) nor by section 13 and 43 of the Civil Procedure Code.

The Subordinate Judge gave the plaintiffs a decree for possession of the property in suit on payment of Rs. 1,651 within a certain time.

From that decision the first defendant appealed to the Court of the Judicial Commissioner, and a Divisional Bench of that Court (Mr. E CHAMIER, Judicial Commissioner and Mr. J. SANDERS, First Additional Judicial Commissioner) decided that the proprietary interest in the villages in suit was in the Nawab and that nothing in the settlement or otherwise imposed on him any obligation to restore possession of them to the appellants, and reversed the decree of the Subordinate Judge (1).

The judgment of the Judicial Commissioner after stating that

"In this Court the plaintiffs abandoned the claim to redeem, admitting that it was barred by section 6 of Act No. I of 1869, and pressed the claim as one for recovery of property from a trustee."

And after stating the facts continued :—

"The question then is whether the plaintiffs have proved that the settlement was made with the Nawab as a trustee. If they have proved this, then, subject to the other defences raised by the defendant, they may recover their shares in it, notwithstanding that it was included in the taluqdari sanad granted to the Nawab and he and his son Amjad Ali Khan after him were declared by the letter of 10th October, 1859, and by Act I of 1869 to be proprietors of the same."

Then after stating the settlement proceedings in 1859 and the decision of the claims by the order of the Extra Assistant [130] Commissioner and confirmed by that of the Deputy Commissioner the judgement proceeded :—

"On this evidence it appears to me absurd to suggest that the Government settled with the Nawab as trustee for Wazir-un-nissa or that he undertook to hold the property for her as a trustee. He claimed a lien or charge. His position was closely analogous to that of a mortgagee and it will be convenient to refer here to the orders of Government both before and after the settlement of 1859 regarding villages settled with taluqdars as mortgagees."

After referring to those orders of Government, ending with the letter of Government of the 10th October, 1859 ; the Circular No. $\frac{119}{2917}$ of the Chief Commissioner, dated the 13th August, 1860, and paragraph 21 of the Circular No. 1123, dated the 16th April, 1862, the judgment continued :—

"Subsequently Government came to the conclusion that injustice had been done to proprietors whose villages had under the orders of 1858-9 been settled with taluqdars on the strength of mortgages set up by them, and the taluqdars were induced to

(1) (1907) 10 Oudh Cases, 296.

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agree to a relaxation of the orders giving finality to the settlement of 1859. The official papers suggest that one of the objects of Act XIII of 1866 was to permit the redemption of mortgages in taluqas made after the 13th February, 1844, but if so the Act was very badly designed, for it merely extended the period of limitation and provided for a re-hearing of claims which had been rejected on the ground of limitation. Nothing effectual was done till 1869, when section 6, Act I of that year relaxed the rules of 1859 as regards certain instruments of mortgage. It is conceded by the plaintiffs that this enactment does not help them. The circular orders, which I have quoted, show that the Government were perfectly well aware that many taluqdars had on various grounds been allowed to engage in 1859 for villages to which they had no right whatever, but they deliberately decided to adhere to their promises regarding the settlement of 1859 except in so far as the taluqdars themselves consented to give up their rights.

"None of the well-known cases in which trusts have been enforced against taluqdars, notwithstanding the orders of 1859, have gone the length of holding that taluqdars who were settled with in 1859 as mortgagees or charge-holders should be regarded as trustees. The only case which bears any resemblance at all to the present case is that of *Hasan Jafar* v. *Muhammad Askari* (1), but when that case is examined it will be found that it is clearly distinguishable from the present case. In that case it was held that Hakim Hasan Ali was trustee for his co-sharers, because the Chief Commissioner settled with him on the footing that he would give his co-sharers their shares if they re-appeared. In the present case neither the Government nor the officers charged with making the settlement made any such stipulation. They simply settled with the Nawab, because he was in possession and left Wazir-un-nissa to redeem her property if she could. She never attempted to do so before the orders of Government rendered redemption impossible and therefore she cannot do so now.

[131] "Any other view of this case would destroy in a great measure the settlement of 1859 and unsettle titles all over the Province.

"Mereover, the Nawab and his successors have long since ceased to be mere lien-holders of the property in suit. In 1867 Wazir-un-nissa and her daughter sued for possession of the property. They might have set up a trust then, but they did not do so, and their suit was dismissed; see Exhibits A1, 2, and 4. In 1870 they sued for sub-settlement of the property. That suit also was dismissed; see Exhibits A10, 11 and 19. In 1871 they claimed under-proprietary rights of various kinds, and ultimately got a decree for a substantial *nankar*, for *sir* and other rights, see Exhibits A29 and 21. The position of the parties under this decree is inconsistent with the continuance of the relation of trustee and cestui-que trust if any such relation ever existed. The possession of the defendant and his predecessor has been adverse to the plaintiffs and their predecessors for at last 30 years past as regards the proprietary title to the villages. In my opinion the plaintiffs have entirely failed to substantiate any case of trust and their suit is barred by the failure of their predecessors to set up a case of trust in 1867 and 1870 and is also barred by limitation."

On this appeal.

DeGruyther, K. C. and *Ross* for the appellants contended that the effect of the settlement proceedings subsequent to the confiscation of all titles in Oudh on its annexation by the British Government was not to deprive Wazir-un-nissa, the predecessor in title of the appellants, of all right to the villages in suit, of which she was without doubt the owner previous to the confiscation, and to give the ancestor of the respondent a proprietary title to them. Whatever the arrangement by which, with her acquiescence, they were settled with the Nawab, it must have been one under which she would be able to recover them when she chose to claim them. The possession of the Nawab, either as a trustee or a lien-holder, did not enable him to set up adverse possession against her. It was submitted that that was the construction to be put on the order of the Extra Assistant Commissioner in February, 1859; and it was quite inconsistent with that construction to say that the villages, when she did claim them in 1867, were included in the sanad granted to the Nawab, and on that ground to reject her claim. Reference was made to Sykes'

(1) (1899) I. L. R. 26 Cal. 879; L. R. 26 I. A. 229.

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Compendium of Taluqdari Law, pages 13 and 14, where the orders of Government as to the annexation and subsequent re-settlement of Oudh are set out. The object of that re-settlement was as far as possible to reinstate persons in the estates they [132] held in 1856. The cases of *Hurdeo Bux* v. *Jowahir Singh* (1) and *Hasan Jafar* v. *Muhammad Askari* (2) were also referred to as laying down principles on which a taluqdar had become a trustee in respect of property settled on him by Government which had previous to the confiscation of titles in Oudh belonged to other persons besides himself; and those cases were relied on to show that the Nawab in 1859 had become a trustee of the villages in suit. The Court of the Judicial Commissioner was therefore in error in holding that having regard to the settlement proceedings the plaintiffs had failed to establish a good title to the villages and to possession of them; and that the suit was barred by limitation. Her suit so far as redemption was concerned was, it was admitted, barred by section 6 of Act No. I of 1869. Reference was made to the Limitation Act (XV of 1877) schedule II, article 144; Oudh Estates Act (I of 1869), sections 3, 4, 5 and 6; Sykes' Compendium of Taluqdari Law, page 168; and Papers relating to the Administration of Oudh (Ed. 1865), page 53, sections 17 and 19, and page 55, section 21. Under the circumstances the appellants were entitled to the relief they claimed or a portion of it.

Sir *R. Finlay*, *K. C.*, and *B. Dube*, for the first respondent were not called on.

1910, *December 2nd* :—The judgment of the Lordships was delivered by Mr. AMEER ALI :—

This appeal arises out of a suit brought by the plaintiffs to recover possession of a half share in certain villages in the district of Sitapur in Oudh. The villages in question belonged originally to one Qazi Muhammad Azhar, but some years prior to the annexation, either for convenience in the payment of Government demands or from motives of greater security, they appear to have been included, with the consent of Muhammad Azhar's widow, Wazir-un-nissa, in the ilaqa or estate of Nawab Munauwar-ud-daula, the ancestor of the principal defendant in this case. Thus in 1859, when the first settlement of the Province was carried out, the villages were found to be in the possession of Munauwar-ud-daula. On that occasion Wazir-un-nissa applied as [133] *malik* or owner for settlement of the villages. The claim was resisted by the Nawab's agent and was ultimately dismissed. It is upon the orders passed by the extra Assistant Commissioner in the settlement proceedings, coupled with certain statements made by the Nawab's agent, that the present action is based. On the 21st of January, 1859, in answer to a question by the settlement officer as to his ground of objection to Wazir-un-nissa's claim, he stated as follows :—

"*A.*—This village has been included in our (my client's) ilaqa for the last seven or eight years, it neither being mortgaged nor sold. But the arrears for eight (not clear in the original) years, regarding this village are still due to us (my client). Whenever the original zamindar, *i.e.*, the claimant, will pay off our (my client's) money he will get the village released. There is no other objection."

"*Q.* - Who mortgaged this village to you (your client)?

"*A.*—We (my client) got this village from the wife of Qazi Muhammad Azhar. We know nothing about the claim of Karamat-ul-lah."

(1) (1879) L. R. 6 I. A. 161. 26 I. A 229.
(2) (1899) I. L. R. 26 Cal. 879 ; L. R.

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33 M. 125=13 C. L. J. 63=8 A. L. J. 132=15 C. W. N. 273=9 M. L. T. 200=(1911) 1 M. W. N. 127=13 Bom. L. R. 78=21 M. L. J. 109=14 C. C 95=38 I. A. 23=9 I. C. 391.

And on the 19th of February, 1859, the extra Assistant Commissioner made the following order :—

"The objection of the agent of Nawab Munauwar-ud-daula is that she at her own instance got the villages included into his taluqa, hence she can get the villages released on payment of the arrears and *takavi*. As the facts of the case have been recorded in detail, therefore it is ordered that the *kabuliat* shall remain as usual in accordance with possession in the name of the agent of Nawab Munauwar-ud-daula. The claim of the thakurs, who have been out of possession for 100 years, is dismissed. The *zamindari* right of the wife of Qazi Muhammad Azhar appears to be correct. She should file a separate application to have the money due to the agent to Nawab Munauwar-ud-daula settled by arbitration and have her villages released. Whenever the villages, on payment of the money due to Nawab Munauwar-ud-daula, are released, the mortgagees shall be at liberty to put forward their claim. Let the file be submitted to the Deputy Commissioner for perusal and approval."

As the proceedings related to a number of villages, similar orders appear to have been recorded on other dates.

On the 24th of February, 1859, the Deputy Commissioner, to whom the matter was submitted for approval, confirmed the settlement with Munauwar-ud-daula and dismissed Wazir-un-nissa's claim.

For the next eight years no action seems to have been taken in respect of the property in suit, but in 1867 when what is called the regular settlement of the Province was in progress, Wazir-un-nissa, in conjunction with her daughter Kutb-un-nissa, applied that [134] the villages might be settled with her. Her claim was again resisted on the ground that they were included in the *sanad* granted by Government to the Nawab. Her application for settlement was accordingly dismissed on the 31st October, 1868. Two years later the two ladies applied for sub-settlement in respect of the villages in question, but as they could not prove possession within the period prescribed by law, their application was rejected on the 30th of August, 1871. Their rights, however, to *nankar* allowance and other dues were admitted and affirmed in proceedings taken about the same time.

In 1873 Wazir-un-nissa and Kutb-un-nissa transferred by a deed of gift their right and interest in the said villages to defendant No. 2, who is the son of another daughter of Muhammad Azhar. In 1898 the defendant No. 2 instituted a suit against the defendant Bakar Ali Khan to recover possession of those villages. His claim was dismissed by the first Court, but was compromised on appeal.

The present action is brought by the son and daughter of a brother of defendant No. 2 who claim to be entitled to a half share in the property in suit. Their contention is that the proceedings in 1859 constituted the ancestor of Bakar Ali Khan either a mortgagee or trustee on behalf of Muhammad Azhar's widow. The latter position was abandoned in the first Court where the case was tried, on the basis that the Nawab was a mortgagee or lien-holder. The Subordinate Judge upheld the plaintiffs' contention, and made a decree in their favour under section 92 of the Indian Transfer of Property Act (IV of 1882) for "redemption" on payment of a sum specified.

On appeal by the defendant Bakar Ali Khan, the Judicial Commissioners have held the suggestion that Government settled the properties with the Nawab as trustee for Wazir-un-nissa, or that he undertook to hold the same as trustee for her, to be untenable. On the question whether the plaintiffs were entitled to any relief on the hypothesis that he was a mortgagee, they held that section 6 of Act No. I of 1869 was a bar to the action. They accordingly dismissed the suit.

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33 A. 125=13 C. L. J. 63=8 A. L. J. 132=15 C. W. N. 278=9 M. L T. 200=(1911) 1 M. W. N. 127=13 Bom. L. R. 75=21 M. L. J. 109=14 O. C. 95=38 I. A. 23=9 I. C. 391

The plaintiffs have appealed to His Majesty in Council. It is conceded on their behalf that, having regard to the provisions [135] of section 6 of Act No. I of 1869, their claim for redemption cannot be sustained. But it is contended that, as the settlement with the Nawab was made subject to the rights of Wazir-un-nissa, who was declared entitled to recover possession of the villages on payment of the money due from her, the present suit comes strictly within the principle enunciated by this Board in *Hasan Jafar* v. *Muhammad Askari* (1). Their Lordships agree with the Judicial Commissioners in holding that the facts of the two cases are not at all analogous. In *Hasan Jafar* v. *Muhammad Askari* the settlement was effected with the person who took it on a distinct understanding which, in their Lordships' judgment, constituted him a trustee for his co-sharers who were not present at the time.

In the present case, the settlement officer's proceedings can bear no such meaning. The Nawab was in possession of the villages by virtue of some arrangement regarding the exact nature of which there is no evidence. At the time of settlement he or his agent opposed the claim of Wazir-un-nissa to have the properties settled with her, on the ground that he was entitled to remain in possession until the moneys he had disbursed on her account were paid off. That objection was upheld, and the settlement was made with the Nawab "in accordance with possession," and the lady was directed to proceed by separate application to get her property released by payment of the money due by her. In their Lordships' judgment there is no warrant for the contention that the correlative obligation that lay on the Nawab to release the property on payment of the money created a trust or constituted him a trustee for Wazir-un-nissa. No step appears to have been taken by her in compliance with the directions of the settlement officer; and the Nawab was allowed to remain in possession of the property without any attempt on her part to get it released. In 1867, when she applied for the regular settlement of the villages, an adverse title was distinctly set up on his behalf. From the date of the dismissal of her application in 1868 on the ground that they were included in his taluqdari sanad the Nawab's possession was adverse to her. The present suit was not instituted until 1905 and is thus clearly barred. The appeal, therefore, fails and must [136] be dismissed with costs. And their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants :—*T. L. Wilson and Co.*
Solicitors for the first respondent:—*Barrow, Rogers and Nevill.*

33 A. 136 (=8 A. L. J. 190=9 I C. 931).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

RAM DIAL AND OTHERS (*Defendants*) v. NARPAT SINGH (*Plaintiff*).*

[12th February, 1909.]

Act (Local) No. II of 1901 (Agra Tenancy Act), section 20 (2)—Civil Procedure Code (1882) section 266—Occupancy holding—Mortgage of occupancy holding and appurtenant house—Mortgaged property not saleable.

* Second Appeal No. 145 of 1908, from a decree of Pitambar Joshi, Additional Subordinate Judge of Aligarh, dated the 13th of December, 1907, reversing a decree of Mubarak Husain, Munsif of Bulandshahr, dated the 31st of July, 1907.

(1) (1899) I. L. R. 26 Cal. 879; L. R. 26 I. A. 229.

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33 A. 136=8 A. L. J. 190 =2 I. C. 931.

Where an occupancy tenant purported to mortgage (1) a grove, which was his occupancy holding, and (2) a house appurtenant to such holding, *Held* that having regard to section 20 (2) of the Agra Tenancy Act, 1901, and section 266 of the Code of Civil Procedure (1882) neither the grove nor the house could be sold in execution of a decree on the mortgage.

[Ref: 34 All. 25; 84 I. C. 749=22 A. L. J. 321=46 All. 489;]

THIS was a suit for sale upon a mortgage, dated the 26th of September, 1898, executed by the defendants Nos. 1 to 3 in favour of the plaintiff. The mortgage bond provided for payment of the amount secured by it by instalments covering a period of twelve years. The plaintiff alleged that default had been made in the payment of one of the instalments, and claimed the amount of all the instalments remaining unpaid. He also prayed for the sale of the mortgaged property, which consisted of a grove, admittedly the occupancy holding of the mortgagors, and a dwelling house and inclosure, which they occupied as such occupancy tenants. The court of first instance (Munsif of Bulandshahr) granted the plaintiff a decree for only one of the instalments, in respect of which default had been made, and dismissed the remainder of the claim, including the claim for sale. The lower appellate court (Additional Subordinate Judge of Aligarh) modified the decree of the court of first instance and made a decree for the whole amount claimed. It upheld the first court's finding that the mortgaged grove was not liable to [137] sale, but it was of opinion that the dwelling house could be sold. The defendants appealed to the High Court.

Babu *Parbati Charan Chatterji*, for the appellants.

Babu *Jogendro Nath Chaudhri*, for the respondent.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for sale brought upon a mortgage, dated the 26th of September, 1898, executed by the defendants Nos. 1 to 3 in favour of the plaintiff. The mortgage bond provides for payment of the amount secured by it by instalments covering a period of twelve years. The plaintiff alleges that default has been made in the payment of one of the instalments and he claims the amount of all the instalments remaining unpaid. He also prays for the sale of the hypothecated property, which consists of a grove, admittedly the occupancy holding of the mortgagors, and a dwelling house and enclosure in which they reside as such occupancy tenants. The court of first instance granted to the plaintiff a decree for only one of the instalments in respect of which default had been made, but it dismissed the remainder of the claim, including the claim for sale of the mortgaged property. The lower appellate court has modified the decree of the court of first instance and made a decree for the whole of the amount claimed. In its judgment it upheld the first court's finding that the mortgaged grove was not liable to sale, but it was of opinion that the dwelling house could be sold. In the decree which was prepared there is, however, an order for the sale of all the mortgaged property including the grove.

In this appeal the first contention raised on behalf of the appellants is that the plaintiff is not entitled to claim the amounts of unpaid instalments. Having regard to the terms of the mortgage we are unable to accede to this contention. Under the mortgage-deed the mortgagee is given the right to claim all the instalments in the event of default being made in the payment of any one of them. The court below was therefore right in making a decree for the instalments which remained unpaid.

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It is next contended that the decree for sale of the dwelling house of the mortgagors is contrary to the provisions of section 266 of the Code of Civil Procedure of 1882, which exempts the materials of the dwelling house of an agriculturist from attach-[138]ment or sale. Under the Agra Tenancy Act, an occupancy holding of a tenant is not transferable and cannot be sold by auction in execution of a decree. The dwelling house of an agriculturist may be deemed to be an appurtenant to his holding. Further, section 266 of the Code of Civil Procedure, 1882, which has been re-enacted in section 60 of Act No. V of 1908, prohibits the sale of materials of dwelling houses occupied by agriculturists. The Court therefore has not the power to sell the materials of such a dwelling house, and it necessarily follows that it cannot make a decree for sale of such property. In this view the claim for sale of the dwelling house of the defendants ought not to have been decreed. The order in the decree for sale of the grove was clearly erroneous. The result is that we allow the appeal so far that we dismiss the claim for sale of the hypothecated property and affirm the remainder of the decree of the Court below. We make no order as to the costs of this appeal.

Decree modified.

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33 A. 138 (=6 I. C. 338).

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Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

GAYA PRASAD *and others* (*Plaintiffs*) *v.* GANGA BISHAN (*Defendant*).*

[20th May, 1910.]

Act (*Local*) *No. I of* 1903 (*Bundelkhand Encumbered Estates Act*), *section* 13—*Sub-mortgage by usufructuary mortgagee—Covenant to indemnify sub-mortgagee if dispossessed—Effect on such covenant of mortgagors taking advantage of the provisions of the Bundelkhand Encumbered Estates Act*, 1903.

The mortgagee in possession under a usufructuary mortgage executed a sub-mortgage of his mortgagee rights and covenanted with the sub-mortgagee that if during the period of the mortgage the property mortgaged, in any year, by any reason, should pass out of the possession of the sub-mortgagee, or the mortgage deed for any reason should be declared to be invalid, he, the executant, would be liable to pay the loss sustained by the mortgagee The mortgagors took advantage of the provisions of the Bundelkhand Encumbered Estates Act. The mortgagee took no steps under the Act to realize the amount due to him on his mortgage. The sub-mortgagee did prefer a claim, but it was rejected, and he did not appeal against the special Judge's order rejecting it. The sub-mortgagee was ejected from the mortgaged property, and thereafter his sons sued the mortgagee on his covenant, claiming damages on account of his ejectment. *Held* that the suit was not barred by reason of anything contained in the Bundelkhand Encumbered Estates Act, 1903.

[139] THIS was an appeal under section 10 of the Letters Patent from a judgment of KARAMAT HUSAIN, J. The facts out of which the appeal arose are fully stated in the judgment under appeal, which was as follows :—

" The facts necessary for the disposal of this appeal are these. Sartan and Achche Lal executed a mortgage with possession in favour of Ganga Bishan on the 26th June, 1885, and put the mortgagee in possession of the property mortgaged to him. On the 7th of November, 1900, Ganga Bishan executed a deed in favour of Basdeo and put Basdeo in possession of the property. The heirs of Sartan and Achche Lal started

*Appeal No. 168 of 1909 under section 10 of the Letters Patent.

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33 A. 138=
6 I. C. 838.

proceedings under the Bundelkhand Encumbered Estates Act I of 1903. Basdeo advanced his claim under the deed of the 7th of November, 1900, before the Special Judge, but the original mortgagee Ganga Bishan put forward no claim under the mortgage of 1885 before the Special Judge. The Special Judge came to the conclusion that Basdeo was a sub-mortgagee and had therefore no *locus standi*. Basdeo did not appeal against the decision of the Special Judge. Thereafter by the order of the Special Judge the sub-mortgagee was ejected from the mortgaged land. The result was that the heirs of Sartan and Achche Lal got back the property without paying anything either to Ganga Bishan or to Basdeo. The plaintiffs, who are the heirs of Basdeo, instituted a suit against Ganga Bishan for the recovery of the amount due under the deed of 7th November, 1900, and interest by way of damages. The pleas raised in defence were that Basdeo was a transferee of Ganga Bishan's mortgagee rights; that he was not a sub-mortgagee; that the plaintiffs' father ought to have preferred an appeal from the decision of the Special Judge, that their father was guilty of negligence in not appealing against the decision of the Special Judge and was not therefore entitled to succeed against the defendant Ganga Bishan. The Court of first instance decreed the claim. The defendant appealed to the Lower Appellate Court, and the following pleas, according to the judgment of the Lower Appellate Court, were argued in that court: (1) that the claim was time barred; (2) that the claim was barred by the explanation to section 13 of Act No. I of 1903; (3) that the finding of the lower court that Ganga Bishan, appellant should have appealed against Sartan and others was not correct; (4) that the Lower Court placed a wrong interpretation on the mortgage deed of the 7th of November, 1900; (5) that the plaintiffs suffered no loss by the act of the appellant. On the first point the Lower Appellate Court came to the conclusion that the suit was not time-barred. On the second point it came to the conclusion that the claim was not barred by the explanation to section 13 of Act No. I of 1903, inasmuch as the respondents do not seek to enforce the claim as against the heirs of the original mortgagors. On the third point that Court remarks as follows:—"The defendant appellant should have assisted the plaintiffs' ancestor as against the mortgagors. But as a fact he did not. On the contrary, he laid his claim on another mortgage deed and about the same property against the original mortgagors. He should not have done so." The findings on the fourth and fifth points are that the defendant appellant is under the terms of the deed of 7th of November, 1900, bound to pay any damages sustained by the sub-mortgagee or his heirs. On the above findings the Lower Appellate Court confirmed the decree [140] of the first Court. Ganga Bishan defendant has preferred a second appeal to this Court, and the following pleas have been argued by his learned counsel before me. (*a*) The deed of the 7th of November, 1900, is a transfer of all the mortgagee rights and not a sub-mortgage; (*b*) the plaintiffs under the terms of the deed of 7th of November, 1900, are not entitled to any claim against the defendant; (*c*) section 10 (*d*) of the Bundelkhand Encumbered Estates Act bars the suit; (*d*) the explanation to section 13 of Act I of 1903 bars the suit; (*e*) the claim is time barred; (*f*) the plaintiffs having failed by their own negligence to make good their claim under Act No. I of 1903 cannot claim compensation from the defendant. I have carefully gone through the deed of the 7th of November, 1900, and I have no doubt that it is not a transfer of all the mortgagee rights but is a sub mortgage. The document very distinctly says 'I have sub-mortgaged the mortgagee rights (*dar rehan dakhli*).' The first ground is therefore untenable. There is no force in the second plea also, because that document in very distinct terms says that if during the period of the mortgage the property mortgaged, in any year by any reason passes out of the possession of Basdeo or the said mortgage deed for any reason is declared to be invalid the executant will be liable to pay the loss sustained by the mortgagee. I am of opinion that section 10 (*d*) of Act No. I of 1903 has no application to the case before me. The Special Judge on the application of Basdeo ruled that he had no *locus standi*. In such a case it cannot be said that Basdeo's debt was a debt in respect of which no fresh suit could be instituted. The explanation to section 13 of Act No. I of 1903 does not also cover this case. In the first place there was no determination as to the amount which was justly due to Basdeo and in the second the representatives of the original mortgagor are no parties to the suit. There is no force in the plea of limitation and no fact has been brought to my notice to support that plea. The sole question on which the decision of this appeal turns is whether the plaintiffs as heirs of the sub-mortgagee Basdeo had or had not a *locus standi* to have their money satisfied out of the property which belonged to Sartan and Achche Lal. A sub-mortgagor has been held in a Full Bench ruling of this Court in *Ramshankar Lal* v. *Ganga Prasad* (1) to get a security, that is, an interest in the property mortgaged, and that being his position he undoubtedly has a *locus standi* and is one of the persons who have a claim against the pro-

(1) (1907) I. L. R. 29 All. 451.

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perty of the proprietor. It is, however, contended by the learned vakil for the respondent that sections 6, 7 and 8 of the Bundelkhand Encumbered Estates Act go to show that a special judge has to make an enquiry with reference to those debts only which are the private debts of the proprietor and can take no notice of any other incumbrance created by a mortgagee on the property of the proprietor to which that proprietor is no party. I am unable to accept such an interpretation of those sections. The result of such interpretation will be that the sub-mortgagee from the mortgagee who may have advanced large sums of money on the security of the mortgagee rights will have no remedy at all, and I do not think that the Legislature intended that the mortgagors should get their property free from the security created in favour of the sub-mortgagee without giving him any chance of establishing his claim. Section 9 of Act No. I of 1903 shows that the special judge shall [141] publish in the gazette a notice in the vernacular language of the district calling upon all persons having claims against the person or property of the proprietor by whom or in respect of which an application is made under section 6 of the Act, to present to the special judge within two months of the publication of the notice a written statement of their claims, and I am of opinion that a sub-mortgagee is one of the persons who have a claim on the property of the proprietor. This leads me to discuss whether the plaintiffs were bound to appeal to the Commissioner under the provisions of section 30 of Act No. I of 1903 against the decision of the special judge. I am of opinion that the decision of the special judge that the plaintiffs had no *locus standi* was wrong, that they ought to have appealed to the Commissioner to have that decision set aside and that their failure to appeal was a negligence which debars them from seeking compensation against the defendants. In this connection I have to remark that the finding of the lower appellate Court on the third point argued before that Court is not a finding on that plea. The plea taken was that the finding of the first court that Ganga Bishan should have appealed against Sartan and others is not correct. The finding of the lower appellate court on that point is neither that the finding of the first court is correct nor that it is incorrect. It only says that the defendant appellant should have assisted Basdeo against the mortgagor. The conclusion at which I arrive is that Basdeo as a sub-mortgagee under the deed of the 7th of November, 1900, had a *locus standi*, that he ought to have appealed from the judgement of the special judge and that in consequence of his failure to have that decision set aside he lost his remedy against the defendant Ganga Bishan. I therefore allow this appeal, set aside the decrees of the courts below and dismiss the plaintiffs' suit with costs in all courts."

The plaintiffs appealed.

Pandit *Baldeo Ram Dave* (for Munshi *Iswar Saran*), for the appellants, relied upon the covenant of indemnity given by Ganga Bishan, the plaintiff's sub-mortgagor, which, he argued, was outside any of the provisions of the Act of which the original mortgagors had taken the benefit.

Mr. *A. H. C. Hamilton*, for the respondent, urged that the effect of the explanation to section 13 of the Bundelkhand Encumbered Estates Act, 1903, was to extinguish any claim that the plaintiffs may have had under the sub-mortgage in favour of their father.

STANLEY, C. J., and GRIFFIN, J.—The facts of the case are these:—One Achche Lal and another, the owners of property, executed a possessory mortgage of their property in favour of one Ganga Bishan on the 26th of June, 1885. On the 7th of November, 1900, Ganga Bishan sub-mortgaged this property to Basdeo and in that mortgage he entered into the following absolute covenant, namely, that if during the period of the mortgage, [142] the property mortgaged, in any year, by any reason, should pass out of the possession of Basdeo, or the mortgage deed for any reason should be declared to be invalid, he (the executant) would be liable to pay the loss sustained by the mortgagee. The mortgagors took advantage of the Bundelkhand Encumbered Estates Act (Act I of 1903). Notices to claimants were issued in accordance with the provisions of that Act. Ganga Bishan, the mortgagee of the property from the proprietors, took no steps to realize the amount due to him under his mortgage of the 26th of June 1885. Basdeo did prefer a claim, but that claim was rejected on the

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ground that he was merely a sub-mortgagee and therefore his remedy was against his sub-mortgagor and not against the proprietor. Subsequently Basdeo was ejected from the property. He then preferred the suit out of which this appeal has arisen for recovery of the damages sustained by him by reason of his being dispossessed. Both the lower courts passed a decree in his favour. But upon second appeal the learned Judge of this court from whose decision this appeal under the Letters Patent has been preferred, came to the conclusion that Basdeo was guilty of negligence in not having preferred an appeal against the order of the special Judge rejecting his claim, and that not having done so, he cannot recover against his sub-mortgagor upon the special covenant entered into in his mortgage deed. We are wholly unable to agree with our learned brother in his decision. Ganga Bishan gave an absolute covenant to Basdeo undertaking to compensate him for any loss which he might sustain by reason of his dispossession during the period of the mortgage. He was dispossessed. It was for Ganga Bishan rather than for Basdeo to take the proper steps before the special Judge for enforcement of the mortgage of the 26th of June, 1885. Whether it was open to Basdeo or not to appeal against the order of the special Judge, it was certainly open to Basdeo to rely upon the absolute covenant contained in his mortgage deed and to hold his sub-mortgagor responsible for the loss which he sustained by reason of his dispossession. We accordingly allow the appeal. We set aside the decree of the learned Judge of this court and restore the decree of the lower appellate court. The respondent must pay to the appellant all the costs incurred in the High Court.

Appeal decreed.

33 A. 143 (=7 I. C. 398).

[143] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

RAGHUNATH KALWAR AND OTHERS (*Plaintiffs*) *v.* BALA DIN KALWAR AND OTHERS (*Defendants*).*

[15th July, 1910.]

Act No. I of 1872 (*Indian Evidence Act*), *section* 44—*Res judicata—Fixed rate tenancy —Partition—Power of joint tenants to partition—Suit to recover joint possession.*

A certain holding owned jointly by tenants at fixed rates was partitioned by an award. One party sued on the award to recover exclusive possession of certain plots and obtained a decree for possession and mesne profits, which was executed. Subsequently the other party sued to regain joint possession of these plots and pleaded that the former decree was by a court not competent to pass it and therefore not binding on them. There was nothing to show whether the former suit was filed before or after the coming into force of the Agra Tenancy Act, 1901, or whether the landlord had or had not assented to the partition.

Held that the plaintiffs had failed to show that the former decree was passed by a Court which had not jurisdiction, and that the present suit was barred. *Achhey Lal* v. *Janki Prasad* (1) explained.

THIS was an appeal under section 10 of the Letters Patent from a judgement of TUDBALL, J. The facts of the case are stated in the following judgement of Piggott, J., before whom the case first came in appeal.

* Appeal No. 28 of 1910 under section 10 of the Letters Patent.

(1) (1906) I. L. R. 29 All. 66.

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7 I. C. 398.

"The plaintiffs in this case sued for a declaratory decree to the effect that they were jointly entitled to possession as co-sharers in certain cultivatory holdings, together with an injunction to restrain certain defendants from interfering with their joint cultivation. In the alternative a decree for joint possession was asked. The question in dispute on second appeal has narrowed itself down and now relates only to certain particular plots, which the courts below describe as those shown in list (B). With respect to these plots the case for the defendants is that the plaintiffs' suit is barred by the principle of *res judicata*. It has been shown that as recently as June the 21st, 1906, the defendant, Bala Din, obtained as against the present plaintiffs a decree for exclusive possession of these particular plots together with mesne profits. The present suit is clearly intended to annul the effect of that decree so far as these particular plots are concerned In reply to the plea of *res judicata*, which was accepted by the court of first instance, the plaintiffs pleaded that the decree of the 21st June, 1906, can have no effect as *res judicata*, because the court which passed it, the learned Munsif of Jaunpur city had no jurisdiction to make any such decree. It is, therefore, contended that under the provisions of section 44 of the Indian Evidence Act the plaintiffs are entitled to show and that they have in fact shown that the judgement and decree pleaded by the defendant, Bala Din, under section 40 of the same Act, was delivered by a court not competent to deliver it. **[144]** The learned District Judge has held, first, that the decree of the 21st June, 1906, amounts to a division of a tenant-holding and is in contravention of the provisions of section 32 of the Tenancy Act of 1901; secondly that it was, therefore a decree passed without jurisdiction and one which can have no operation as *res judicata*. I am unable to concur in either of those findings. The plaint in the suit decided on the 21st June, 1906, is not on the record. Like the learned District Judge, I can only refer to the judgment and decree of the Munsif of Jaunpur city in order to ascertain the nature of that suit. It appears from the decree that the relief sought was simply exclusive possession of certain particular plots described as being a fixed rate holding and that the ejectment of the defendants in that suit (present plaintiffs) was sought as in an ordinary action in ejectment against trespassess. The Munsif of Jaunpur was a court of competent jurisdiction to entertain a suit for the ejectment of trespassers in wrongful possession of the fixed rate holding in question, supposing the plaintiff to be able to prove that he was himself the rightful tenant of these fields and entitled to possession of the same. The judgement shows that the case was defended, but no plea of want of jurisdiction on the part of the court by reason of the operation of section 32 of the Tenancy Act was raised It is also clear, however, as remarked by the learned District Judge, that the defendant, Bala Din, relied upon a certain award according to which he claimed that the plots then in suit had been assigned to him while certain other plots had been assigned to the opposite party. From this fact the learned District Judge has presumed that the suitwas in effect one to enforce an agreement under which a certain occupancy holding had been divided and was, therefore, not maintainable in any court by reason of the provisions of section 32 of the Tenancy Act. In support of this view reliance is placed on the decision of this Court in *Achhey Lal* v. *Janki Prasad* (1). I may refer also to the later case of *Najib-ullah* v. *Gulsher Khan* (2), in which this decision was considered and explained, though it seems to me that the head-note goes somewhat too far in noting it as having been overruled. It seems to me sufficient with regard to the point immediately in issue before me to say that it is really not proved by the evidence on the record that the effect of the award relied on by Bala Din in the suit of 1906 was in fact to split up a particular holding and not, for instance, to apportion different occupancy holdings amongst different members of the same family. I may add that it is also not proved that the landholder concerned was not a consenting party to the arrangement whatever may have been effected under the award relied on by Bala Din in the suit of 1906. Passing on to the second of the points indicated by me above I have to consider what would have been the position of the present plaintiffs if they had resisted the suit of 1906 on the ground that itwas in effect a suit for division of a holding and calculated to defeat the provisions of section 32 of the Tenancy Act. I have shown that if this point had been taken evidence might have been offered by Bala Din to satisfy the court as to the nature of the suit and as to its being distinguishable from the case of *Achhey Lal* v. *Janki Prasad*. Suppose now that an issue had been raised on this point and that after **[145]** considering the pleadings to the parties and the evidence, if any, adduced by them the learned Munsif had come to the conclusion that the suit was not in its nature obnoxious to the provisions of section 32 of the Tenancy Act, would the defendants in that case have been entitled to submit to the decree resulting from such

(1) (1906) I. L. R. 29 All. 66.

(2) (1909) I. L. R. 31 All. 348.

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finding, but to treat it hereafter as a nullity on the ground that they would be entitled in any future proceeding to raise again in virtue of the provisions of section 40 of the Indian Evidence Act the very point which had been decided against them ? I concede not, and on this point I am content to refer to the cases of *Ketlilamma* v. *Kelappan* (1), *Sardarmal Jagonath* v *Aranvayal Subhapathy Moodliar* (2) and the decision of this Court in *Nathu Ram* v. *Kalian Das* (3). This being so, I am unable to hold that the present plaintiffs are in any better position because they made no attempt in the suit of 1906 to set up a defence based on the provisions of section 32 of the Tenancy Act, but appear on the contrary to have asked the court to examine carefully the effect of the award relied on by Bala Din and to give judgment in accordance with its terms. For these reasons, I accept this appeal, set aside the decree of the lower appellate court and restore that of the court of first intance. The plaintiffs must pay all costs in this and in the lower appellate courts."

As, however, PIGGOTT, J., retired from the court before signing the above judgement, the appeal was reargued before TUDBALL, J., who decreed it by the following judgment :—

" This appeal was argued before Mr. Justice PIGGOTT, who delivered the above judgement, but without signing it, prior to his retirement from this Court. The case has been reargued before me, and I find myself in accord with all that Mr. Justice PIGGOTT has said above. In respect of the lands in list *B* which alone are in dispute in this appeal, the defendants appellants brought a suit to eject the plaintiffs respondents as trespassers. The lands were held as a fixed rate tenure from the landlord. Admittedly at some time past it belonged to the common ancestor of the parties and the latter separated at the latest in 1899 : after which there was a dispute which was submitted to arbitration, and the arbitrators, in part at least, partitioned the tenure. There is nothing to show whether this occurred prior to the first of January, 1902, when the tenancy Act came into force, or subsequently thereto. There is nothing to show whether or not the consent of the zamindars was obtained to this partition. Be that as it may, in 1906, the defendants appellants came into court alleging that they were the sole owners of the tenure in so far as these plots were concerned. The plaintiffs respondents met them by pleading that some of the plots belonged exclusively to themselves and one was still joint and undivided. The court held as against them that the plots were the exclusive property of the then plaintiffs, the present appellants, and gave them a decree for possession and mesne profits. The decree has been executed. The plaintiffs respondents now come into court alleging that this decree was null and void because the court had no jurisdiction to entertain any such suit. This plea was based upon the provisions of section 32, clause (*b*) of the Tenancy [146] Act. It is clear that if the decree was made in a suit of such a nature that no court, Civil or Revenue, could entertain it, it would be null and void, and no decision therein could operate as *res judicata* between the parties. The only materials before the court are the judgement and the decree, and there is nothing on the face of them to show that the suit as brought was one in which the court had no jurisdiction. The partition may have been carried out prior to the first of January, 1902, or may even have been made with the sanction and approval of the zamindars. The burden therefore lay on the plaintiffs to show that that decree was passed without jurisdiction. They have failed to place any materials before the court in order to enable it to arrive at such a conclusion. Presumably the decree was one made with jurisdiction, and it was for the plaintiffs to show the opposite if they wished to treat it as a nullity. Partition of a holding made by the co-sharers thereof with the sanction of the landlord is not an illegal act, and if once made, could be maintained in a suit brought in a civil court for possession, in case of dispossession by either party; and it could not be said that a decree for possession in such a suit would be one made without jurisdiction. There being insufficient materials to enable the Court to hold that the former decree was passed in a suit, the entertainment of which by the court was forbidden by law, the court is bound to hold the former decision operates as *res judicata* between the parties. I therefore fully agree with the decision arrived at by Mr. Justice PIGGOTT. I accept the appeal, set aside the decree of the lower appellate court, and restore that of the court of first instance. The appellants will have their costs in this and in the lower appellate court."

The plaintiffs appealed.

Mr. *Ishaq Khan*, for the appellants.

(1) (1889) I. L. R. 12 Mad. 228.
(2) (1896) I. L. R. 21 Bom. 205.
(3) (1904) I. L. R. 26 All. 522.

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Munshi *Gokul Prasad*, for the respondents.

STANLEY, C. J.—I am of opinion that the judgements of the learned Judges of this Court from which this appeal has been preferred are not open to objection. They have very fully dealt with the facts and the law, and it is unnecessary for me to add anything to what they have said, save and except that I desire to make an observation upon the judgement in *Achhey Lal* v. *Janki Prasad* (1), to which judgement I was a party. In that case it was held that " neither a Civil or Revenue Court can partition or divide an occupancy holding. Such partition or division can only be effected out of court with the consent of the landholder." If these words are interpreted as meaning that tenants cannot agree to divide a holding amongst themselves without the consent of the landholder, the judgement in my opinion goes too far. There is no objection to joint tenants agreeing among themselves to occupy and cultivate distinct parts **[147]** of the joint holding, provided that their so doing in no respect prejudices the rights of the landholder. Under such an agreement the tenants continue to be liable to the landlord for the entire rent, and the arrangement between them is not a partition which is enforceable as between them and the landlord. A partition to bind the landlord must be a partition with his consent. I therefore would dismiss this appeal with costs.

BANERJI, J.—I also am of opinion that there is no force in this appeal. The former suit was not one for partition of a holding or the distribution of the rent thereof, but was a suit for exclusive possession of certain plots of land which the then plaintiff claimed to be his separate property. The court which tried that suit had jurisdiction to entertain it and its judgement has the effect of *res judicata*. I agree in dismissing the appeal.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

33 A. 147 (=11 Cr. L. J. 681=8 I. C. 569=7 A. L. J. 1075).

REVISIONAL CRIMINAL.

Before Mr. Justice Chamier.

EMPEROR *v.* RAM DAYAL.*

[1st August, 1910.]

Act (Local) No. I of 1900, (*Municipalities Act*), *sections* 87 (5), 147, 152—*Municipal Board—Order for demolition of building—Order ultra vires—Revision—Jurisdiction.*

Held (1) that section 152 of the Municipalities Act, 1900, does not apply where the prohibition, notice or order issued by the Board is *ultra vires*, and (2) that section 87 (5) of the Act applies only to buildings of the kind referred to in the preceding sub-sections, that is, new buildings in respect of which notice should have been given under sub-section (1). *Alopi Din* v. *The Municipal Board of Allahabad* (2) and *Hyam* v *The Calcutta Corporation* (3) referred to.

[Ref. 63 I C. 410=48 Cal. 534=22 Cr. L. J. 650.]

THE facts of this case are as follows:—

In 1865 certain shop-keepers at Etawah entered into an agreement with the Municipal Commissioners for the construction of a *ganj*, now

* Criminal Revision No. 350 of 1910 from an order of H. Dupernex, Sessions Judge of Mainpuri, dated the 26th of February, 1910.

(1) (1906) I. L. R. 29 All. 66.
(2) Weekly Notes, 1907, p. 2.
(3) (1906) 10 C. W. N. 1004.

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33 A. 147=
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681=8 I. C.
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known as Hume Ganj. The agreement provided that if the buildings were erected in contravention of the plans, the Municipal Commissioners would be entitled to interfere, and **[148]** would also be entitled to forbid the making of additions to or changes in the buildings. On the 18th January, 1909, the Municipal Board of Etawah issued a notice to the applicant under sub-section (5) of section 87 of the Municipalities Act, 1900, requiring him to remove a wall on the upper storey of his shop in Hume Ganj on the ground that it had been erected without permission and contrary to the original plans. The applicant failed to comply with this notice and was accordingly prosecuted under section 147 of the Act. He was convicted and fined Rs. 10. The Sessions Judge of Mainpuri refused to interfere, and the applicant thereupon came in revision to the High Court.

Mr. *Muhammad Ishaq Khan*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

CHAMIER, J.—This is an application for revision of an order passed by a Magistrate in the Etawah district convicting the applicant of an offence under section 147 of the N. W. P. and Oudh Municipalities Act (I of 1900) and sentencing him to pay a fine of rupees ten. The facts are stated as follows by the Sessions Judge who refused to interfere with the Magistrate's order. In 1865 certain shop-keepers at Etawah entered into an agreement with the Municipal Commissioners of the town for the construction of a *ganj*, now known as Hume Ganj. The agreement provided that if the buildings were erected in contravention of the plans, the Municipal Commissioners would be entitled to interfere and would also be entitled to forbid the making of additions or changes in the buildings. On January 18th, 1909, the Municipal Board of Etawah issued a notice to the applicant under sub-section (5) of section 87 of the Municipalities Act requiring him to remove a wall on the upper storey of his shop in the ganj on the ground that it had been erected without permission and contrary to the original plans. Similar notices were issued to Daya Ram and Kashi Ram, who are the applicants in Criminal Revisions Nos. 351 and 352. Prosecutions were instituted on the applicants failing to comply with the notices. It has been contended throughout that the Board had no power to issue the notices.

[149] Both the courts below have declined to consider this plea, holding that if the applicants wished to challenge the legality of the notices they should have appealed under section 152 of the Act. That section provides *inter alia* that any person aggrieved by notice from a Board under sub-section (5) of section 87 or sub-section (2) of section 88 requiring the alteration or demolition of a building may within a certain time appeal to a certain authority and "no such notice shall be liable to be called in question otherwise than by such appeal." In the case of *Alopi Din* v. *The Municipal Board of Allahabad* (1), where a Board had by a notice purporting to be issued under section 88 of the Act required a person to remove a wall which the court found did not overhang, project into, or encroach on any street or into on or over any drain, sewer or aqueduct therein, the notice was challenged by suit and the court gave the plaintiff a declaration that the order was not within the competence of the Board and was invalid. Relying partly upon this decision I held in a case that came before me as Judicial Commissioner of Oudh that a conviction under section 147 of the Act for disobeying a notice issued under sub-

(1) Weekly Notes, 1907, p. 2.

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section (2) of section 88 could be challenged in revision on the ground that the notice was *ultra vires* of the Board.

It appears to me that precisely the same consideration arises in the case of a notice purporting to have been issued under sub-section (5) of section 87 of the Act. If the Board have no power whatever to issue the notice it cannot be considered to be a notice under that section and the provisions of section 152 do not apply. In the case now before me it is abundantly clear that the Board had no power to issue the notices in question. The section applies to new buildings. Sub-section (1) provides that every person who intends to erect or re-erect any building of the kinds specified shall give notice to the Board. Under sub-section (2) the Board may require a person who has given such notice [*i.e.*, notice under sub-section (1)] to submit plans, etc. Sub-section (3) applies only to valid notices given under sub-section (1). Sub-section (4) determines the period for which sanction given by the Board is to remain in force, and lastly sub-section (5) provides that should any such building be begun or erected without **[150]** sanction or in contravention of the directions of the Board under sub-section (1) or after the sanction has elapsed, the Board may by notice require the building to be altered or demolished. It is quite clear that the words "such building" in sub-section (5) apply only to buildings of the kind referred to in the preceding sub-sections, *i.e.*, new buildings in respect of which notice should have been given under sub-section (1). It has been found that the walls referred to in the notices now in question were built many years ago. It is not suggested that they were built after the passing of the Act of 1900 or at a time when there was any rule or bye-law in force requiring the sanction of the Board to the building of the walls. That the walls were built in contravention of the agreement of 1865 is immaterial, for the Board cannot enforce the agreement by proceedings taken under the Act of 1900. Nor are the persons who built the walls liable to be punished under section 147 of the Act for breaches of that agreement. It seems to me quite clear that section 87 was not intended to empower a Board to require a man to pull down his house, though the house may have been standing for 50 years or more. In this connection I may refer to the case of *Hyam* v. *The Calcutta Corporation* (1), in which a similar question arose under the Calcutta Municipal Act. The Magistrate who tried these cases saw the absurdity of applying section 87 to such cases as these, for he declined to order the demolition of the walls, saying that the Board would have to go to the Civil Court to enforce the agreement of 1865. I allow this and the connected applications, set aside the orders of the Magistrate and direct that the fine, if paid, be refunded.

Application allowed.

(1) (1906) 10 C. W. N. 1004.

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APPELLATE CIVIL.

33 A. 151=
7 I. C. 909=
7 A. L. J.
995.

33 A. 151 (=7 I. C. 909=7 A. L. J. 995.)

[151] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

DAKHNI DIN AND OTHERS (*Plaintiffs*) *v.* SYED ALI ASGHAR AND OTHERS (*Defendants*).*

[2nd August, 1910.]

Civil Procedure Code (1908), *section* 11—*Res judicata—Same issue decided in two connected suits—Appeal in one only.*

The same issue was decided between the same parties in each of two connected suits. The party against whom the decision was appealed in the one case, but not in the other, the decree in which became final before his appeal was heard. *Held* that the hearing of the appeal was barred. *Zaharia* v. *Debia* (1) followed.

[**Ref.** 64 I. C. 574=34 C. L. J. 281 ; 84 I. C. 894=2 R. 688 ; **Over.** 74 I. C. 411=21 A. L. J. 465=45 All. 506 (F. B.); **Ref.** 74 I. C. 591=37 C. L. J. 184; 75 I. C. 479; 75 I. C. 570.]

THE facts of this case are fully stated in the judgement of the Court

The Hon'ble Pandit *Moti Lal Nehru*, for the appellants.

Mr. *M. L. Agarwala*, (with him Babu *Jogindro Nath Chaudhri*, The Hon'ble Pandit *Sundar Lal*, Dr. *Satish Chandra Banerji*, Babu *Lalit Mohan Banerji* and Maulvi *Shafi-uz-zaman*), for the respondents.

STANLEY, C. J., and BANERJI, J.—An objection has been taken on behalf of the respondents to the hearing of this appeal on the ground that the question raised in the appeal has become *res judicata* in consequence of the plaintiffs not having appealed against the judgment and decree in another suit in which the same issue was determined between these parties adversely to the appellants. The *res judicata* is alleged to have arisen out of the following facts : One Rahat Husain mortgaged certain property to Gaya Prasad, father of Bhawani Prasad and Raja Ram, defendants, on the 4th of January, 1883. On the 13th of February, 1890, he mortgaged the same property to Bhawani Prasad, Raja Ram and Birj Mohan, the sons of Gaya Prasad. On the 12th of September, 1891, he executed a mortgage in favour of Musammat Nidhoo Kunwar. The suit out of which this appeal has arisen was brought by the plaintiff to enforce 9 subsequent mortgages, some of which were in favour of the plaintiff Dakhni Din and some in favour of his deceased brother, This suit was No. 13 of 1906 in the court below. Another suit [152] which was No. 12 was brought by the plaintiffs against Hijab-un-nissa, the daughter-in-law of Rahat Husain and transferees from her, and also against Bhawani Prasad and Raja Ram to enforce three other mortgages in which property, other than the property comprised in the 9 mortgages referred to above, was mortgaged. These mortgages, as well as the mortgages on the basis of which suit No. 13 of 1906 was instituted, related to property which was also comprised in the three earlier mortgages. It appears that in 1905 the heirs of Rahat Husain sold some of the mortgaged property to Nidhoo Kunwar and set off against the consideration for the sale the amount of her mortgage and left with her a portion of the consideration for discharge of the mortgages of the 4th of January, 1883 and the 13th of February, 1890. She at first attempted to redeem those mortgages by

* First Appeal No. 118 of 1909 from a decree of Prag Das, Judge, Small Cause Court, exercising the powers of a Subordinate Judge of Allahabad, dated the 19th of January, 1909.

(1) (1910) I. L. R. 33 All. 51.

payment of a proportionate part of the mortgage money, but the mortgagees having refused to allow redemption on those terms she redeemed the mortgages out of the proceeds of a sale executed by her in favour of Bhawani Prasad, defendant, and his brother Raja Ram. Raja Ram, however, repudiated the sale and he asserted that so far as his interest in the mortgages were concerned, the said mortgages were not discharged. The plaintiffs allege that they have paid to Nidhoo Kunwar the rateable share of liability of the property comprised in their mortgages, and they seek to sell the mortgaged property, not only for the amount secured by the mortgages in their favour but also for the amount which they paid to Nidhoo Kunwar. Raja Ram, who was made a defendant to the suit, resisted it on the ground that the earlier mortgages of 1883 and 1890 were not discharged so far as his interests were concerned, inasmuch as payment to Bhawani Prasad of the full amount of the mortgages was not a payment which would have the effect of discharging the share of the mortgage debt due to him. This contention was raised in both the suits to which we have referred. The Court below tried both the suits and disposed of the first suit in which the issue as to the discharge of the earlier mortgages was raised. It recorded its decision on that issue in suit No. 13, and came to the conclusion that the amount payable to Raja Ram under the mortgages of 1883 and 1890 had not been satisfied, and it made a decree on condition that the plaintiffs should pay [153] the said amount to Raja Ram. In the other suit No. 12 it did not record a separate finding on the issue above mentioned, but it referred to its finding on the said issue in suit No. 13 and held in suit No. 12 also that Raja Ram's share in the mortgages of 1883 and 1890 had not been paid off. The plaintiffs have appealed against the decree in suit No. 13, but not in suit No. 12, and the time for preferring an appeal has expired, so that the judgement and decree in suit No. 12 have become final. It is contended that as the issue which arises in this appeal also arose in suit No. 12 between the plaintiffs and Raja Ram and was decided adversely to the plaintiffs, and as the judgement and decree in that case have become final between those parties, the question cannot be re-opened in this appeal. In our judgment this contention is well founded. The matter in issue between the parties was substantially determined in suit No. 12, although the reasons for the Court's determination were given in the judgment in suit No. 13. In view of what the court had held in suit No. 13, it was not necessary to reiterate in the judgment in suit No. 12 the same reasons which were set forth in the judgment in suit No. 13; but the finding in both the suits on the issue was the same. That being so, since no appeal was preferred against the finding and decree in suit No. 12, the matter raised by the issue has become *res judicata* and cannot be raised again in this appeal. This was so held in the case of *Zaharia* v. *Debia* decided by a Bench of three Judges on the 9th of July, 1910, which is yet unreported.* We accordingly allow the objection and dismiss the appeal with costs. We extend the time for payment of the various amounts directed by the decree to be paid, including the amount payable to Raja Ram, for a period of six months from this date.

Appeal dismissed.

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* Since reported, *Supra*, p. 51.

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FULL BENCH.

33 A. 154=9 I. C. 926=7 A. L. J. 1001.

33 A. 154 (=9 I. C. 926=7 A. L. J. 1001).

[154] FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Chamier.

ABDUL MAJID AND OTHERS (*Judgement-debtors*) *v.* JAWAHIR LAL (*Decree-holder*).*

[15th August, 1910.]

Act No. XV of 1877 (*Indian Limitation Act*), *schedule II, article* 180—*Execution of decree—Limitation—Terminus a quo—Order of His Majesty in Council dismissing an appeal for want of prosecution an affirmance of the decree appealed from.*

An order of His Majesty in the Privy Council dismissing an appeal for whatever cause is in effect an affirmance of the Court below and is the only order in the litigation capable of enforcement.

Where, therefore, an appeal to His Majesty in Council from a decree passed by the High Court for sale on a mortgage was dismissed for want of prosecution, it was *held* that limitation in respect of an application by the decree-holder for an order absolute for sale was governed by article 180 of the second schedule to the Indian Limitation Act, 1877, time running from the date of the order of His Majesty in Council.

Pitts v. *LaFontaine* (1), *Luchmun Persad Singh* v. *Kishen Persad Singh* (2), *Beni Rai* v. *Ram Lakhan Rai* (3), *Tassadaq Rasul Khan* v. *Kashi Ram* (4) and *Oudh Behari Lal* v. *Nageshar Lal* (5) referred to. *Bipro Doss Gossain* v. *Chunder Seekur Bhuttacharjee* (6) distinguished.

[Rev. 36 All. 350.]

THE facts of this case were as follows :—

One Thakur Prasad brought a suit for sale upon a mortgage against Chaudhri Abdul Majid and others. The Court passed a decree on 8th May, 1890, against Abdul Majid, ordering him to pay the money within three months, on failure of which the property mortgaged was to be sold. Abdul Majid appealed against the decree to the High Court and the appeal was dismissed on 8th April, 1893. He appealed to His Majesty in Council, and the Judicial Committee dismissed the appeal for failure of prosecution on 13th May, 1901. The decree-holder made the first application for an order absolute for sale on the 14th May, 1904, but the application was rejected by the Court on 1st April, 1905 on the ground that the procedure prescribed by section 610 of Act XIV of 1882 had not been followed. The decree-holder obtained the necessary **[155]** order from the High Court on 14th June, 1906, and then made a fresh application on 11th June, 1909. On this application the judgment-debtor raised the plea of limitation. The plea was rejected by the lower Court on two grounds, that the application was one falling within article 180 of the Limitation Act of 1877, and that the decree sought to be executed was a Privy Council decree and article 183 of the present Limitation Act applied. The judgment-debtor appealed.

Babu *Jogindro Nath Chaudhri* (with him Dr. *Satish Chandra Banerji* and Babu *Lalit Mohan Banerji*), for the appellant :—

An application to obtain a decree under order XXXIV, rule 5 of the Code of Civil Procedure, was not one to execute a decree. It did not fall

* First Appeal No. 333 of 1909, from a decree of Srish Chandra Basu, Subordinate Judge of Allahabad, dated the 6th of October, 1909.

(1) (1881) L. R. 6 A. C. 482.
(2) (1882) I. L. R. 8 Cal. 218.
(3) (1898) I. L. R. 20 All. 367.
(4) (1902) I. L. R. 25 All. 109.
(5) (1890) I. L. R. 13 All. 278.
(6) (1867) 7 W. R. C. R. 521.

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within article 182 of the Limitation Act (IX of 1908), but under article 181.

[BANERJI, J., referred to the case of *Oudh Behari Lal* v. *Nageshar Lal* (1).]

That was a case in which the question of payment of court fee had arisen. Under article 182, the decree must be capable of enforcement, but an order under section 88 of Act No. IV of 1882, (Order XXXIV, rule 4, Act No. V of 1908), only declared the liability of the mortgagor and gave him time to comply with directions of the court, subject to the condition that on his failure to do so the property was to be put up for sale. Another order had yet to be obtained under section 89 of that Act. (Order XXXIV, rule 5, Act No. V of 1908). He cited *Ali Ahmad* v. *Naziran Bibi* (2).

In order that article 182 of Act No. IX of 1908 should apply the order must be capable of execution in accordance with law *Chhedi* v. *Lalu* (3), *Udit Narain* v. *Jagan Nath* (4), *Baldeo Prasad* v. *Ibn Haidar* (5), *Kedar Nath* v. *Lalji Sahai* (6) and *Oudh Behari Lal* v. *Nageshar Lal* (7). The last two cases showed that the stage of execution began after a decree had been passed, not that an application for foreclosure was one to execute a decree. At one time no limitation applied to such applications; *Ranbir* [156] *Singh* v. *Drigpal* (8). Dismissal of an appeal for default could not stand on the same footing as the affirmance of a decree. It did not constitute a decree of the appellate court; *Bipro Doss Gossain* v. *Chunder Seekur Bhuttacharjee* (9). It was not a decree of the Privy Council to which 12 years limitation could apply. Article 183 of the present Limitation Act would apply only to orders which could be enforced; the order in the present case had no elements in it capable of execution. It is questionable whether, when an appeal is dismissed for default, the order of dismissal amounts to an affirmance of the lower court's decree; *Mansab Ali* v. *Nihal Chand* (10).

The Hon'ble Pandit *Sundar Lal* (with him Maulvi *Rahmatullah*), for the respondent:—

An order under section 89 of the Transfer of Property Act was an order in a suit. Article 181 of the new Limitation Act applied only if no other article applied. Article 183 was clearly applicable here. A decree *nisi* was given granting three month's time to the judgment-debtor and that time expired on 12th August, 1890. The decree of the final court was the only decree which could be executed; *Kristo Kinkur Roy* v. *Burrodacaunt Roy* (11), *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (12). The dismissal of the appeal was an affirmance of the decree below. The reason of that dismissal was perfectly immaterial; *Luchmun Persad Singh* v. *Kishan Persad Singh* (13). The result is always the same. That is the effect of order XLV, rule 15, (section 610 of Act No. XIV of 1882.)

Dr. *Satish Chandra Banerji*, in reply:—

It was held in the case in 7 W. R, 521, that time ran from the date of original decree in cases of dismissal for default. That case was approved of by the Privy Council in *Kristo Kinkur Roy* v. *Burrodacaunt Roy* (11).

(1) (1890) I. L. R. 13 All. 278.
(2) (1902) I. L. R. 24 All. 542.
(3) (1902) I. L. R. 24 All. 300.
(4) (1904) A. L. J. 15.
(5) (1905) I. L. R. 27 All. 625.
(6) (1889) I. L. R. 12 All. 61.
(7) (1890) I. L. R. 13 All. 278.
(8) (1893) I. L. R. 16 All. 28.
(9) (1867) 7 W. R. C. R. 521.
(10) (1898) I. L. R. 15 All. 359.
(11) (1872) 14 Moo I. A. 465.
(12) (1888) I. L. R. 11 All. 267.
(13) (1882) I. L. R. 8 Cal. 218.

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There was no decree of the appellate court to be executed, as the order of dismissal did not amount to a decree.

STANLEY, C. J.—The facts of this case, so far as it is necessary to state them for the purposes of this appeal are these:—A decree for sale was passed under section 88 of the Transfer of Property [157] Act against several sets of defendants on the 12th of May 1890, by the Court of the Subordinate Judge of Allahabad. According to that decree a sum of Rs. 11,751-15-9 was directed to be paid by the appellant Abdul Majid, one of the judgement-debtors. He appealed from this decree to this Court and his appeal was dismissed on the 8th April, 1893. He applied for and obtained leave to appeal to Her late Majesty in Council. No steps however were taken to prosecute the appeal, and it was dismissed for default of prosecution by the Privy Council on the 13th of May, 1901. The order of dismissal runs in these terms:—"Their Lordships of the Committee in obedience to the said order in Council have proceeded to take into consideration the appeal of Chaudhri Abdul Majid, appellant, and Thakur Prasad, Kanhaiya Lal and Jawahir Lal respondents from a decree of the High Court of Judicature for the North-Western Provinces, and having called on the appellant to show cause why the said appeal should not be dismissed for non-prosecution, no effectual steps having been taken to set down the same for hearing, their Lordships do this day humbly agree to recommend to Your Majesty the dismissal of this appeal for non-prosecution." An order was subsequently passed in these terms:—"His Majesty having taken the said report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order, as it is hereby ordered, that the said appeal be, and the same is hereby, dismissed for non-prosecution, whereof the Judges of the High Court of Judicature of the North-Western Provinces at Allahabad for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly." On the 14th of November, 1904, an application was made to the High Court by the decree-holder, Jawahir Lal, for an order absolute against Abdul Majid. An objection was taken to this application by the judgement-debtor on the ground that it was barred by limitation and on the further ground that the procedure enjoined by section 610 of the Code of Civil Procedure of 1882, had not been followed. On the latter ground the objection was allowed. The decree-holder then on the 11th of June, 1906, applied to this Court under section 610, and an order was passed to this effect:—"Let the order be sent down to the court below [158] for necessary execution according to law." The decree-holder then applied for a decree absolute under order 34, rule V of Act No. V of 1908. This application was met by the objection on behalf of the judgement-debtor that the application was barred by limitation; that the only decree which was capable of execution was the decree of the High Court passed on the 8th of April, 1893; that the order of their Lordships of the Privy Council did not affirm that decree, but merely dismissed the appeal for want of prosecution; and that there was no order or decree of the Privy Council which was capable of execution.

If this contention be correct, then the application for execution is barred by article 178 or 179 of the second schedule to Act XV of 1877, corresponding to article 181 or 182 of Act No. IX of 1908. If, on the other hand, the order of the Privy Council is an order which can be executed, the application of the decree-holder is governed by article 180 of Act No. XV of 1877, corresponding to article 183 of Act No. IX of 1908.

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This last mentioned article provides a period of 12 years within which an order of His Majesty in Council may be enforced. If the order of His Majesty of the 13th of May, 1901, is treated as an affirmance of the decree of this Court, it seems to me that it is the decree or order of the final Court of Appeal and is an order which can be executed, and as 12 years have not elapsed since the date of that order, the application of the creditor is not barred by limitation.

The question is not without authority. In *Pitts* v. *LaFontaine* (1), it was held by their Lordships of the Privy Council that when a decision of the Judicial Committee has been reported and sanctioned and embodied in an order of Council, it becomes the decree or order of the final Court of Appeal, and it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution.

In *Luchmun Persad Singh* v. *Kishun Persad Singh* (2), it was held by a Full Bench of the Calcutta High Court, on a reference by MITTER and MACLEAN, JJ., that although an order of Her late Majesty in Council only confirms a decree of the court below, that order is the paramount decision in the suit and any application to enforce it is in point of law an application to [159] execute the order and not the decree which it confirmed. The question before the Court in that case was whether article 179 or article 180 of schedule II of Act No. XV of 1877 governed an application to enforce an order of Her Majesty in Council, affirming a decree of the High Court on its appellate side. GARTH, C. J., who delivered the judgement of the Court observed:—"Although an order of Her Majesty in Council may confirm the decree of the court below, that order is undoubtedly the paramount decision in the suit and any application to enforce it is in point of law an application to execute the order and not the decree which it confirmed." Then he observes that "before the decree-holder can obtain execution he must apply to the High Court under section 610 of the Code to transmit the order of Her Majesty to the Court whose duty it is to issue execution, and it is clear from the language of that section that the court to which the order is transmitted has to execute not its own decree but the order itself. If this were not so, there would seem no necessity for applying to the High Court at all."

In that case, it will be observed, the order of the Privy Council affirmed the decree of the High Court, and it may be said that there was no such affirmance of the decree of the High Court in the present case. This I think is not so. The dismissal of the judgement-debtor's appeal for want of prosecution must, I think, be treated as an affirmance of the decree of the High Court.

The question whether the dismissal of an appeal for want of prosecution is a decree affirming the decision of the court immediately below, within the meaning of section 596 of the former Code of Civil Procedure was considered in the case of *Beni Rai* v. *Ram Lakhan Rai* (3). That section falls within chapter XLV which treats of appeals to His Majesty in Council, and it prescribes the requirements for such an appeal, and, amongst others enjoins that where the decree appealed from affirms the decision of the court immediately below the court passing such a decree, the appeal must involve some substantial question of law. My brothers KNOX, and BANERJI, held that a decree dismissing an appeal for want of prosecution was a decree affirming the decision of the court

(1) (1881) L. R. 6 A. C. 482.
(2) (1882) I. L. R. 8 Cal. 218.
(3) (1898) I. L. R. 20 All. 367.

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immediately below, within the meaning of section 596. [160] The decision of the Privy Council in *Tassaduq Rasul Khan* v. *Kashi Ram* (1), lends support to the view taken in the last mentioned case. In that case a preliminary objection was taken on behalf of the respondents to the hearing of an appeal before their Lordships on the ground that the order giving leave to appeal was not in accordance with the Code of Civil Procedure. The suit in that case was for specific performance of an agreement and the court below had decreed specific performance. On appeal the only order of the appellate court was in these terms:—"It is ordered and decreed that this appeal be dismissed and the respondents' costs of this appeal are to be paid by appellant." It was held that in order to "affirm the decision of the court below" within the meaning of section 596, it is sufficient for the appellate court to affirm the decree. It need not also affirm the grounds of fact on which the judgement was passed, and that where the decree of the appellate court was that the appeal be dismissed, but the reasons given were not the same as those of the lower court in respect of some matters of fact, the appellate court by the dismissal affirmed the decision of the lower court within the meaning of the section. This decision appears to me to lend strong support to the argument addressed to us on behalf of the respondent, that the dismissal of an appeal operates as an affirmance of the decree of the court from which the appeal is preferred, and it is immaterial on what grounds it is dismissed. It seems to me therefore that we ought to treat the order of His Majesty in Council as the final order in the litigation and the order which alone is capable of enforcement.

I would therefore dismiss the appeal.

BANERJI, J.—The question to be determined in this appeal is whether the application of the respondent for an order absolute for sale under section 89 of the Transfer of Property Act is barred by limitation, as contended by the appellant.

The decree under section 88 of the Act was passed by the court of first instance on the 12th of May, 1890, and was affirmed by this Court on the 8th of April, 1893. The appellant preferred an appeal to His Majesty in Council, but allowed it to remain pending till the 13th of May, 1901, when it was dismissed for [161] "non-prosecution," no effectual steps having been taken by the appellant for its hearing. After the disposal of the appeal to the Privy Council the respondent applied for an order absolute for sale on the 14th of November, 1904, but it was dismissed on the objection of the appellant on the ground that the provisions of section 610 of Act XIV of 1882, had not been complied with. On the 11th of June, 1909, the application which has given rise to this appeal was presented. It is urged that the application is time-barred under article 178 of schedule II to Act No. XV of 1877.

It was held by a Full Bench of this Court in *Oudh Behari Lal* v. *Nageshar Lal* (2) that an application for an order absolute for sale under section 89 of the Transfer of Property Act is an application in execution. This will apparently not be so under Act No. V of 1908 (the present Code of Civil Procedure), as order XXXIV, rule 5, declares that what was an order absolute for sale under section 89 of the Transfer of Property Act is the final decree in the suit. However, as order XXXIX does not apply to this case, we must, in accordance with the ruling of the Full Bench, hold

(1) (1902) I. L. R. 25 All. 109

(2) (1890) I. L. R. 13 All. 278.

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FULL BENCH.

33 A. 154=9 I. C. 926=7 A. L. J. 1001.

the present application to be an application in execution, and we must consider what article of schedule II of the Limitation Act applies to it.

Article 178 applies if there is no other article in the schedule which governs the application. It is urged on behalf of the respondent that article 180 of schedule II to Act No. XV of 1877, to which article 183, schedule I to Act No. IX of 1908 corresponds, is applicable. Article 180 provides a limitation of 12 years for an application to enforce, among other orders, etc., "an order of Her Majesty in Council." We have to determine whether the order which the respondent seeks to enforce is an order of His Majesty in Council within the meaning and intention of the article. When a decision of their Lordships of the Privy Council "has been reported to his Majesty and has been sanctioned and embodied in an order of His Majesty in Council" it becomes the order of His Majesty and the final order in the case which a court is to carry into effect. This order is not a decree, but it is the order of His Majesty and as such has to be enforced. In this case **[162]** their Lordships of the Privy Council made a report to His Majesty and recommended "the dismissal of the appeal for non-prosecution." This report was taken into consideration by His Majesty and was approved of, and it was ordered that the "appeal be and the same is hereby dismissed for non-prosecution." This order of His Majesty is the final order in the cause and is the order which must be enforced. The necessary effect of an order dismissing an appeal from the decree of a subordinate court is an affirmance of that decree. Therefore when an appeal to His Majesty in Council is dismissed, the necessary result is that the decree of the court below is affirmed, whatever the reason for the dismissal may be. It was held in *Beni Rai* v. *Ram Lakhan Rai* (1) that a decree of the High Court dismissing an appeal for want of prosecution was a decree affirming the decision of the court below. I was a party to this ruling and I see no reason to alter the opinion therein expressed. To the same effect is the decision of their Lordships of the Privy Council in *Tassaduq Rasul Khan* v. *Kashi Ram*, referred to in the judgement of the learned Chief Justice. In that case the decree of the appellate court was, as the report of the case shows, "that the appeal should be dismissed with costs." It was held that the appellate court affirmed the decision of the lower court. The principle of these cases applies to the present case, and applying that principle, it cannot but be held that the order of His Majesty dismissing the appellant's appeal affirmed the decree of this Court. The learned advocate for the appellant placed great reliance on certain observations made by SIR BARNES PEACOCK, C. J., in his judgement in *Bipro Doss Gossain* v. *Chunder Seekur Bhuttacharjee* (2). That case is in my opinion distinguishable. There the question was as to the meaning to be placed on the provision of section 20 of Act XIV of 1859 and no question arose as to the effect of an order of His Majesty dismissing an appeal. For the above reasons, I agree with the learned Chief Justice in holding that the respondent's application is governed by article 180 of schedule II, Act No. XV of 1877, and is not time-barred. I also would dismiss the appeal.

CHAMIER, J.—I concur.

[163] BY THE COURT :—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

(1) (1898) I. L. R. 20 All. 367.

(2) (1867) 7 W. R. C. R. 521.

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AUG. 9.

REVISIONAL CRIMINAL.

33 A. 163=7 I. C. 914=7 A. L. J. 1143=11 Cr. L. J. 537.

33 A. 163 (=7 I. C. 914=7 A. L. J. 1143=11 Cr. L. J. 537).

REVISIONAL CRIMINAL.

Before Mr. Justice Griffin and Mr. Justice Chamier.

EMPEROR *v.* MATAN.*

[9th August, 1910.]

Act No. XLV of 1860 (*Indian Penal Code*), *section* 182—*Transfer—Unfounded allegations against the trying magistrate made by an accused person in an application for transfer of his case.*

Held that an accused person, who in support of an application for the transfer of the case against him to some other Magistrate makes unfounded and defamatory allegations against the trying Magistrate, cannot be prosecuted in respect of such allegations under section 182 of the Indian Penal Code. *Queen* v. *Daria Khan* (1) and *Queen-Empress* v. *Subbayya* (2) referred to.

[Ref. 83 I. C. 343=20 L. W. 624=47 M. L. J. 658=1925 M. W. N. 146=25 Cr. L. J. 1383.]

THE facts of this case were as follows:—

One Ramdoo lodged a complaint against Matan of an offence under section 323 of the Indian Penal Code in the court of the Sub-Divisional Magistrate. The case was made over to a Tahsildar Magistrate for trial. The case had not proceeded far when Matan presented a petition to the Sub-Divisional Magistrate praying him to transfer the case from the court of the Tahsildar Magistrate to some other court. In the course of the petition the applicant stated as one of the reasons for a transfer of the case that it had been instituted at the instance of the Tahsildar because the applicant had declined to accede to the Tahsildar's request that he should stand security for a man named Mangalia. The allegation was entirely without foundation. The Sub-Divisional Magistrate examined the applicant on oath in support of the application for transfer and the applicant then repeated his accusation against the Tahsildar. The Sub-Divisional Magistrate on this directed the applicant to be prosecuted in respect of these allegations under section 182 of the Indian Penal Code. Against this order the applicant applied in revision to the High Court.

[164] Babu *Satya Chandra Mukerji*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

CHAMIER, J.—This is an application for revision of an order passed by a Sub-Divisional Magistrate, directing the prosecution of the applicant for an offence under section 182 of the Indian Penal Code.

It appears that one Ramdoo lodged a complaint against the applicant of an offence under section 323 of the Code in the court of the Sub-Divisional Magistrate. The case was made over to a Tahsildar Magistrate for trial. The case had not proceeded far when the applicant presented a petition to the Sub-Divisional Magistrate praying him to transfer the case from the court of the Tahsildar Magistrate to some other court. In the course of the petition the applicant stated as one of the reasons for a transfer that the case had been instituted at the instance of the Tahsildar because the applicant had declined to accede to the Tahsildar's request that the applicant should stand security for a man named Mangalia. The allegation was entirely without foundation. The Sub-Divisional Magistrate examined the applicant on oath in support of the application for

* Criminal Revision No. 364 of 1910 against the order of Raghubar Dayal Misra, Magistrate, first class, of Hamirpur, dated the 5th of May, 1910.

(1) (1870) 2 N. W. P. H. C. Rep. 128. (2) (1889) I. L. R. 12 Mad. 451.

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REVISIONAL CRIMINAL.

33 A. 163=7 I. C 914=7 A. L J. 1143 =11 Cr. L. J. 537.

transfer and the applicant then repeated the accusation against the Tahsildar. It is in respect of this accusation that the applicant has been ordered to be prosecuted.

It has been held repeatedly by this court that an accused person who makes a false affidavit in support of an application for transfer cannot be prosecuted in respect of the affidavit under section 193 of the Indian Penal Code, and it has been held that an accused person applying for a transfer cannot be prosecuted under section 228 of the Code in scandalous or insulting allegations made against a magistrate in the application for a transfer. Such a person may be prosecuted under section 500 of the Code in respect of defamatory statements made in the application, but in the only reported case that I am aware of the prosecution failed on the ground that the case fell within the 9th exception stated in that section. It appears to me that the applicant cannot be prosecuted under section 182 of the Indian Penal Code in respect of statements made by him during his examination **[165]** on oath by the Sub-Divisional Magistrate, because the statements were made in answer to questions put by the magistrate and the applicant cannot be said to have been giving information within the meaning of section 182, when he was under examination.

But the question whether he may be prosecuted under section 182, in respect of statements made in his application for transfer is one of some difficulty. There is a note in the Current Index of Cases for 1908 of a case of *Imperator* v. *Khan Muhammad* (1), in which an accused person who made false allegations in an affidavit in support of an application for a transfer was prosecuted under section 182, but with that exception I have been unable to find any case in which such a prosecution was attempted or allowed. The report of the case referred to is not available.

It was held in *Queen* v. *Daria Khan* (2) that statements made by a prisoner for the purpose of his defence cannot be held to be information given to a public servant within the meaning of section 182 of the Indian Penal Code. It appears to me that the applicant was in the position of an accused person when he presented the application for a transfer. Had the case been pending in the Court of a magistrate having power to make over cases to other magistrates, *e.g.*, a District Magistrate or Sub-Divisional Magistrate and the allegation had been made concerning some magistrate to which it proposed to transfer the case, there would, I suppose, be no doubt that the case was covered by the decision in *Queen* v. *Daria Khan*, of which, if I may say so, I entirely approve. It seems to me that it can make no difference that the statement was made to a magistrate other than that in whose Court the case was pending. I hold that the applicant was at the time in the position of an accused person, and I think it would be straining the language of section 182 to hold that a statement made in such circumstances was information given to a public servant within the meaning of that section. I feel confident that the section was never intended to apply to such a case. The view which I take is supported by the decision of the Madras High Court in *Queen-Empress* v. *Subbayya* (3).

[166] I would set aside the order for the prosecution of the applicant.

GRIFFIN, J.—I concur.

BY THE COURT:—The order of the Court is that the order of the magistrate sanctioning prosecution under section 182 of the Indian Penal Code is set aside.

Application allowed.

(1) 1 Sind L. R. 124.
(2) (1870) 2 N. W. P. H. C. Rep. 128.
(3) (1889) I. L. R. 12 Mad. 451.

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AUG. 10.

APPELLATE CIVIL.

33 A. 166=7 A. L. J. 1019 =7 I. C. 794.

33 A. 166 (=7 A. L. J. 1019=7 I. C 794).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

ROSHAN LAL (*Plaintiff*) *v.* THE DELHI CLOTH AND GENERAL MILLS COMPANY, LIMITED, DELHI (*Defendant*).*

[10th August 1910.]

Contract—Sale—Deposit—Failure of purchaser to complete contract—Vendor entitled to retain deposit.

Plaintiff agreed to purchase 500 bales of cotton yarn from defendants and to deposit 5 rupees per bale as earnest money. He deposited somewhat more than half of the earnest money and thereafter repudiated the contract. Held that plaintiff was not entitled to recover that portion of the earnest money which he had paid. *Collins* v. *Stimson* (1), *Howe* v. *Smith* (2), *Ex parte Barrell In re Parnell* (3) and *Bishan Chand* v. *Radha Kishan Das* (4) referred to.

[Ref. 53 I. C. 875=30 C. L. J. 113=24 C. W. N. 40; 17 A. L. J. 309=50 I. C. 948 67 I. C. 714; 67 I. C. 806; cf. 1923 Rang. 47; 35 M. L. T. 205 (P. C.).]

THIS was a suit by the purchaser to recover a sum of Rs. 1,300 paid by him as earnest money on a contract for the purchase of cotton. The plaintiff agreed to take 500 bales of cotton yarn and to deposit as earnest money Rs. 5 per bale; if the earnest money was not deposited within two days the defendents were to be at liberty to adhere to or cancel the contract. The plaintiff paid Rs. 1,300 out of the earnest money, but failed to pay the balance, and thereafter repudiated the contract. Subsequently the plaintiff sued for the return of the earnest money which he had deposited. The claim was decreed by the first Court, but on appeal this decree was set aside and the suit dismissed. The plaintiff appealed to the High Court.

Munshi *Gulzari Lal*, for the appellant.

Pandit *Baldeo Ram Dave*, for the respondents.

[167] STANLEY, C. J. BANERJI, J.—The question in this appeal is whether a purchaser who has repudiated a purchase is entitled to recover earnest money paid by him on entering into the contract. The contract in this case was for the purchase of 500 bales of cotton yarn, and the agreement was that the purchaser would deposit Rs. 5 per bale as earnest money with the defendant company; and that if that was not done within two days of the contract the defendant company would be at liberty either to adhere to or cancel the contract. The purchaser paid a sum of Rs. 1,300 as earnest money, which left a balance of earnest money still unpaid. It has been found by the lower appellate court that the purchaser repudiated the contract. He was guilty of two breaches: first of all, he failed to pay the entire earnest money agreed to be paid by him, and he also failed to take delivery of the goods and pay for them. Upon these findings the lower appellate court dismissed the plaintiff's claim. His suit was for recovery of the sum of Rs. 1,300, which was paid by him as earnest money.

We think that the court below was right in the view which it took. The question whether earnest money is recoverable has been considered

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* Second Appeal No. 588 of 1909, from a decree of H. J. Bell, District Judge of Aligarh, dated the 10th of March, 1909, reversing a decree of Pitambar Joshi, Extra Additional Subordinate Judge of Aligarh, dated the 25th of June 1908.

(1) (1883) 11 Q. B. D. 142.
(2) (1884) L. R. 27 Ch. D. 89.
(3) (1885) L. R. 10 Ch. App. 512.
(4) (1897) I. L. R. 19 All. 489.

in a number of cases, and it would appear that no invariable rule can be laid down on the subject. In the case of *Collins* v. *Stimson* (1) BARON POLLOCK stated the law upon the subject in the following terms "According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser the vendor is entitled to retain the deposit."

In the case of *Howe* v. *Smith* (2) the question was considered whether a sum which was paid on the purchase of real estate as a deposit and in part payment of the purchase money was recoverable. The plaintiff who sued for the recovery of the earnest money failed to perform his contract within a reasonable time, and it was held by the Court of appeal, affirming the decision of KAY, J., that the deposit, although to be taken as part payment, if the contract was completed, was also a guarantee for the performance of the contract, and that the plaintiff, having failed to [168] perform his contract within a reasonable time, had no right to a return of the deposit.

Again, in the case of *Ex parte Barrell, in re Parnell* (3), in which by a contract for sale of real estate it was stipulated that a portion of the purchase money should be paid immediately and the residue on completion of the contract, it was held on non-fulfilment of the contract by the purchaser that the vendor was entitled to retain the deposit. SIR W. M. JAMES, L. J., in his judgment says:—"The money was paid to the vendor as a guarantee that the contract should be performed. The trustee refuses to perform the contract and then says give me back the deposit. There is no ground for such a claim." SIR G. MELLISH, L. J., in his judgment observes:—"It appears to me clear that even where there is no clause in the contract as to the forfeiture of the deposit, if the purchaser repudiates the contract he cannot have back the money, as the contract has gone off through his default."

To the same effect is the ruling of KNOX and BURKITT, JJ., in the case of *Bishan Chand* v. *Radha Kishan Das* (4). The contract in that case was for the purchase of a decree for money. Through default of the purchaser the purchase was not carried out, and it was held that the purchaser could not recover the deposit which had been paid by him in pursuance of the contract.

We have said that no hard and fast rule can be laid down on this subject. As was said by COTTON, L. J., in the case of *Howe* v. *Smith*, "I do not say that in all cases where this Court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion, there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of [169] specific performance, but which would make his conduct amount to a repudiation on his part of the contract." Such a case as would entitle a purchaser to a return of the earnest money is that of

(1) (1883) 11 Q. B. D. 142.
(2) (1884) 27 Ch. D. 89.
(3) (1885) I. R. 1 Ch. App. 512.
(4) (1897) I. L. R., 19 All. 489.

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33 A. 15=49
I. C 926=7
A. L. J. 1001.

Alokeshi Dassi v. *Hara Chand Dass* (1). In that case the defendant vendor unsuccessfully denied the contract *in toto* and there was no repudiation of the contract by the plaintiff, and it was held that plaintiff purchaser was entitled to a refund of the deposit made by him. The present case is unlike that case according to the finding of the lower appellate Court. The plaintiff in this case was in default, in that he repudiated the contract, although full opportunity was given to him of completing it. We think that the lower appellate Court rightly dismissed his suit. We accordingly dismiss this appeal with costs.

Appeal dismissed.

33 A. 169 (=8 I. C. 807=7 A. L. J. 1156).

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

LACHMAN DAS (*Defendant*) *v.* HANUMAN PRASAD (*Plaintiff*).*

[11th August, 1910.]

Act (Local) No. III of 1901 *(United Provinces Land Revenue Act), section* 233 *(k)—Partition—Revenue Court irregularly entertaining an application for allotment of a share to applicant—Suit in Civil Court for declaration of title as to share so allotted—Jurisdiction.*

Some of the co-sharers in a mauza applied for partition. *H*, one of the non-applicants, came in within the time limited in the proclamation issued under section 110 of the Land Revenue Act, 1901, and asked for his share also to be partitioned off. After the time for objecting to the partition had expired, L filed an application claiming a share in the portion alleged by *H* to be his share, and without notice to H this application was granted, and part of the share allotted to him was given to *L*. *H* then sued in the Civil Court asking for a declaration of his title to the plots so allotted to *L*. *Held* that, however erroneous the procedure of the revenue authorities might have been, *H*'s suit was barred by section 233 (*k*) of the Land Revenue Act, 1901. *Muhammad Sadiq* v. *Lauto Ram* (2) followed. *Khasay* v. *Jugla* (3) and *Muhammad Jan* v. *Sadanand Pande* (4) distinguished.

[Dist. 28 I. C. 454; 12 A. L. J. 1126=25 I. C. 177.]

THE facts of this case were as follows:—

In qasba Khair there were several *khatas*. On the 11th December, 1905, Bilas Rai and others who owned certain shares in same *khatas*, except *khata* No. 34, applied for perfect partition **[170]** making the other co-sharers parties to their application. The officer in charge of the partition issued a proclamation under section 110 of Act No. III of 1901, calling on the recorded co-sharers who had not joined in the application to appear and show cause on or before the 12th April, 1906. On the 10th April, 1906, the plaintiff in the present suit filed an application stating that he had no objection to the application of Bilas Rai and others but he further prayed that his own share be made into a separate and distinct mahal. Lachman Das, who had purchased only plots Nos. 979 and 1518 in *khata* No. 34 in execution of a decree, did not file any objection to the petition of the plaintiff. The application of the plaintiff was proceeded with, and the amin allotted to him the lands in dispute. On the 21st October,

* First Appeal No 141 of 1909, from an order of Jagat Narain, Additional Subordinate Judge of Aligarh, dated the 20th of March, 1909.

(1) (1897) I. L. R. 24 Cal. 897.
(2) (1901) I. L. R. 23 All. 291.
(3) (1906) I. L. R. 23 All. 432.
(4) (1906) I. L. R. 23 All. 394.

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APPELLATE CIVIL.

33 A. 169=8
I. C. 807=7
A. L. J. 1156.

1907. Lachman Das put in a petition before the partition officer stating that he had a title to the extent of two bighas and odd in all the lands in *khata* No. 34 and the allotment by the Amin was wrong and improper. On the 28th October, 1907 the partition officer, without issuing notice to the plaintiff, decided the objection in favour of Lachman Das. Thereupon the plaintiff instituted the present suit for a declaration that he was the owner in possession of the plots in dispute, and that the defendant had no right or share in it. The main defence of the defendant was that the suit was barred by the rule of *res judicata* and that section 233 clause (*k*) of Act No. III of 1901 applied to the case and that it was consequently not cognizable by the Civil Court. The Court of first instance dismissed the suit, but the lower appellate Court reversed the decree and remanded the suit.

The defendant appealed.

Mr. *M. L. Agarwala*, for the appellants, contended that the suit was barred by section 233, clause (*k*) of Act No. III of 1901, and by the rule of *res judicata*. The plaintiff ought to have raised the question of proprietary title when he appeared in answer to the proclamation. The partition having been completed, the suit was not maintainable. He relied upon *Muhammad Sadiq* v. *Laute Ram* (1) and *Nathi Mal* v. *Tej Singh* (2).

Munshi *Haribans Sahai*, for the respondent, submitted that the suit was not barred by the rule of *res judicata* inasmuch as the [171] objection of Lachman Das raised a question of proprietary title and the partition officer was not competent to decide it. The partition officer was comptent to determine a question of title only when an objection was raised in the manner pointed out in section 111 of Act No. III of 1901. The plaintiff could not get any relief from the superior revenue Courts, inasmuch as they had no jurisdiction to determine a question of title. The decision was merely waste paper. Further, as the plaintiff had no opportunity of meeting the objection raised by the defendant, the jurisdiction of the Civil Court is not barred; *Awadh Behari Lal* v. *Ishri Prasad* (3), *Khasay* v. *Jugla* (4) and *Muhammad Jan* v. *Sadanand Pande* (5). The suit was brought some eighteen months before the completion of the partition proceedings. The Full Bench in *Muhammad Sadiq* v. *Laute Ram* expressly left this question open.

KNOX and GRIFFIN, JJ.:—Lala Hunman Prasad, respondent in the present appeal was plaintiff in the Court of first intance. He came to Court saying that he was the owner in possession of certain zamindari property, consisting of numbers which are given in the schedule to his plaint, of which the total amount is 14 bighas 9 biswas. He alleged that the defendant had no right or share in these plots of land, that in the same village, the defendant Lachman Das, now appellant had purchased at auction 2 bighas 5 biswas, which was a grave-yard, and of which the numbers were 979 and 1518. He makes other allegations regarding the defendant Lachman Das' possession *quoad* these plots, but we are not concerned with these allegations in this appeal. He then goes to say that Bilas Rai, one of the co-sharers in Kasba Khair, applied the Revenue Court in 1905 for the partition of the Kasba Khair. The usual proclamation regarding partition was issued, and before the time allowed by the proclamation had expired, Hanuman Prasad came before the Collector and said that he had

(1) (1901) I. L. R. 23 All. 291.
(2) Weekly Notes, 1907. p, 190.
(3) Weekly Notes, 1907, p. 172.
(4) (1906) I. L. R. 28 All. 432.
(5) (1906) I. L. R. 28 All. 394.

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33 A. 169 =8 I. C. 507 =7 A. L. J. 1156

no objection to the partition and asked that a separate lot might be prepared of his property. Apparently Lachman Das had notice of the application of Bilas Rai, and it is admitted that he was present at the partition [172] proceedings which ensued. According to Hanuman Prasad, when their proceedings had gone on some way, namely, in October, 1907, and after the amin had drawn up lots, Luchman Das put in a petition to the effect that he was a co-sharer in *khata* No. 34. Hanuman Prasad says that no notice was given to him of this petition, and that behind his back the Revenue Court passed an order on the 21st of October, 1907, to the effect that Lachman Das was to have a share in the whole of the *khata* corresponding to the amount claimed by him, the result of which was that, instead of Lachman Das being given merely the two plots of grave land, he was given a share in the lands of the *khata* and, amongst that, of land which the plaintiff had asked to be marked out in a separate lot in his favour. Upon this Hanuman Prasad, on the 22nd November, 1907, instituted the suit, out of which this appeal has arisen, asking for a declaration that he was the owner and in possession of the plots in suit.

The Court of first instance, holding that the plaintiff ought to have applied to the Revenue Court and that the Civil Court had no jurisdiction, dismissed the suit. On appeal the learned Subordinate Judge, holding that Hanuman Prasad had no opportunity to assert his title in answer to the petition put in by Lachman Das and could maintain a suit in the Civil Court, which could adjudicate upon the question of title raised before it, set aside the decree of the first Court and remanded the case for trial on the merits. In appeal, Lachman Das urged that section 233 (*k*) of Local Act No. III of 1901 bars the suit. He further contended that the plaintiff ought to have raised any question of title he possessed when he appeared in answer to the original proclamation for partition, and also that the decision of the Revenue Court operated as *res judicata* to the present claim. The partition proceedings, we are told, were not completed until the 15th of April, 1909, some 18 months after Hanuman Prasad instituted his suit in the Civil Court. So far as we can judge from the papers before us, the petition put in by Lachman Das was untrue, misleading and put in before the revenue Court out of time. The allegation of Hanuman Prasad is that he holds the land in severalty. This appears to be the fact, and the allegation appears to have commended itself to the partition [173] officers and he acting, as he would, under section 117 of Act III of 1901, allotted to Hanuman Prasad the lands held by him in severalty. The only lands, if any, to which the defendant was entitled were the two plots which we may term in this judgment the cemetery land. The procedure of the Court, so far as we may say anything about it, after Lachman Das' application was entirely irregular. At the same time we are also compelled to hold that Hanuman Prasad should have gone to the Revenue Court and to get put right the manifest irregularity in procedure which he says was committed by the Revenue Court. Had he done so, and if his allegations are correct, we have little doubt that the Revenue Court would have put matters right. Instead of that he has come to this Court and he is met by the bar contained in section 233 (*k*) of the Land Revenue Act. Section 233 (*k*) says that no person shall institute any suit or other proceedings in a Civil Court with respect to the partition or union of mahals except as provided by sections 111 and 112. Unless Hanuman Prasad can show that his case comes clearly within the provisions of section 111, his suit is barred by section 233 (*k*). He attempts to show this

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33 A. 169=8 I. C. 807=7 A. L. J. 1156.

by saying that Luchman Das in his application of the 21st of October, 1907, raised a question of title, and as he never had any opportunity to answer that question of title, and in this way he tries to bring his case within the rulings in *Khasay* v. *Jugla* (1) and *Muhammad Jan* v. *Sadanand Pande* (2). Both these cases are clearly distinguishable from the present case. We can only repeat here what was laid down in the Full Bench case of *Muhammad Sadiq* v. *Laute Ram* (3), in which it was held that any exercise of jurisdiction of a Civil Court which would disturb or in any way affect the distribution of land made by partition is barred by section 241 (*f*) of Act XIX of 1873, now section 233 (*k*) of Act No. III of 1901, no matter whether a question of title or any other question is raised in the suit.

We decree the appeal, set aside the decree of the Court below and restore the decree of the Court of first instance. We make no order as to costs.

Appeal dismissed.

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33 A. 174 (=7 I. C. 495=7 A. L. J. 1073).

[174] FULL BENCH.

Before Mr. Justice Sir George Knox, Mr. Justice Banerji and Mr. Justice Karamat Husain.

LACHMAN (*Plaintiff*) *v.* SHAMBHU NARAIN AND OTHERS (*Defendants*).*

[11th August, 1910].

Act No. 1 of 1877 (Specific Relief Act), sections 8 and 9—Suit for ejectment based on title—Court not competent in such a suit to grant a decree on the basis merely of previous possession.

Where a plaintiff sues for possession on the basis of title and fails to establish his title, he cannot be granted a decree for possession under the first paragraph of section 9 of the Specific Relief Act. *Ram Harakh Rai* v. *Sheodihal Joti* (4) and *Mauzi* v. *Kashi* (5) overruled. *Ramasami Chetti* v. *Paraman Chetti* (6) followed. *Wajid Ali* v. *Ram Saran* (7) and *Chathan Rai* v. *Sheo Ghulam Rai* (8) referred to.

[Dist. 16 M. L. T. 190=25 I. C. 802; Ref. 36 All. 51; 34 All. 538; Rel: 72 I. C. 924=1923 All. 117; Fol: 82 I. C. 324;]

THE facts out of which this appeal arose were as follows:—

The plaintiff alleged that he was the owner of the grove which he and his ancestors held rent-free; that the defendants Nos. 3 to 11 were his co-sharers; that the first two defendants, who are the land-holders of the village wrongfully dispossessed him in July, 1906, and let it to the 13th defendant, and that he, plaintiff, as one of the owners of the grove, was entitled to be restored to possession. He accordingly brought the suit out of which this appeal has arisen, on the 7th of January, 1907, for ejectment of the defendants Nos. 1, 2 and 13 and for recovery of possession of the grove. The Court of first instance found that the plaintiff was the tenant of the defendants Nos. 1 and 2 in respect of the grove

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*Second Appeal No. 1038 of 1908, from a decree of Prem Bihari Lal, Subordinate Judge of Farrukhabad, dated the 25th of August, 1908, reversing a decree of Suraj Narain Majju, Munsif of Kanauj, dated the 24th of July, 1907.

(1) (1906) I. L. R. 28 All. 432.
(2) (1906) I. L. R. 28 All. 394
(3) (1901) I. L R. 23 All. 291.
(4) (1893) I. L. R. 15 All. 384.
(5) Weekly Notes, 1897, p. 145.
(6) (1901) I. L. R. 25 Mad. 448.
(7) Weekly Notes, 1884, p. 39.
(8) Weekly Notes, 1889, p. 89.

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and not the owners of it and that he had been dispossessed within six months preceding the date of the institution of the suit. It made a decree in the plaintiff's favour for possession as tenant. On appeal by the defendants the lower appellate Court held that the plaintiff had forfeited his right as tenant by denying his landlord's title, that the trees now existing in the grove were of spontaneous growth and were not planted by the plaintiff or his predecessors in title, and that he was not entitled to recover possession. The suit was accordingly dismissed.

[175] The plaintiff appealed to the High Court. On the appeal coming up for hearing before their Lordships KNOX and KARAMAT HUSAIN, JJ., it was referred to the Chief Justice for the constitution of a larger Bench in view of the fact that the rulings of the Court on the point raised in it appeared to be in conflict. The order of reference was as follows:—

"The suit out of which this second appeal arises was a suit brought by the appellant, who was plaintiff in the Court of first instance, for possession of a grove, which he claimed as forming part of a rent-free tenure which had been since the settlement made under Regulation IX of 1833 in the possession of Mansa Ram, ancestor of the plaintiff, and of his descendants. He alleged forcible dispossession by the respondents in July, 1906. In January, 1907, therefore he brought the present suit for recovery of possession.

"The Court of first instance gave him a decree. The lower appellate court reversed this decree on the ground that as the plaintiff had denied the relationship of landlord and tenant and raised a question of proprietary title which he had not proved his suit should be, and it was, dismissed.

"In second appeal the plaintiff contends that as the respondents forcibly dispossessed him and as his suit has been brought within six months from the date of dispossession, he is entitled, in any case, to a decree for possession under section 9 of the Specific Relief Act.

"The question then raised is whether in a suit for ejectment a plaintiff, who bases his claim upon proprietary title, is entitled to a decree under section 9 of the Specific Relief Act, in any event, if he sues within six months from the date of dispossession and independently of whether he makes good the title under which he professes to sue.

"On this point the ruling of this Court would appear to be in conflict.

"In *Wali Ahmad Khan* v. *Ajudhia Kandu* (1) it was held by the majority of the Court that section 9 of the Specific Relief Act is intended to provide a special summary remedy for a person who being, whatever his title, in possession of immovable property is ousted therefrom. In *Ram Harakh Rai* v. *Sheodihal Joti* (2) a similar view was taken, and it was held that a Court should in all cases in which it applies give effect to the provisions of the first paragraph of section 9 of the Specific Relief Act, 1877, whether that section be expressly pleaded or not. In *Monsi* v. *Kashi* (3) one of us followed, but with reluctance, the law laid down in *Ram Harakh Rai* v. *Sheodihal Joti*. These rulings were followed in *Parbhu Lal* v. *Ram Charan* (4).

"On the other hand, this Court in *Wajid Ali* v. *Ram Saran Sahai* (5), in *Chuthan Rai* v. *Sheo Ghulam Rai* (6) and in *Baldeo Das* v. *Mangni Ram* (7) held that section 9 of the Specific Relief Act referred only to cases in which no title was set up, but only the fact of dispossession established, and not to cases in which the plaintiff sought a declaration of title.

[176] "Our attention has moreover been called to the cases of *Rama Sami Chetti* v. *Paruman Chetti* (1), in which the Madras High Court declined to follow the case *Ram Harakh Rai* v. *Sheodihal Joti* and held that where a suit had not been brought under the special provisions of the Specific Relief Act, but was based on plaintiff's superior title, a claim to title being also set up in defence, the issue concerning title should have been tried.

(1) (1891) I. L. R. 13 All. 537.
(2) (1893) I. L. R. 15 All. 384.
(3) Weekly Notes, 1897, p. 145.
(4) Weekly Notes, 1907, p. 244.
(5) Weekly Notes, 1884, p. 39.
(6) Weekly Notes, 1889, p. 89.
(7) Weekly Notes, 1900, p. 7.

"We think the question is one which calls for consideration by a Full Bench of this Court and direct that with the approval of the learned Chief Justice, the question raised in this case may be so referred."

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The case then came on for hearing before a Full Bench, consisting of KNOX, BANERJI, and KARAMAT HUSAIN, JJ.

Dr. *Satish Chandra Banerji* (Munshi *Jang Bahadur Lal* with him), for the appellant :—

The sole question for decision in this appeal is whether a plaintiff who brings a suit for possession of immoveable property by ejectment of the defendant on the basis of his own title, but fails to prove that title, would nevertheless be entitled to a decree for possession of the property if he can prove possession over that property within six months anterior to the date of his dispossession, under the provisions of section 9 of the Specific Relief Act, 1877, even if that section be not expressly pleaded. This question was answered in the affirmative by a Division Bench of this Court in *Ram Harakh Rai* v. *Sheodihal Joti* (1), and this ruling was followed in *Mousi* v. *Kashi* (2) and *Parbhu Lal* v. *Ram Charan* (3). The court of first instance has found in this case that the plaintiff's suit was instituted within six months of the date of his dispossession, and that finding has not been disturbed by the lower appellate court. In view, therefore, of the above rulings of this Court, the plaintiff is entitled to a decree for possession of the property in suit, although he claimed on the basis of his title, and endeavoured to prove it, but failed.

There is nothing in section 9 of the Specific Relief Act to show that the plaintiff is precluded from bringing a suit upon his title and at the same time claiming the benefit of that section. The authorities are clear that the section need not be specifically pleaded. Possession may be a source or root of title, and in any case deserves to be protected. When a person out of possession therefore sues for possession, if he proves his title, there can be [177] no further question, but if he cannot, the mere fact of his anterior possession will entitle him to a decree for possession, provided only that his suit is brought within six months of the date of his illegal dispossession. There is nothing in the language of sections 8 and 9 of the Act to indicate that the remedies are alternative. The plaintiff has the option either to bring a suit upon his title or to bring merely what is called a possessory suit. The beneficial object of section 9, as explained in *Wali Ahmad Khan* v. *Ajudia Kandu* (4), ought not to be lost sight of. There are old rulings of this Court which uphold the contrary view, but no reasons are given : *Wajid Ali* v. *Ram Saran Sahai* (5), *Chuthan Rai* v. *Sheo Ghulam Rai* (6), *Baldeo Das* v. *Mangni Ram* (7). The Madras High Court in *Ramasami Chetti* v. *Parman Chetti* (8) declined to follow the ruling in *Ram Harakh Rai* v. *Sheodihal Joti* (1).

Babu *Jogindro Nath Chaudhri* (Munshi *Gulzari Lal* with him), for the respondent :—

Sections 8 and 9 of the Specific Relief Act provide for alternative remedies and they are mutually exclusive. From the language of sections 8 and 9 we find that an option has been given to the plaintiff. He may either bring a regular suit upon his title under section 8 of the Act, or he may elect to adopt the summary procedure provided by section 9 under

(1) (1893) I. L. R. 15 All. 334.
(2) Weekly Notes, 1897, p. 115.
(3) Weekly Notes, 1906, p. 244.
(4) (1891) I. L. R. 13 All. 537.
(5) Weekly Notes, 1881, p. 30.
(6) Weekly Notes, 1889, p. 89.
(7) Weekly Notes, 1900, p. 7.
(8) (1901) I. L. R. 25 Mad. 448.

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which no question of title can be raised. The object of section 9 is clearly to discourage forcible and unlawful dispossession. In order to grant relief under this section the court will only see whether the plaintiff was wrongfully dispossessed within the six months of the date of the institution of the suit. No other question can be gone into in such a suit. Any option or privilege granted by this section can be waived by the party concerned. When, therefore, the plaintiff brings a suit upon his title, he does not avail himself of the privilege granted by section 9 of the Act. He clearly intends that the court should grant him relief as in a regular suit on the strength of his title. There is no warrant in law for the court after it has examined the question of title in detail and found it against the plaintiff, to give him [178] relief under the summary jurisdiction provided by section 9. And the plaintiff may for very good reason desire that the question should not be settled summarily and that a decision once for all should be given on the basis of his title. The evidence in support of his title, for instance, may not be available to him when the question of title is litigated subsequently. A suit under section 9 of the Specific Relief Act, again, it will be observed, is very limited in its scope. No appeal is allowed from any order or decree passed under this section; neither can such order or decree be reviewed. The plaintiff may, therefore, well chose his remedy under a suit on title and waive his right to a summary remedy. The right to both the remedies cannot therefore be combined in one and the same suit.

There is, again, I submit, a question of estoppel to be considered in such a case. By the frame of his suit and by his representations to the court the plaintiff induces and obliges the defendant to undergo an amount of trouble and expense to disprove the plaintiff's title and substantiate his own. The plaintiff cannot then be allowed at the last moment, when he fails to prove his title – the basis of his suit—to turn round and ask the court not to look upon all the evidence adduced, but to give him a relief only upon the basis of dispossession. If the court really finds upon evidence that the title is with the defendant and not with the plaintiff, it cannot be justified in granting any relief to the plaintiff, and in ignoring the defendant's cause, thus driving him to useless litigation. This would be both inconvenient and anomalous. It is certainly open to the plaintiff to amend his plaint before the trial commences. But if he elects to go to trial upon the merits of his title, he must prove that title to obtain any relief in the suit.

Dr. *Satish Chandra Banerji*, was heard in reply.

KNOX, BANERJI, and KARAMAT HUSAIN, JJ.:—The sole question raised in this appeal is whether a plaintiff who sues for possession and for ejectment of the defendant on the basis of title and fails to prove his title is still entitled to a decree for possession under section 9 of the Specific Relief Act, 1877, if he can prove possession within six months anterior to the date of his [179] dispossession. As there are conflicting rulings in this Court on the point the case has been referred to this Bench.

The facts are these:—The plaintiff alleged that he was the owner of a grove which he and his ancestors held rent-free; that the defendants Nos. 3 to 11 were his co-sharers; that the first two defendants, who are the land-holders of the village, wrongfully dispossessed him in July, 1906, and let it to the 13th defendant, and that he, plaintiff, as one of the owners of the grove, was entitled to be restored to possession. He accordingly brought the suit out of which this appeal has arisen, on the 7th of January, 1907, for ejectment of the defendants Nos. 1, 2 and 13 and for recovery of possession of the grove. The court of first instance found that

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the plaintiff was the tenant of the defendants Nos. 1 and 2 in respect of the grove, and not the owner of it, and that he had been dispossessed within six months preceding the date of the institution of the suit. It made a decree in the plaintiff's favour for possession as tenant. On appeal by the defendants the lower appellate court held that the plaintiff had forfeited his right as tenant by denying his landlord's title, that the trees now existing in the grove were of spontaneous growth and were not planted by the plaintiff or his predecessors in title, and that he was not entitled to recover possession. The suit was accordingly dismissed.

The findings of the lower appellate court have not been questioned in the argument before us, but it is contended that as the court of first instance found that the plaintiff's suit had been instituted within six months of the date of his dispossession and this finding was not dissented from by the lower appellate court, the plaintiff was entitled to a decree under section 9 of the Specific Relief Act, although he failed to establish his title. In support of this contention we have been referred to the decision of this Court in *Ram Harakh Rai* v. *Sheodihal Joti* (1), which undoubtedly favours the contention. In that case it was held that "the fact that the plaintiff in addition to alleging and proving the facts which would entitle him to a decree under the first paragraph of section 9, claimed a title as mortgagee, would not disentitle him to a decree under the first paragraph of section 9." The learned Judges further observed :— "We see no reason why [180] a claim for damages and a claim for establishment of title may not be combined with a claim based on the first paragraph of section 9 of Act No. 1 of 1877". With great respect we are unable to agree with this view. Section 8 of the Act provides that a person entitled to the possession of specific immovable property may recover it in the manner prescribed by the Code of Civil Procedure, that is to say, by a suit for ejectment on the basis of title. Section 9 gives a summary remedy to a person who has without his consent been dispossessed of immoveable property otherwise than in due course of law, for recovery of possession without establishing title, provided that his suit is brought within six months of the date of dispossession. The second paragraph of the section provides that the person against whom a decree may be passed under the first paragraph may, notwithstanding such decree, sue to establish his title and to recover possession. The two sections give alternative remedies and are in our opinion mutually exclusive. If a suit is brought under section 9 for recovery of possession, no question of title can be raised or determined. The object of the section is clearly to discourage forcible dispossession and to enable the person dispossessed to recover possession by merely proving previous possession and wrongful dispossession without proving title, but that is not his only remedy. He may, if he so chooses, bring a suit for possession on the basis of his title. But we do not think that he can combine both remedies in the same suit and that he can get a decree for possession even if he fails to prove title. Such a combination would, to say the least of it, result in anomaly and inconvenience. In a suit under section 9 no question of title is to be determined, but that question may be tried in another suit instituted after the decree in that suit. If a claim for establishment of title can be combined with a claim under section 9, the court will have to grant a decree for possession on dispossession being proved, in spite of its finding that the plaintiff had no title and that title was in the defendant. It

(1) (1893) I. L. R. 15 All. 384.

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could not surely be the intention of the legislature that the question of title could be litigated in another suit which under the second paragraph of section 9 the defendant would have the right to bring. In the case relied on, the claim for establishment of the plaintiff's title and for damages was dismissed, but he was [181] granted a decree for possession. The defendant was entitled under section 9 to bring a suit for establishment of his title, and in such suit the decision in the former suit as to title would be conclusive between the parties. So that the defendant in the first suit had merely to file his plaint in order to entitle him to a decree. This would only lead to anomaly and would promote litigation. In our judgment, when a plaintiff sues for possession on the basis of title and fails to establish title he cannot be granted a decree for possession under the first paragraph of section 9 of the Specific Relief Act. Of course in some instances previous possession may afford evidence of title and where the defendant is a trespasser and the plaintiff was in continuous and peaceful possession he would be entitled to retain such possession. But where, as in this case, it is found that the plaintiff has no title and that the principal defendants are entitled to the property, the plaintiff cannot obtain a decree for possession. Our view is supported by the ruling of the Madras High Court in *Ramasami Chetti* v. *Paraman Chetti* (1), and is in consonance with the decisions of this Court in *Wajid Ali* v. *Rama Saran*(2) and *Chuthan Rai* v. *Sheo Ghulam Rai* (3), which do not appear to have been considered in *Ram Harak Rai* v. *Sheodihal Joti*, referred to above. The case last mentioned was, no doubt, followed by one of us sitting singly in *Mousi* v. *Kashi* (4), but this was done with reluctance. The point, however, did not arise in that case, as the plaintiff's adverse possession for more than twelve years was established. For the reasons stated above we are of opinion that when a plaintiff brings a suit for possession on the basis of title and fails to establish title, he cannot be granted a decree under the first paragraph of section 9 of the Specific Relief Act, and that the case of *Ram Harakh Rai* v. *Sheodihal Joti* was not rightly decided. This appeal fails and is dismissed with costs.

Appeal dismissed.

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33 A. 182 (=7 I. C. 497=7 A. L. J. 1025).

[182] FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr Justice Banerji and Mr Justice Karamat Husain.

HAMIRA BIBI (*Plaintiff*) *v.* ZUBAIDA BIBI AND OTHERS (*Defendants*).*

[11th August, 1910.]

Muhammadan Law—Dower—Interest—Liability of widow in possession to account for profits.

Held by the Full Bench that a Muhammadan widow, who has been put in possession by her husband of his estate in lieu of her dower debt, is entitled, when called upon by her husband's heirs other than herself, to account for rents and profits received by her during the time of her possession, to claim interest at a reasonable rate upon her dower debt.

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* First appeal No. 3 of 1907 from a decree of Achal Behari, Subordinate Judge of Gorakhpur, dated the 15th of September, 1906.

(1) (1901) I. L. R. 25 Mad. 448.
(2) Weekly Notes, 1884, p. 39.
(3) Weekly Notes, 1889, p. 89.
(4) Weekly Notes, 1897, p. 145.

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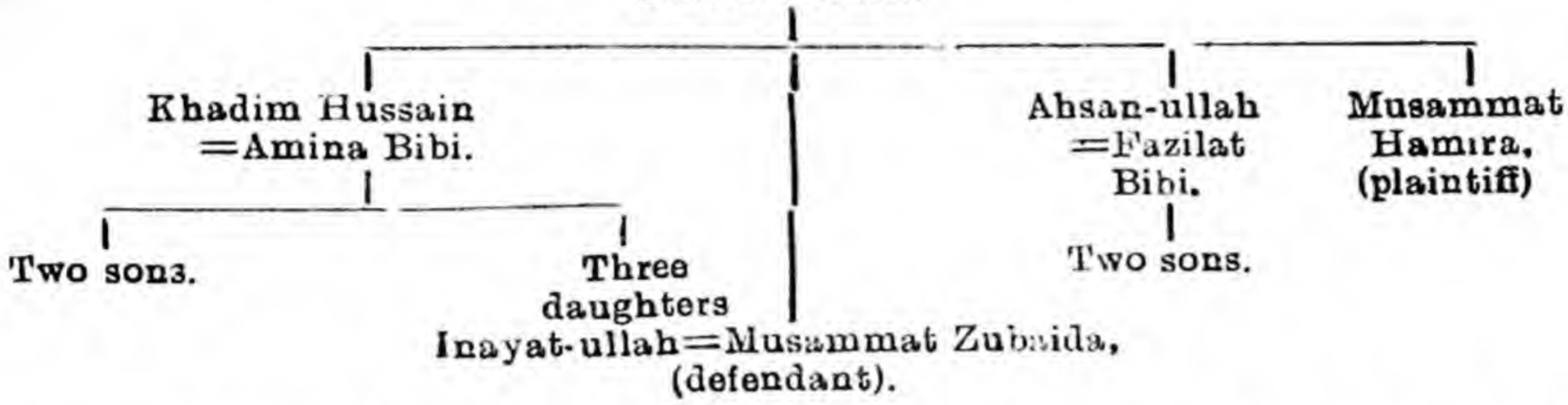
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The liability of the heirs of the husband not being personal, the heir who sues the widow for possession of his share is only liable to pay the proportionate part of the dower debt. *Abdul Karim* v. *Maqbulan* (1), *Soorma Khatoon* v. *Attoff oon-nissa Khatoon* (2), *Woomatool Fatima Begum* v. *Meer-un-nissa Khanum* (3), *Bakreedun* v. *Ammatul Fatima* (4) *Mia Khan* v. *Bibi Bibijan* (5) and *Chaudhri Wasi Ahmad* v. *Musammat Maina Bibi* (6) referred to.

[Ref : 53 I. C. 905=37 M L. J. 627 ; Rel : 73 I. C. 959=6 N. L. J. 161.]

THE facts of this case are as follows :—

The following pedigree will make the relation of the parties clear :—



The plaintiff Hamira Bibi in this case sued to recover her share in the inheritance of her brother Inayat-ullah. Zubaida Bibi was in possession and claimed to be so in lieu of her dower, which had been fixed at the time of the marriage, at the sum of a lakh of rupees. Hamira Bibi had brought a suit against Zubaida Bibi on 4th October, 1902, to recover her share of the inheritance of her brother's estate without asking for any accounts. Her suit was dismissed by the Subordinate [183] Judge on the ground that Zubaida Bibi was in possession in lieu of dower, and as the suit was one for possession without any mention of accounts as to the discharge of dower, it could not be maintained. This decision of the Subordinate Judge was upheld by the High Court on 12th August, 1905, but it was provided that the dismissal of the appeal was without any prejudice to the institution of any fresh suit which the plaintiff might bring on proper lines. Hamira Bibi then brought the present suit asking for accounts. She claimed to recover the property on the plea that during the 14 years of her possession Zubaida Bibi had realized her dower, but proposed herself willing to pay the difference, if any part of the dower money still remained unrealized. The Court below took accounts and granted the defendant interest on her dower money at the rate of 6 per cent. per annum. The plaintiff appealed.

The case was referred to a Full Bench in view of the conflict of authorities in this Court upon the question of the right of a Muhammadan widow to recover her dower with interest.

The Hon'ble Pandit *Sundar Lal* (with him Maulvi *Abdool Raoof*), for the appellant :—

No interest could be allowed under the Muhammadan Law. No Moslem was allowed to claim it. In the absence of a contract for interest it could only be claimed under section 37 of the Bengal Civil Courts Act (VII of 1887.) If that section did not apply, the Muhammadan Law applied. He referred to the Sacred Books of the East, Vol. VI. The

(1) (1908) I. L. R. 30 All. 315.
(2) (1873) 2 Hay, 210.
(3) (1868) 9 W. R. 318.
(4) (1905) 3 C. L. J. 541.
(5) (1870) 5 B. L. R. 500.
(6) F. A. No. 65 of 1904, decided 3rd July 1906.

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Koran, chap. 2, page 44, verse 275 ; chap. 3, page 62, verse 125. The Hidaya, at page 609. Even if there were a contract for interest it would be unlawful. The case relied on by the Court below *Mia Khan* v. *Bibi Bibijan* (1) had no reference to the present case. The Law of British India was the Muhammadan Law on the subject. *Sugra Bibi* v. *Masuma Bibi* (2). If a husband promised 100 gallons of wine as dower, the wife could not claim it under the Muhammadan law ; *Hadi Ali* v. *Akbar Ali* (3) *Ali Muhammad Khan* v. *Azizullah Khan* (4), [184] *Chuhi Bibi* v. *Shams-un-nissa Bibi* (5), *Ajuba Begum and another* v. *Nasir Ahmad* (6) and *Ramzan Ali Khan* v. *Asghari Begum* (7). The Muhammadan Law had been applied as a matter of fact either under one or another of the clauses of section 37 ; *Zamani Begum* v. *Mansur Shah* (8).

Mr. *W. Wallach* (with him Maulvi *Muhammad Ishaq*), for the respondents :—

As far as dower itself was concerned Muhammadan Law was not applicable ; a marriage could be valid without any dower. Hidaya, page 44. *Soorma Khatoon* v. *Attaff-oon-nissa Khatoon* (9), *Musammat Wahid-un-nissa* v. *Musammat Subrattan and others* (10). The transaction would be governed by the rules of justice, equity and good conscience. He referred to *Woomattool Fatima Begum* v. *Meer-un-nissa Khatoon* (11), *Mia Khan* v. *Bibi Bibijan* (12). The lady was an ordinary creditor, and as such she was entitled to interest ; *Chaudhri Wasi Ahmad* v. *Maina Bibi* (13).

The Hon'ble Pandit *Sundar Lal*, in reply :—

The object of dower was to prevent capricious divorce—we must apply to it the ordinary incidents of Muhammadan Law. *Musammat Bebee Bachun* v. *Sheikh Hamid Hossein* (14). If the lady held trees in dower she could not take the fruits of it except in reduction of the amount of dower. Marriage always involved dower. When none was fixed, the minimum amount, 10 dirhams, allowed by the Muhammadan Law, was supposed to have been settled. In the case in 9 W. R., the marriage had taken place in 1835 ; the wife was in possession and was alleged to be so under certain documents ; the suit was on the basis of the deeds being forgeries. So interest was allowed as she was held to be a trespasser. It is no authority for the proposition that a dower debt carries interest with it. The dower was already very excessive.

[185] KARAMAT HUSAIN, J.—The property in suit belonged to one Inayat-ul-lah, who died on the 10th of March, 1892. Zubaida Bibi is his widow. Her dower as found by this Court (see 43, Appellant's Evidence) was one lakh of rupees, and she was put into possession of the estate by her husband in lieu of her dower.

The suit out of which this appeal has arisen was brought by the plaintiff appellant for the recovery of her share (1 anna $\frac{2}{5}$ pies out of 16 annas) in the estate in the possession of Zubaida Bibi on the allegation that Zubaida Bibi had been in possession of the said estate for more than 14 (fourteen) years ; that her dower debt of one lakh of rupees had been satisfied out of

(1) (1870) 5 B. L. R. 500.
(2) (1877) I. L. R. 2 All. 573.
(3) (1898) I. L. R. 20 All. 262.
(4) (1883) I. L. R. 6 All. 50.
(5) (1894) I. L. R. 17 All. 19.
(6) Weekly Notes, 1890, p. 115.
(7) (1910) 7 A. L. J. 614.
(8) F. A No. 107 of 1893, decided on the 2nd of June, 1896.
(9) (1863) 2 Hay, 210.
(10) (1870) 14 W. R. 239.
(11) (1868) 9 W. R. 318,
(12) (1870) 5 B. L. R. 500, 506.
(13) F. A. No. 65 of 1904, decided on the 3rd of July, 1906.
(14) (1871) 14 M. I. A. 377.

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its usufruct; that she had realized a sum of Rs. 12,240-12-5 over and above her dower; and that the plaintiff was entitled to Rs. 918-2-0 out of the excess. The plaintiff expressed her willingness to pay a share of the dower debt proportionate to her share in the estate, in case it was found that the dower debt was still due to Zubaida Bibi.

The pleas raised in defence by Zubaida Bibi, which we have to consider in the appeal, were that she was entitled to interest at the rate of Rs. 0-8-0 per cent. per mensem on the entire dower debt amounting to one lakh of rupees and that the plaintiff was not entitled to recover her share of the estate by paying off a proportionate share of the dower debt, but that she must pay the entire dower debt.

The court below came to the conclusion that Zubaida Bibi was entitled to interest at the rate of 6 per cent. per annum on the whole dower debt, and that the plaintiff could not recover her share in the estate without paying it. On the above findings the court below dismissed the plaintiff's suit. That court in its judgement, dated the 15th of September, 1906, observed :—

"As the plaintiffs do not offer in terms to pay the whole dower debt due to defendant No. 1 (Zubaida Bibi) and they are not likely to pay a lakh of rupees to recover 4 annas of Inayat-ul-lah's property, I think the proper order to pass in the case would be to dismiss the suit."

Musammat Hamira Bibi appealed to this Court, and a Bench of this Court, in view of the conflict of the authorities in this Court upon the right of the widow of a Muhammadan to recover her dower together with interest, referred the case to the learned **[186]** Chief Justice in order that he might appoint a larger Bench. The case by the order of the learned Chief Justice came on for hearing before a Bench of three Judges.

Two points only were argued before us. The first is that a Muhammadan widow in the absence of a contract to the contrary has no right to claim interest on her dower. The second is that an heir of her husband may recover his share in the estate by paying a share of the dower proportionate to the share claimed.

In support of the first point, it is urged that the parties to the case are Hanafi Muhammadans; that the question whether the dower due to a Hanafi widow is or is not to carry interest is a question regarding marriage; that therefore under section 37 (1) of the Bengal, North-Western Provinces and Assam Civil Courts Act, 1887 (Act No. XII of 1887) the rule of the Hanafi School of the Muhammadan law must be the rule of decision, and that as soon as it is established that this case is to be governed by the Hanafi School of the Muhammadan Law, Zubaida Bibi cannot claim interest on her dower, for usury is strictly prohibited in Islam (1).

This argument has no force. The law of Islam as interpreted by the Hanafi Doctors, no doubt, strictly prohibits receiving interest as well as paying it, but the provisions of section 37 (1) of the Bengal North-Western Provinces and Assam Civil Courts Act, 1887, have no application. The question whether a dower debt is or is not to carry interest can by no stretch of language be deemed to be a question regarding marriage.

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(1) Those who devour usury shall not rise again save as he riseth whom Satan hath paralysed with a touch; and that is because they say selling is only like usury, but God has made selling lawful and usury unlawful, and he to whom the admonition from his Lord has come, if he desists, what has gone before is his (*); his matter is in God's hands. But whosoever returns (to usury) these are the fellows of the fire; and

(*) *i. e.* his former conduct shall be pardoned.

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[187] Another argument of the learned advocate for the appellant is that under section 37 (2) of the Bengal, North-Western Provinces and Assam Civil Courts Act, 1887, this Court acting according to justice, equity and good conscience should apply the Hanafi Law to the case just as it, acting according to justice, equity and good conscience, applies the Muhammadan Law of pre-emption and of gift to Muhammadans, and should hold that a dower debt due to a Hanafi wife carries no interest. This argument is also unsound and is based on a wrong notion as to the nature of dower debt and as to the scope of section 37 (2) of the Act. In *Abdul Karim* v. *Maqbul-un-nissa* (1) the learned Chief Justice quotes (at p. 318) the following passage from Mr. Ameer Ali (now the Right Hon'ble Syed Ameer Ali) with approval:—

"Dower is a debt, like all other liabilities of the husband, and has preference over legacies bequeathed by the testator and the right of the heirs. A partition of estate cannot take place until the dower debt has been satisfied when the wife is alive she can recover the debt herself from the estate of her husband. If she be dead her representatives stand in her place and are entitled to recover the same;" and goes on to say:—"Dower in fact, whether it be prompt or deferred, is a debt due from the husband to the wife."

In first appeal No. 65 of 1904 decided on the 3rd of July, 1906, it has also been expressly laid down that dower is a debt. Dower therefore cannot come within the purview of section 37 (2), which applies to such cases as are not provided for section 37 (1) or by any other law in force in British India; but the question whether a debt is or is not to carry interest is not a question which is not provided for the Municipal Law of British India.

The fact that dower debt owes its origin to a peculiarity of the Muhammadan Law of marriage and is not the result of advancing money, can be no reason to divest it of the characteristics of a debt and to put upon it the limitations imposed by the Hanafi School of the Muhammadan Law on usury.

Supposing that the case were to be governed by the dictates of justice, equity and good conscience, I would be the last person to deprive a Muhammadan widow of interest on her dower. [188] Taking into account the helpless condition of a Muhammadan wife and the fact that when she is put into possession of the immovable property of her husband in lieu of her dower that is more to the advantage of the husband and other members of the family than to the advantage of the wife, I deem it highly unjust and inequitable that a Muhammadan widow in possession of the immovable property of her husband should be liable to account for the profits arising out of the property and should not be entitled to a reasonable rate of interest on her dower. The suggestion that the motive which made the the law-giver of Islam sanction exorbitant dowers is not a pecuniary gain to a wife but simply a check upon the capricious exercise of the unfettered power of divorce which her husband has, and that therefore the argument that it is inequitable to allow interest upon dower has

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they shall dwell therein for aye. God shall blot out usury, but shall make almsgiving profitable, for God loves not any sinful misbeliever.

The *Quran* by Palmer p. 44. "O ye who believe, devour not usury doubly doubled, but fear God; perchance ye may be prosperous; fear the fire which is prepared for the unbelievers, and obey God and His Apostle; perchance he may get mercy." Palmer, Vol. VI, p. 62.

See also Hidayah by Grady, 289, *et seqq*, and the Muhammadan Law of Sale by Baillie where the law on usury is discussed.

(1) (1908) I. L. R. 30 All. 553.

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no force. There is nothing, in the first place, to show that the motive for sanctioning large amounts of dower is to check the unlimited power of a husband to divorce according to the Hanafis; it is a mark of the personal qualification and the social status of the wife and is spoken of in the Hidaya, p. 44, as a token of respect for its object (the woman).

In the second place, in dealing with the legal incidents of a dower debt one has to look to its nature from the stand point of jurisprudence and not to the motives of the law-giver which brought it into being.

In the third place, there is no connection between the fact that a large dower is a check upon divorce and the fact that dower should carry no interest.

In the fourth place, if the object of sanctioning large dowers be a check upon divorce, the rule that dower should carry interest would put an additional check and would further the end in view. Granting that dower is a debt, it follows that the legal incidents of it after it has come into existence are to be governed by the Municipal Law of British India and not by the Hanafi Law which prohibits usury. It is, however, urged that to some of the legal incidents of dower after its creation the Hanafi Law has been applied and that therfore it should be extended to the remaining legal incidents of it. As instances of [189] the application of the Hanafi law, the following cases are put forward :—

The rule that a Muhammadan widow who obtains possession of the immovable property of her husband without force or fraud can retain it until her dower is paid [see *Musummat Bibi Bachun* v. *Sheikh Hamid Hossein* (1), and the cases which follow it]. The rule that a Muhammadan widow is entitled to the whole of the dower which her husband on marriage agreed to give her irrespective of his pecuniary means [*Sugra Bibi* v. *Masuma Bibi* (2)]. The rule that where the marriage contract is silent as to whether the payment of the dower is to be prompt or deferred, the whole or a portion of it is presumed to be prompt. (See Wilson's *Anglo-Mahomedan Law*, p. 121, 3rd Edition.)

The above instances in my opinion are exceptions to the general rule and do not establish the proposition that all the legal incidents of dower, after it has become due, are to be governed by the Hanafi Law. I may observe, in passing, that the right of a Muhammadan widow to hold the property of her husband until her dower is paid is a rule of the Hanafi Law of debt and not the law of dower. The rule that a husband is bound to pay the dower he agreed to pay, no matter how excessive it be, is hardly an incident of dower debt.

The rule that in cases in which the marriage contract is silent on the point, the whole or a portion of the dower is presumed to be prompt is according to the original authorities regulated by the local custom and cannot strictly speaking be deemed to be an incident of dower debt.

Coming to the case law on the point, I find that the preponderance of authority is in favour of the rule that interest is chargeable on dower. The first case is that of *Soorma Khatoon* v. *Attaff-un-nissa Khatoon* (3). The suit was for dower and an objection as to the awarding of interest was taken. The learned Judges who decided the case observed : —" Now with regard to the objection regarding interest, this being a case simply for recovery of debt, the principles of Mahomedan Law have no bearing upon it." (See p. 211 of the Report.)

(1) (1871) 14 Moo. I. A. 377.
(2) (1877) I. L. R. 2 All. 573.
(3) (1863) 2 Hay's Reports, 210.

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[190] The second case is *Woomatool Fatima Begum* v. *Meer-un-nissa Khanum* (1). In this case it was contended that the widow in possession of the estate of her husband was liable to account for the profits of the land; while on behalf of the widow it was urged that she was entitled to interest on her dower, PEACOCK, C. J., observed :—

"The plaintiff does not ask to receive interest upon her dower, but she asks that she may not be compelled to account for the profits of the land during the time that she held it in lieu of her dower.

"If she had had a lakh of rupees paid to her when she first entered into possession of the land in 1845, she would not have been bound according to the tenets of the Mahomedan religion, to keep it in a box and take out of the box from time to time as much as she had occasion to spend, but she would have been allowed to invest her money in the purchase of land and to have lived upon the rents of her estate, even if she was prevented by her religion from lending her money at interest. If she would have been prevented from purchasing Government securties and receiving interest from Government instead of receving it from an individual, there were many other modes in such she might have invested the money if she had received her dower. It would have been a poor investment in this country if this lady could not have realised from her money at least 5 per cent. An investment which would have given her 5 per cent. for her capital would have yielded Rs. 5,000 a year; whereas taking the profits of the whole estate as six times the amount of the *wasilat* assessed upon the ⅙th of it, she received only Rs. 4,692 a year. If therefore she is to account for the profits of the land during the whole time that she held it in lieu of her dower, she will in fact, have received nothing instead of receiving the Rs. 5,000 a year, which she would have received from the investment of her money, if paid to her on her husband's death."

The third case is that of *Bakreedun* v. *Ammatul Fatima* (2). In this case it was contended that the widow was entitled to interest upon her dower and the learned Judges observed :—

"In the next place, J] is contended that the widow is entitled to charge interest upon her dower. The Subordinate Judge has disallowed into est, because it is forbidden by the Prophet. The question was discussed in the case of *Mia Khan* v. *Bibijan*, and it was held that for a considerable period of time past, the prohibition of Koran and of the Hedayah against the taking of interest has not been treated by the executive and by the persons charged with the administration of justice in this part of India as forming part of the active Municipal Law of the country, as moral precept it will no doubt always be influential with those who acknowledge its authority, but as a part of Municipal Law, if it ever had existence as such, it has long been obsolete. We are not aware of any case in this Court which has tended to shake the authority of that decision."

[191] The interest was, however, disallowed on the ground that it could not have been in the contemplation of the parties that interest would be chargeable on such excessive dower, (Rs. 41,003 and one gold Mohar).

The fourth case is that of *Mia Khan* v. *Bibi Bibijan* (3). This case is not an authority for the particular proposition that a widow is entitled to charge interest upon her dower, but it is an authority for the broader proposition that the Courts in British India do not refuse to decree interest to a Muhammadan on the ground that he is disentitled by Muhammadan Law to recover it. The rule laid down certainly covers the case of a widow if she claims interest upon her dower. As the passage bearing on this point is instructive and shows the attitude of the Courts in British India towards awarding interest to Muhammadan suitors, I quote it *in extenso* : —" The learned First Judge appears to be of opinion that, if the Act of 1855 be put upon one side, the law which the Civil Courts of this country are bound to administer between Muhammadan suitors " does not allow a Muhammadan to charge another Muhammadan any interest

(1) (1868) 9 W. R. C. R. 318.
(2) (1905) 3 C. L. J. 541.
(3) (1879) 5 B. L. R. 500.

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whatever." It seems to me that this view is erroneous. No doubt, the passage in the Hidaya to which the learned First Judge refers, and other passages in the Koran do, as they are commonly understood, forbid the taking of interest and certainly as far as I have the means of judging, I should suppose that a very considerable number of religiously inclined persons of the Muhammadan faith consider themselves bound to observe these precepts, and conscientiously keep themselves out of all transactions which appear to infringe them. But on the other hand, it is notorious that there are in India Muhammadan dealers in money, and traders of unquestionable respectability, and that it has been the practice among this class for a very long period to take interest even from their co-religionists in the way of their business. Mr. Harrington in his *Analysis* 1st Vol., page 182, after remarking that the Muhammadan Law forbids the taking of interest for the use of money upon loans from one Mussalman to another, and that the Hindu Law permits interest to be taken at prescribed rates only, goes on to say: "The Hindu legislators **[192]** have expressly sanctioned, and the Mussalman Government of India appear to have tolerated directly or indirectly, the customary interest of the country which, in the plan for the administration of justice proposed by the Committee of Circuit in 1772, is stated to have amounted to the most exorbitant usury. I cannot learn that our courts have, in any case which is of authority, refused to decree interest to a Muhammadan on the ground that he was disentitled by Muhammadan Law to recover it. On the whole it seems to me that, for a considerable period of time past, the prohibition of the *Koran* and the Hidaya against the taking of interest has not been treated by the executive and by the persons charged with the administration of justice in this part of India, as forming part of the active Municipal Law of the country. As a moral precept it will, no doubt, always be influential with those who acknowledge its authority, but I think that, as a part of the Municipal Law, if it ever had existence as such, it has long been obsolete."

The fifth case is an unreported ruling of this Court in *Chaudhri Wasi Ahmad* v. *Musammat Maina Bibi* (1) and is a direct authority for the proposition that interest is chargeable on a dower debt. The learned Chief Justice in his judgment observed:—

"It has been argued, and very strenuously argued, by Mr. Rahmat-ullah that according to the Muhammadan Law interest is not chargeable in respect of dower. We have been referred to a number of authorities but none of them bear out this proposition. On the contrary, it appears to be well setted law that dower is a debt ranking at least equally with other debts. That it is a debt there can be no doubt. Whether or not Musammat Maina Bibi was bound to account for the rents and profits during the time she was in possession is perhaps a question open to some doubt; but it appears to us to be clear that having been charged with the rents and profits she certainly is entitled to reasonable interest in respect of so much of her dower debt as remained undischarged by the rents and profits."

The above are the authorities in favour of the proposition that interest is chargeable on dower debt. There are two unreported rulings of this Court which are against it. The first is F. A. No. 204 of 1895, decided on the 23rd of July 1897. The learned judges who decided that case observed:—"The appellant put forth a claim to interest upon her dower. Such a claim we never **[193]** heard raised before. No authority, it was admitted, could be produced in support of it. We overrule it."

The second is F. A. No. 3 of 1881, decided on the 1st of January

(1) F. A. No. 65 of 1904, decided on the 3rd of July, 1906.

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1882. The learned Subordinate Judge of Gorakhpur in his judgment dated the 24th of September, 1880, in the case of *Sheikh Mujibullah* v. *Ummed Bibi* (No. 42 of 1880) said: — 'Under the Muhammadan Law the defendant is not entitled to get interest on the amount of dower" and the learned judges of this Court on appeal from the decree of the Subordinate Judge of Gorakhpur in the case already mentioned observed :—' In the case of Sheikh Mujib-ullah respondent, we find no force in the pleas impugning the principle on which account has been prepared in respect of allowance on account of commission and of interest. The appellant's pretensions in these respects are untenable.' "

In *Musammat Zamani Begam* v. *Syed Mansur Shah* (1) the question of dower debt was involved but no interest on it was claimed.

Considering the facts that dower is a debt ; that as a debt it is to be governed by the Municipal Law of British India and not by the Hanafi Law ; that it would be extremely inequitable to make a Muhammadan widow in possession of her husband's property in lieu of her dower liable to account for the profits of the property without giving her a right to claim interest upon her dower, and the rulings which are in favour of interest, I would without the least hesitation hold that a Muhammadan widow in possession of her husband's estate in lieu of her dower could claim interest on it, and that the Courts in British India should not refuse to grant her a decree for it on the ground that the Muhammadan law prohibits usury. As regards the plea that the plaintiff is entitled to recover her share of the estate of Inayat-ullah on payment of the part of the dower proportionate to the share in the estate would ordinarily be not a valid plea.

In the particular circumstances of this case we think it would be inequitable to direct the plaintiff to pay the full amount of the dower as the share which the defendant Musammat Zubaida Bibi inherited from her husband and which is in her possession is also liable for her dower. Further we have before us two [194] sets of heirs claiming their respective shares in the estate. Both sets of plaintiffs cannot be directed to pay the whole amount of dower, as that would have the effect of awarding to Zubaida Bibi double the amount of her dower. The liability of the heirs of the husband for the dower is not personal and the dower is recoverable from the assets left by the husband. It would therefore be inequitable to direct each set of plaintiffs to pay to the defendant more than a share of dower proportionate to their share in the estate. Besides the two sets of plaintiffs and the defendant Zubaida Bibi, there are no other claimants of the estate. It seems therefore reasonable to direct the plaintiff in this case to pay her share of the dower in order to enable her to recover her share of the inheritance. Similarly the plaintiffs in the other case will have to pay their share of the dower to get their share of the inheritance. If the plaintiff were ordered to pay the whole dower and to get the whole estate, other heirs of Inayat-ullah including Zubaida would have to sue her for their shares and this would lead to multiplicity of actions. This is undesirable. The plaintiff should therefore get a decree for her share in the property which has been found to belong to Inayat-ullah on condition that she do pay her share of the dower of one lakh of rupees found to be due to Zubaida Bibi.

STANLEY, C. J.—I am also of opinion that the main question raised in this appeal, namely, whether Musammat Zubaida Bibi, who was

(1) F. A. No. 107 of 1893, decided on the 2nd of June, 1896.

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put into possession by her husband of his estate in lieu of her dower debt, is entitled, when called upon by her husband's heirs other than herself, to account for the rents and profits received by her during the time of her possession, to claim interest at a reasonable rate upon her dower debt, must be answered in the affirmative. The plaintiff is one of the heirs of Inayat-ullah, the deceased husband of Zubaida Bibi, and she claims her share of the estate discharged of Zubaida Bibi's dower on the allegation that the dower debt has been satisfied out of the rents and profits. In the judgment which has just been delivered, my brother KARAMAT HUSAIN has dealt with the question at length and has quoted the authorities bearing on the subject. The weight of authority appears to me entirely [195] to support the view which he has taken, and I see no reason to disagree with him in the conclusion at which he has arrived.

As regards the form of the decree, it appears to me that the rights of the parties can be adjusted in two ways, either by a sale of the property and payment out of the proceeds of the sale of the dower debt, and by a division of the balance between the heirs according to their rights therein, or if the parties desire to retain the estate unsold, there being apparently no other debts of Inayat-ullah, to give their shares in the estate to Zubaida Bibi, Hamira Bibi and Amina Bibi and others, Hamira Bibi, and Amina Bibi and others first paying to Zubaida Bibi the rateable proportion of the dower debt proportionate to their shares respectively in the estate of Inayat-ullah. In the circumstances of the present case the last mentioned course appears to me to be equitable.

BANERJI, J.—I do not express any opinion on many of the various points discussed by my brother KARAMAT HUSAIN in the elaborate judgment just now delivered by him. The question whether interest can be allowed on the dower due to the widow of a deceased Muhammadan is not free from difficulty, but the weight of authority is in favour of the view that if the widow has been placed in possession of her husband's estate in lieu of her dower the Court has the discretion to award to her interest at a reasonable rate, and I am not prepared to dissent from this view. I agree in the order proposed.

BY THE COURT.—The order of the Court is that we allow the appeal, set aside the decree of the Court below and make a decree in favour of the plaintiff for possession of the share claimed by her save and except the property mentioned in list I annexed to the written statement of the defendant Zubaida Bibi conditional upon payment by her of Rs. 12,500 within six months from this date to Musammat Zubaida Bibi on account of her dower. If such payment be not made within the time mentioned above, her suit will stand dismissed with costs. In the event of her paying the said amount the parties will bear their own costs in both Courts.

Appeal allowed.

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7 I. C. 630=7
A. L. J. 1040.

33 A. 196 (=7 I. C. 680=7 A. L. J. 1040).

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Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox and Mr. Justice Chamier.

RETURAJI LUBAIN (*Plaintiff*) v. PAHLWAN BHAGAT *and others* (*Defendants*).*

[11th August, 1911.]

Pre-emption—Wajib-ul-arz—Custom or contract—Construction of document—Regulation VII of 1822.

In a suit for pre-emption, wajib-ul-arzes of 1839 and of 1869, were produced. The preamble to the former was worded thus :—"Having well understood the following matters we willingly accept them" It then dealt with the right of pre-emption in the following terms :—"Mode of sale or transfer of whole or part of share," giving the right of pre-emption to co-sharers as against strangers and concluded with the words :—"therefore we write this *iqrarnama* so that it may be of use in future." The wajib-ul-arz of 1869, provided that "near co-sharers and other pattidars would have the right of pre-emption. Preference amongst them would be according to degrees of nearness" :—

Held (STANLEY, C. J., dissenting), the wajib-ul-arzes contained the record of custom and not of contract.

Per STANLEY, C. J. :—A custom to be binding must be unaltered, uniform, constant and definite. If the settlement of 1833 recorded a custom, then the co-sharers in the village at the time of the later settlement of 1869 must be deemed to have abrogated it and to have adopted by agreement the right of pre-emption which is recorded in the later wajib-ul-arz as more suitable to the then existing conditions. The variance in the rights as defined in two wajib ul-arzes leads to the conclusion that the right recorded in 1869, cannot be treated as a right existing by custom.

Per KNOX and CHAMIER, JJ.:—The word *iqrar* does not necessarily mean a contract. It means "ratification" or "assent"

[Fol. 8 A. L. J. 947=11 I. C. 258 ; 12 I. C 739=8 A. L. J. 1135 ; 10 I. C. 323 ; Ref. 12 I. C. 179 ; 36 All. 471 ; 34 All. 542 ; Dist. 72 I. C. 491 ; Ref. 81 I. C. 10= 46 All. 627.]

The plaintiff appellant and one Babu Janki Prasad Singh, the vendor, were co-sharers in a village. The vendor sold a 5-anna 4 pie share to defendants 1 to 5 on 19th April 1907. The plaintiff brought this suit for pre-emption. She based her claim on a wajib-ul-arz of 1869, prepared at the settlement of 1859—69, and evidencing a custom of pre-emption in the village. The defendant vendees produced a wajib-ul-arz prepared at the settlement of 1834—42. The preamble to that wajib-ul-arz was as follows :—"We write this wajib-ul-arz in favour of the Government and having understood the following matters we willingly accept them." The heading of the clause relating to pre-emption [197] purported to deal with "the mode of sale and transfer of the whole or part of the shares of the shareholders." The clause itself provided that "whosoever from amongst ourselves wishes to transfer the whole or part of his share by sale or mortgage then it is incumbent on him that he should give information to the co-sharers of the village and sell or mortgage to him at the price settled. If any one without giving information to the shareholders of the village transfers his share to a stranger then it will be invalid." The last line of the wajib-ul-arz says:—"Therefore we write this *iqrarnama* so that it may be of use in case of need." The section relating

* Second Appeal No. 31 of 1909 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 14th of June, 1909, confirming a decree of Gokul Prasad, Subordinate Judge of Gorakhpur, dated the 5th of September, 1908.

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to pre-emption in the wajib-ul-arz of 1869, was headed thus :—" Pre-emption and transfer by gift and the disposal of property, &c." The clause lays down that " in case of extreme necessity every co-sharer has the right to transfer his share recorded in the *khewat*. Near co-sharers and other pattidars will have the right of pre-emption. Preference amongst them will be according to degrees of nearness." The Subordinate Judge of Gorakhpur dimissed the suit on the grounds, (1) that certain words used in the preamble of the wajib-ul-arz of 1833, showed that it was a record of contract and not of custom; (2) that the variations in the terms of the two wajib-ul-arzes showed that that of 1869 was a record of contract. The District Judge agreed with the view of the Subordinate Judge and dismissed the appeal. The plaintiff appealed.

Munshi *Iswar Saran*, for the appellant: —

The wajib-ul-arz of 1869 was a record of custom. The one for 1833 was modelled on lines laid down by the Board of Revenue with reference to section 9 of Regulation VII of 1822. The only interpretation was that the share holders agreed to what was put down there as well as to the customs obtaining at the time. The Circular Orders of the Board of Revenue for 1868 direct Settlement Officers to record only customs and usages in the wajib-ul-arzes. In the record of 1833 only a skeleton form was given, a detailed account was found in the wajib-ul-arz of 1869. Besides, a custom could have grown up between 1833 and 1869. It was not necessary that it should be immemorial, it had only to be notorious. He referred to *Baldeo Sahai* [198] v. *Nagai Ahir* (1), *Kuar Sen* v. *Mamman* (2), *Hub Lal Tewari* v. *Ganga Sahu* (3), *Bahal Rai* v. *Sukhdeo* (4), *Majidan Bibi* v. *Hayatan* (5), *Daryao Singh* v. *Jahan Singh* (6), *Parbhu* v. *Thakur* (7), *Gokal Dichhit* v. *Maheshri Dichhit* (8), *Lekhraj Bharti* v. *Anrudh Tiwari* (9).

Babu *Sital Prasad Ghosh*, for the respondents :—

Thomason's Directions to Settlement Officers, (1858) p. 106, mentioned the "agreement of the country regarding pre-emption of shares" to be recorded by officers. Section 9 of Regulation VII of 1822, did not prohibit the recording of agreements.

He referred to *Anant Singh* v. *Durga Singh*, (10) *Ram Prasad* v. *Mahadeo* (11), *Dharam Rai* v. *Tahal Rai* (12), *Baldei* v. *Wazir* (13), and *Muhammad* v. *Ilahi* (14).

Munshi Iswar Saran, in reply:—

The wajib-ul-arz of 1869 must have been prepared according to the Circular Orders of 1869, and could only be a record of custom. The burden of proving it to be a record of contract rested on the other side.

STANLEY, C. J.: - The question raised in this appeal lies in a narrow compass. The appeal arose out of a suit for pre-emption, and the sole question is whether or not the record of the right of pre-emption contained in a wajib-ul-arz of the village of Deoria in the district of Gorakhpur, prepared at the Settlement of 1869, is a record of a right

(1) Weekly Notes, 1907. p. 17.
(2) (1895) I. L. R. 17 All. 87.
(3) (1910) 7 A. L. J. 519.
(4) F. A. F. O. No. 13 of 1910, decided on 17th July, 1910.
(5) Weekly Notes, 1897, p. 8.
(6) (1909) I. L. R., 31 All. 539.
(7) S. A. No. 307 of 1907, decided on the 8th of May, 1908.
(8) Weekly Notes, 1905, p. 266.
(9) Weekly Notes, 1906, p. 80.
(10) (1910) 7 A. L. J. 704.
(11) S. A. No. 37 of 1909, decided on the 12th of August, 1909.
(12) L. P. A. No. 64 of 1905, decided on the 27th of April, 1906.
(13) S. A. No. 1220 of 1908, decided on the 2nd of January, 1910
(14) L. P. A. No. 61 of 1908, decided on the 1st of January, 1909.

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existing by custom or by contract. The plaintiff relies upon this wajib-ul-arz as establishing her claim, while the defendants rely also upon an earlier wajib-ul-arz of 183 and contend that reading the two wajib-ul-arzes together, the right must be regarded as one arising out of contract. This is the view which was taken by the two lower Courts. In consequence of a recent decision of [199] a Bench of this Court which is in conflict with earlier decisions, this appeal has been laid before a Full Bench.

The heading to the paragraph in the wajib-ul-arz of 1833 which deals with pre-emption is—" Mode of sale or transfer of whole or part of shares." The words " custom of pre-emption " are not used. The paragraph runs as follows :—

" If any of us wishes to transfer the whole or a part of his share by sale or mortgage, he should inform the co-sharers of the village and should mortgage or sell the same to him (sic) at a fixed price. If any one sells his share to a stranger without information to the co-sharers of the village the said transfer shall be invalid."

In the wajib-ul-arz of 1869 the right which is recorded is different. Paragraph 14 of that wajib-ul-arz in which the right of pre-emption is stated runs as follows :—" In case of extreme or urgent necessity every co-sharer has a right to transfer his share recorded in the *khewat*. Near co-sharers and other pattidars will have the right of pre-emption, preference amongst them will be according to degrees of nearness." The heading to the palagraph is " Pre-emption and transfer."

On behalf of the defendants respondents the contention is that the right recorded in this later wajib-ul-arz is at variance with the right previously existing ; and this being so, the right recorded in it must be deemed to be a right arising from the contract of the parties and as such came to an end at the termination of the settlement. On the part of the plaintiff it is contended that between the years 1833 and 1869 a custom of pre-emption may have slowly and gradually sprung into existence at variance with the right recorded in the wajib-ul-arz of 1833 and that this custom is the custom which is recorded in the later wajib-ul-arz In the course of the argument a suggestion was thrown out that the record contained in the wajib-ul arz of 1833 was only a skeleton form which omitted to give the details of the custom and that the details were supplied by the wajib-ul-arz of 1869.

As regards the first of these arguments, it appears to me that whatever the right was which is recorded in the earlier wajib-ul-arz that right must be deemed to be the right which continued to prevail during the existence of this settlement of 1833. There is no evidence before us to justify us in holding that any right of pre-emption grew into existence during this [200] period other than the one which is recorded in the wajib-ul-arz of 1833.

Then I come to what I may describe as the skeleton theory. It appears to me that the right recorded in the wajib-ul-arz of 1833 is very far from being a mere skeleton. It is definite, reasonable and complete; such a right as a co-parcenary body might naturally accept as ample protection against the incursion of stangers into the village. In the year 1833 there were only four co-sharers in the village and the object of pre-emption being to keep out stangers, this object would be attained by a provision that any share holder wishing to transfer his share should offer it first to his co-sharers before he offered it for sale to a stranger ; that there should be grades of pre-emptors where there are only four sharers, that is three entitled to pre-empt, appears to me to approach the absurd. The right recorded in the wajib-ul-arz of 1869 is a modification of the right

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previously recorded. According to it a share-holder wishing to sell his share must offer it first to near co-sharers, then to other co-sharers, before he could sell to a stranger. A custom to be binding must be unaltered uniform, constant and definite. If the settlement of 1833 recorded a custom, then it appears to me that the co-sharers in the village at the time of the later settlement of 1879 must be deemed to have abrogated it and to have adopted by agreement the right of pre-emption which is recorded in the later wajib-ul-arz as more suitable to the then existing conditions of the village. There are ten signatories to the wajib-ul-arz of 1869 and in the preamble to the wajib-ul-arz is the statement on their part:—"We write out the following conditions and shall act up to them." It seems to me highly probable that at the time of the settlements the co-sharers agreed among themselves as to the nature of the right of pre-emption which they desired to have recorded and communicated their wishes to the settlement Officer or some subordinate official charged with the duty of collecting information for the preparation of the settlement and consequently we have different rights recorded in the two settlements. The variance in the rights as defined in the two wajib-ul-arzes leads me to the conclusion that the right recorded in 1869 cannot be treated as a right existing [201] by custom. This view is consonant with a number of unreported decisions of this Court It was urged in the course of the arguments that only rights existing by custom are recorded in wajib-ul-arzes, but this does not appear to me to have been the case. It is common experience that agreements of the co-parcenary body as well as customs are constantly recorded in wajib-ul-arzes. We should be closing our eyes to realities if we failed to recognise this. We find that in Thomason's Directions to Settlement Officers of the year 1858, Settlement Officers were enjoined to record "an agreement of the community as regards the pre-emption of shares." As to this Regulation VII of 1822 may also be relied on (see section 9).

Many cases have come before the Courts in which the sole question was whether the record of a right of pre-emption in a wajib-ul-arz was a record of a custom or a contract. This question occupied the full Bench which determined the case of *Ishri Singh* v. *Ganga* (1) and also the attention of a Full Bench in *Dalganjan Singh* v. *Ka ka Singh* (2).

In addition to the wajib-ul-arz of 1869 the plaintiff relied upon a decree in a pre-emption suit. No reliance was placed upon this decree in the arguments before us. It was passed in January, 1888. If at this date the settlement of 1869 was in existence, this decree would be a colourless piece of evidence as during the settlement of 1869 a right of pre-emption did exist either by contract or by custom.

I would dismiss the appeal.

KNOX, J.—Musammat Returaji Dubain instituted a suit in the Court of the Subordinate Judge at Gorakhpur, in which she sought to enforce a right of pre-emption in respect of a 5-anna 4 pie share in mahal Deoria, pargana Salempur, which a certain Janki Prasad Singh, share-holder in the same mahal, sold on the 19th of April, 1907, to Pahalwan Bhagat and certain other Bhagats, residents of mahal Bairona, hereinafter styled in this judgement as "the Bhagats." She arrayed as defendants the Bhagats vendees and Babu Janki Prasad Singh the vendor. She based her right upon a custom of pre-emption which is described in the plaint as having of old been current in mahal Deoria. [202] This custom, she

(1) (1880) I. L. R. 2 All. 877.

(2) (1899) I. L. R. 22 All. 1.

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describes in the plaint thus : —" When a share is to be transferred, the co-sharers in the mahal have a preferential right to purchse it as against strangers."

It is common ground to both parties that the plaintiff is a share-holder in mahal Deoria, and that the defendants Bhagats are strangers. In support of her claim she filed and proved : —

(1) A copy of a decree in case No. 302 of 1887, decided on the 25th of January, 1888, by the Munsif of Deoria.

(2) A copy of an extract from a wajib-ul-arz of 1869.

" The Bhagats" defended the suit. No defence appears to have been filed by Babu Janki Prasad Singh. In the written statement filed by " the Bhagats " they set out that the custom of pre-emption is not current in the village. They raised certain other pleas, but we are not concerned with those in this appeal. In support of their written statement " the Bhagats " filed one solitary document, a copy of an extract of the wajib-ul-arz of 1833 prepared under Regulation VII of 1822, and bearing date 29th June, 1839. When filing it, they stated that they filed it to show that the wajib-ul arz of 1839 was in the form of a contract. (See paper No. 20, file C.)*

The learned Subordinate Judge framed no less than five issues, but he disposed of the case upon the first of the five issues and held that the custom of pre-emption did not exist in the village. The reason for this finding is thus given : —" The language used in the wajib-ul-arz of 1833 clearly showed that the right of pre-emption recorded in it was founded on contract and not on custom." He arrives at this finding because —

(1) The right recorded in the wajib-ul-arz of 1833 must have continued for the term of the settlement and consequently the entry in the wajib-ul-arz of 1869 could not be regarded as a record of custom. In support of this view he cites an unreported ruling of this Court — *Babu Jhinku Singh* v. *Chutkaro* (1).

(2) The language of the wajib-ul-arz of 1833 differs from the lanuauge used in the wajib-ul-arz of 1869. [See *Ram Nandan* v. *Ram Narain* (2)]. He dismissed the decree that had been [203] filed with the remark that this solitary instance was not sufficient to establish the alleged custom.

The District Judge before whom the plaintiff carried her case in appeal, agreed with the Subordinate Judge that the language used in the wajib-ul-arz of 1833 was the language of a contract. He allows that if the wajib-ul arz of 1869 stood alone, it would be construed as a record of custom, but for two reasons he holds that it cannot be anything but a contract ; and the two reasons for his holding this view are the same reasons which are given by the learned Subordinate Judge.

The plaintiff then brought her appeal to this Court. In consequence of the decision of this Court in *Hub Lal Tewari* v. *Ganga Sahu* (3) the appeal has been placed before a Bench of three Judges, and the question which we have to consider is whether the plaintiff has or has not proved the existence of a custom of pre-emption in mahal Deoria, pargana Salempur. The question raised is a question of no small importance, and, so far as I am concerned, I feel that it cannot be dismissed by simple reference to the fact that the language contained in one wajib-ul-arz

* Throughout this judgment the record of rights prepared under the settlement of 1833 and dated the 9th June, 1839, is styled " the wajib- ul-arz of 1833."

(1) S. A. No. 124 of 1907.
(2) S. A. No. 97 of 1907.
(3) (1910) 7 A. L. J. 519.

differs from the language contained in another wajib-ul-arz appertaining to the same mahal.

In the present case neither of the Courts below have really looked into the merits of the case put before them. They have decided the question as to whether the custom of pre-emption does or does not exist in mahal Deoria, (1) upon the strength of certain words contained in the wajib-ul-arz of 1833, which, it appears to me, they have misunderstood, and (2) by applying, as though it had the force of a touchstone, the question: "Is the language contained in the two wajib-ul-arzes alike or different?" The learned District Judge appears to have had some searchings of heart about the matter in his mind, for he writes that had the wajib-ul-arz of 1869 stood alone, he would have construed it as evidence of custom.

I propose first to deal with the criticism addressed by the Courts below to the language of the wajib-ul-arz of 1833.

In the first place the learned Subordinate Judge, although he appears to quote the *ipsissima verba* of the wajib-ul-arz, does not [204] reproduce them accurately. The opening words of the wajib-ul-arz of 1833 run as follows:—

We, Ajudhia Dube, Beni Madho Dube, Lal Behari Dube, and Kura Mal Dube, birt-holders of mauza Deoria, tappa Bairona, pargana Salempur, Majhauli, do declare as follows:—

"The aforesaid village, which is our ancestral "birt" has been settled with us, as such, under Regulation IX of 1833, and the regulations (*muratiba*) relating to the settlement have been settled. Therefore, we execute this wajib-ul-arz (village administration paper) before the sarkar and having fully understood it, accept the following regulations as binding upon us."

The concluding words are:—" For this reason we have written this *iqrarnama* (deed of ratification) that it may be of use at the proper time." There is nothing in the preamble which corresponds to the words used by the learned Subordinate Judge " agreed to be bound by them," and I altogether differ from him in the translation which he gives to the word *iqrarnama*. It appears to me to have been too easily taken for granted in some cases that the word *iqrar* contains in it of necessity any idea of contracting, and that an *iqrarnama* of necessity contains any idea of a deed recording a contract. I have consulted various dictionaries, the well-known Qamus of Freytag, Richardson's Dictionary and others, and in none of them is the meaning "agreement" given as one of the first meanings of the word *iqrar*. My view of the word *iqrar*, and I claim it is amply borne out by those authorities, who are entitled to great weight, is that it stands for "ratification," "profession." A very common use of the word in our Courts is where it stands in the oath addressed to a witness and again in the confession made by an accused person of some wrong done by him. The witness does not contract with Almighty God but he professes before Almighty God that he intends to tell the truth, etc. The accused person does not contract with anyone, but he ratifies, professes, or acknowledges that he has done something. In this connection it is interesting to note that in the translation authorized by Government of the Contract Act of 1872, the word contract is never connoted by the word (*iqrar*); this word is not to be found in any part of the Act. If we get rid of this mistaken idea of the meaning of the word *iqrar* and read the [205] extract of

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the wajib-ul-arz of 1869 naturally, it runs, so far as the question of pre-emption is concerned, thus :—

10. "Method of sale and transfer of the whole or part of a share of shareholders.—Whoever amongst us wishes to transfer by means of sale or mortgage the whole or a portion of his share, it is incumbent (*lazim*) on him that he give notice to his co-sharers in the village and sell or mortage to him (*sic*) at the price fixed and if any one without notice to the co-sharers of the village transfer his share to a stranger the transaction will not be lawful," and the ratifying clause ends thus :—

"Therefore we have written this ratification in order that it may be useful when the time comes."

I have consulted the wajib-ul-arz of 1833 in the original and I see nothing whatever in the language of it from first to last to justify the inference that it is a record of contract. As there is nothing in the language of the wajib-ul-arz of 1833 from which we must necessarily infer that it is a record of contract it is well to look at the case as it stands between the parties. The plaintiff comes into Court upon a custom, the existence of which she claims to prove by an extract from the wajib-ul-arz of 1869, and by a decree recognising that in the year 1888, according to the fact stated in the wajib-ul-arz for 1869 the custom did exist in mahal Deoria. There is nothing in the language of the wajib-ul-arz of 1869 which would militate against the idea that it records a contract, and it is corroborated by the decree. Against this evidence, which would be sufficient to establish the custom if it stood alone, *cf*, *Majidan Bibi* v. *Sheikh Hyatan* (1), the Bhagats put forward an extract from the wajib-ul-arz of 1833. Is this extract any longer of any value as evidence to contradict and rebut the evidence contained in the wajib-ul-arz of 1869? In answer to this I hold, first, that there is nothing in the language of the wajib-ul-arz of 1833 which points to the right therein recorded being a right based upon contract. It follows therefore, that the first of the reasons given by the Courts below for their finding falls to the ground.

The second reason given by them opens up a more difficult question and requires some consideration both of the origin of [206] the customs of pre-emption in Hindu villages (mahal Deoria is a village of which all the co-sharers have been for a long time past and are still Hindus) and of the sanction which the law confers upon records relating to pre-emption contained in a wajib-ul-arz prepared under the authority contained in Regulation VII of 1822.

From the copies of the wajib-ul-arz filed in this case and from copies of the wajib-ul-arzes which have been before this Court there is *prima facie* evidence that a usage or custom did prevail in some of the villages of pargana Salempur, whereby a co-sharer intending to effect a transfer had to give notice of the intended transfer to his co-sharers and to sell to them in preference to a stranger at the price fixed upon for transfer.

In 1822 the Government in Regulation VII of 1822 expressed it as their wish and intention that in revising the existing settlement of Gorakhpur, the efforts of the revenue officers should chiefly be directed to any general and extensive enhancement of the juma, but to the object of equalizing the public burdens and of ascertaining, settling and recording the rights, interests, privileges and properties of all persons and classes owning, occupying, managing or cultivating the land, &c. They desired also that the proceedings held and the records formed by the Collectors, when

(1) Weekly Notes, 1897. p. 3.

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making settlement or otherwise specially employed in conducting inquiries of the above nature, should be such as that all demands, claims and suits may be adjudged and determined according to the facts therein stated until the same shall have been formally altered or it shall be shown by the result of a full investigation in a regular suit that the proceeding or record of the Collector was erroneous or incomplete. In order to carry out their wish and desire they enacted (section 9) that it shall be the duty of Collectors and other officers exercising the powers of Collectors ' on the occasion of making or revising settlements of the land revenue, to unite with the adjustment of the assessment and the investigation of the extent and produce of the land the object of ascertaining and recording the fullest possible information in regard to landed tenures, &c. For this purpose their proceedings were to embrace the formation of as accurate a record as possible of all local usages connected with [207] land tenures, &c. In prosecuting these inquiries, Collectors were given the power of summoning witnesses and examining them on oath. If any doubt exists as to the exact meaning of these words and as to whether they embraced the inquiry into and judicial decision by Collectors on such questions as to the existence of a usage or custom of pre-emption that doubt is resolved by a reference to the famous Circular no. 1, which the Board of Revenue issued on the 9th April, 1839, and the appendix No. XIII, in which a sample is given as to how a right of pre-emption should be entered in the wajib-ul-arz. (Four Circular Orders of the Sadar Board of Revenue, Allahabad, 1839 to 1841, reprinted Calcutta, 1861 see pages 55 and 96.)

The intention of the Regulation was that the inquiry into these entries should be such that all suits may be adjudged and determined according to the facts therein stated until it should be shown that the proceeding or record of the Collector was erroneous or incomplete.

There is nothing in Regulation VII of 1822 which authorized Collectors to record contracts regarding landed tenures. It is only right to infer in the absence of proof to the contrary that they recorded only local usages, *i. e.*, such usages as had the sanction of custom.

As has been seen above, provision was made for correction of incomplete entries or of any errors that might exist. The first settlement conducted under Regulation VII of 1822 in Gorakhpur came to an end just before 1857.

Preparations for the next settlement, also conducted under Regulation VII of 1822, so far as pargana Salempur was concerned, were reopened in 1859-60, and mahal Deoria, as the wajib-ul-arz shows, was settled in 1869.

Just before this date the Board of Revenue had issued their Circular no. 24 of 1868, dated the 9th of December, 1868. This Circular had special reference to the formation of the record of rights. The attention of Settlement Officers was recalled to the Directions to Settlement Officers, which call the attention of Settlement Officers to the fact that (*i*) the formation of the record of rights is a judicial act (p. 21), (*ii*) the object of his investigation is not to create new rights, but to define those that exist (p. 46), [208] (*iii*) that completeness of record can only be insured by great vigilance on his part. The villagers are themselves reluctant to lay open to public scrutiny the internal economy of their village. They are distrustful, and slow to appreciate the motives which lead to the inquiry. The strong, the crafty, and the dishonest wish to avoid a proceeding which will

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tie their hands, and close every door against future encroachment and intrigue. Again the process is a laborious one, which the persons employed in the formation of the record are apt to slur over. Each peculiarity of the tenure probably has to be elicited by repeated questions, and the expressions to be very carefully adjusted so as exactly to meet the case (p. 70) and (*iv*) that the record of rights is not to answer a temporary end, or to exhibit, as in the case of assessment, to the satisfaction of superiors, that a certain operation has been judiciously performed. The record is to be permanent, it is to be as it were the charter of rights, to which all persons, having an interest in the land, or seeking to acquire such interest, are to appeal. It is to be the common book of reference to all officers of Government in their transactions with the people—to the Collector, to the Magistrate, and above all to the Judge (p. 74).

That in the second chapter should be recorded under paragraph 14 the custom relating to pre-emption. They dwell upon the extreme importance to the people of a carefully prepared record of rights and upon the necessity of the Settlement Officer confining himself in the wajib-ul-arz to a record of the usages and customs which they find to be actually in existence.

Lastly, they direct that the greatest care should always be paid to the attestation of the khewat and wajib-ul-arz. The presence of all parties interested should be secured, and the papers carefully read over and explained to them, when possible, by an English officer. Each record of rights should bear at the foot a note by the attesting officer showing the date and place of attestation, and the names of the parties present. This should be signed in full by the attesting officer.

Such was the law and such were the instructions under which this wajib-ul-arz was prepared. It was attested on the 30th of September, 1869 and the attesting officer has signed the attestation. [209] The officer was Rai Baldeo Bakhsh, a Deputy Collector of eleven years' standing.

I have gone through this *wajib-ul-arz* in the original, and I can find in it none of those fancy entries which are said to exist in certain *wajib-ul-arzes*. It is divided into four chapters. The first chapter is headed "Chapter I, an account and description of the mahal and of possession therein." Chapter II is headed "*Haquq baqimanda bahami hissadaran*" —the rights which remain in existence among the share-holders,—and in the 14th paragraph of this chapter, just where we would expect to find it, comes the entry :—

"10. *Mode of sale and transfer of the whole or part of the share of the co-sharers.* If any one of us wishes to transfer the whole or part of his share by sale or mortgage, he is bound to give information to his co-sharers in the village and sell or mortgage to him for the price fixed. If any one transfers his share to a stranger without giving information to the co-sharers in the village, the transfer shall be invalid."

The ratification clause runs as follows :—"The persons whose signatures are given below in a separate *rubkar* of to-day's date acknowledge the accuracy of all the paragraphs of the *waj b ul-arz* pattidari."

Following the well-known rule *Omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium*—I hold that we have to presume regarding this entry—

(1) that the officer who framed the record of 1869 was properly appointed and duly authorized so to act,

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(II) that in the formation of this record of rights he held a judicial inquiry on the spot regarding the various matters co ntained therein,

(III) that in the absence of proof to the contrary credit should be given to him for having acted with honesty and discretion within the limits of his authority,

(IV) that wherein his record differs from the record of 1833, he made complete what he decided was incomplete and corrected what he found to be incorrect in his predecessor's record,

(V) that facts without proof of which the finding as to the custom of pre-emption could not have been found and recorded [210] were proved at the inquiry. See *Rex* v. *Nottingham Old Water Works Coy.* (1).

My attention has now been called to various rulings in which this Court has held that variation between the language contained in two wajib-ul-arzes drawn up under Regulation VII of 1822 is inconsistent with the existence of a custom. One such ruling is *Ram Prasad Misir* v. *Babu Mahadeo Misir* (2). The attention of Mr. Justice TUDBALL who decided this case was not apparently drawn to the force given by Regulation VII of 1822 to records made under that Regulation. He even allows that the agreement before him may have been possibly an agreement to abide by old existing customs, but the documents do not show this. May not the answer to this be that the documents were drawn up under the Regulation and there was no necessity to show that they recorded old customs as still existing?

It is now time to turn to the record of the case and see what, viewed from the above standpoint, is the exact position of the contending parties. It seems to me that we are not concerned with the question how the right arose. This suit has so far as this question is concerned, to be adjudged and determined upon evidence which bears the stamp and impress of being a careful and honest record of a custom of pre-emption. The opposite side might have produced evidence to show that the record was carelessly or dishonestly prepared or that the custom recorded has fallen into desuetude and no longer exists. Nothing of the kind has been shown. They merely produce an extract from the wajib-ul-arz of 1833, in other words they produce the presumably incomplete or incorrect record in answer to the presumably complete and correct record. I would decree this appeal, reverse the decree of the court below, and return the appeal, through the District Judge, to the court below, *i.e.* Subordinate Judge, with a direction that it be re-admitted on the file of pending suits and disposed of according to law.

CHAMIER, J.—This appeal arises out of a suit brought by the appellant for pre-emption of a share in a village on the basis of [211] custom. The appellant relied, in proof of the custom, upon a decree obtained by another person in 1888 for pre-emption of a share in the village and upon the wajib-ul-arz of the village prepared at the settlement of 1859-1869. The respondents, the purchasers of the share in suit, who are complete strangers to the village, denied the custom and produced an extract from the wajib-ul-arz prepared at the settlement of 1834-1842. In this and many other cases the earlier settlement has been referred to as the settlement of 1833, but it appears that that settlement did not begin till 1834. The wajib-ul-arz of the earlier settlement produced in the present case was completed, if not prepared altogether, in 1839. The opening clause

(1) (1837) A. and E. 735.

(2) S. A. No. 37 of 1909, decided on the 12th of August, 1909.

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of it contains the following words :—"The settlement has been made according to Regulation IX of 1833, therefore we write this wajib-ul-arz of our own free-will and having fully understood it, we accept the matters stated below as binding upon us" (*maratib zail khushi se apne upar manzur karte hain*). The heading of the clause relating to pre-emption is "Mode of sale and transfer of the whole or part of the share-holders," and the clause itself runs as follows :—Whoever amongst us wishes to transfer his share in whole or in part by sale or mortgage is bound to inform his co-sharers and to sell or mortgage to him (*sic*), at the price fixed. If any one transfers his share to a stranger without informing his co-sharers, the transfer will not be valid." The concluding words are, "therefore we have written this *iqrarnama* that it may be of use at the proper time." Paragraph 14 of the wajib-ul-arz of the latter settlement, which is in the chapter relating to "the remaining rights of the co-sharers," is headed "Pre-emption and transfer by gift and the disposal of property in charity, &c.," and the relevant portion runs as follows :—"In case of urgent necessity every co-sharer has the right to transfer his share recorded in the *khewat* ; near co-sharers and other pattidars will have the right to pre-empt, the nearer being preferred to the more remote—*tarjih ba lihaz madarij qarib*. The courts below have dismissed the suit. The lower appellate court has held that the earlier wajib-ul-arz recorded a contract for, not a custom of, pre-emption ; that as pre-emption depended upon contract, not custom, between 1833 and 1869 (he assumed [212] that the earlier wajib-ul-arz was prepared in 1833) there cannot have been a custom of pre-emption in 1869, and that if the earlier wajib-ul-arz was a record of custom there were differences between the customs recorded in the two wajib-ul-arzes and therefore that custom was uncertain and could not be enforced.

This appeal has been referred to a Full Bench in consequence of the many conflicting views which have been expressed regarding the proper method of construing the wajib-ul-arzes prepared at the settlements of the Gorakhpur district made in 1834-1842 and 1859-1869. The learned vakil for the respondents contended that a number of recent decisions of this Court have established a *cursus curiæ* which we ought not to disturb. Decisions resting upon the construction of documents couched in different language cannot ordinarily be said to conflict with each other, but there has, I think, been a real conflict of judicial opinion in the pre-emption cases from the Gorakhpur district, notwithstanding that the language of the different wajib-ul-arzes produced has not been the same in all cases. The cases which I have been able to find fall into five distinct classes, namely, (I) those in which the wajib-ul-arz of the later settlement has been accepted as sufficient evidence of the custom therein set out on the ground that the custom may have sprung up since the wajib-ul-arz of the earlier settlement was prepared, e. g., *Gokul Ditchhit* v. *Maheshri Ditchhit* (1) and *Parbhu Nath* v. *Thakur* (2); (II) cases in which the differences between the clauses relating to pre-emption in the earlier and later wajib-ul-arzes have been disregarded or held to be unimportant and the later wajib-ul-arz has been accepted as a correct record of the custom; (III) cases in which it has been held that no valid custom has been proved either, (*a*) because the earlier wajib-ul-arz was a record of a contract, as shown by the use of the words *iqrar* or *iqrarnama* or other similar words, which were held to indicate that the persons who signed

(1) Weekly Notes, 1905, p. 26.

(2) S. A. 807 of 1907.

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33 A. 196 = 7 I. C. 680 = 7 A. L. J. 1040.

the wajib-ul-arzes had "agreed " to what was entered in it, or (*b*) because there was a difference between the earlier and later wajib-ul-arzes, e. g., *Phallu Ram* v. *Sheo* [213] *Harak* (1), *Dhuram* v. *Tahal* (2), *Ahilakh* v. *Bhawani Din* (3), *Shiam Lal* v. *Jadunandan* (4), *Mahabal Rai* v. *Ram Bhabut* (5), *Muhammad Khan* v. *Ilahi Bakhsh* (6), *Ram Prasad* v *Mahadeo Prasad* (7); *Baldeo* v. *Wazir Khan* (8) and *Manraj* v. *Nasirullah* (9); (IV) cases in which the court has held that the earlier wajib-ul-arz was like the later wajib-ul-arz, the record of a custom, notwithstanding the use of words indicating assent or agreement, and that the earlier wajib-ul-arz recorded the custom in brief and general terms, while the later one set it out in greater detail and there was no real conflict between the two, e.g. *Hab Lal* v. *Ganga Sahai* (10) and *Bahal Rai* v. *Sukhdeo Prasad* (11), and (V) cases in which one or both of the wajib-ul-arzes differed largely from those generally met with in the district and there were special reasons for deciding for or against the custom set up which do not exist in the present case. In all the cases of the first four classes which I have seen the court had before it an extract from the wajib-ul-arz of the settlement of 1834-1842 and an extract from the wajib-ul-arz of the settlement of 1859-1863. The former gave the right of pre-emption to co-sharers without more, and the latter provided for two or more grades of pre-emptors, the right being given as a rule first to near co-sharers, next to co-sharers in the same thok or patti and lastly to other co-sharers in the village. The reason given for the decision in any of the cases in the third class are applicable to all of them notwithstanding the difference in the language of the wajib-ul-arzes with which the court had to deal, and it is upon decisions in cases of this class, of which there have been many lately, that the learned vakil for the respondents relied as establishing a *cursus curiæ* which should not be disturbed. It appears to me that the views expressed in them must sooner or later put an end to suits for pre-emption on the basis of custom entered in the wajib-ul-arz not only in the Gorakhpur district but in other districts also. In fact decisions in cases of this class have already been applied to cases from the Meerut and Aligarh [214] districts and probably to others also. It is a significant fact that learned Judges when dealing with pre-emption cases from the Gorakhpur district have almost invariably referred to decisions in other cases, though insisting that each case must be decided with reference to the particular wajib-ul-arzes before the court. The truth is that there are two questions which arise in all these cases, namely, the effect to be given to words indicating that the *malguzars* have assented to a wajib ul-arz or that they are bound by it and the importance to be attached to differences of a well defined nature between the wajib-ul-arzes of the two settlements.

It seems to me that in construing a wajib-ul-arz one must have regard to the document as a whole and bear in mind the law and instructions, if any, under which, and the circumstances in which the document was prepared. The present District Judge of Gorakhpur has in more than one case complained of the difficulty of construing short extracts from wajib-ul-arzes. In the present case the complete wajib-ul-arzes of both settlements are before us. The wajib-ul-arz of the settlement which was

(1) S. A. 810 of 1903.
(2) L. P. A. 64 of 1905.
(3) S. A. 582 of 1907.
(4) S. A. 533 of 1907.
(5) S. A. 385 of 1908.
(6) L. P. A. 61 of 1908.
(7) S. A. 37 of 1909.
(8) S. A. 1220 of 1908.
(9) S. A. 711 of 1909.
(10) (1907) 7 A. L. J. 517.
(11) F. A. f. O. 13 of 1910.

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made between 1834 and 1842 was prepared in accordance with paragraph 9 of Regulation VII of 1822, which I may note was not touched by the later Regulation of 1833 mentioned in the wajib-ul-arz so far as our present purpose is concerned. The Regulation of 1822 imposed upon Settlement Officers the duty of "uniting with the adjustment of the assessment ....the object of ascertaining and recording the fullest possible information with regard to landed tenures and the rights, interests and privileges of the various classes of the agricultural community," and their proceedings were to "embrace the formation of as accurate a record as possible of all local usages connected with landed tenures" and the information collected was to be so arranged and recorded as to admit of immediate reference thereafter by courts of judicature. In the case of *Lekraj Koer* v. *Mahpal Singh* (1) their lordships of the Privy Council held that a custom relating to the mode of inheritance was a usage of the kind which the Regulation required the Settlement Officer to ascertain and record, and there can be no doubt that a custom of [215] pre-emption was also such a usage. Executive instructions were issued by the Board of Revenue from time to time. The instructions in force at the date of the preparation of the wajib-ul-arz of the earlier settlement in the present case, and they are the earliest instructions which I have been able to find, are contained in the Board's Circular of 1839, which laid down that one of the records of the settlement file was to be the engagement (*iqrarnama*) entered into by the malguzars and co-parceners. This engagement was to show the amount of Jama agreed to and to be a general record of liabilities, privileges and interests attaching to each member of the community. Among other matters, it was to show the division of the jama among the members of the community, the mode of collecting village expenses, remunerating chaukidars, and patwaris, the selection of lambardars, and generally all other municipal arrangements made at the settlement, and the document was to be signed by the parties affected thereby in token of their assent to it. The Board disclaimed any desire to bind Settlement Officers to adopt any particular form, but they gave a sample form in the appendix and they said that the engagement need not be drawn out to an unreasonable length so as to exhibit in detail all the information collected. The sample form is very brief. It is described as an *iqrarnama* and one clause in it runs as follows :—" If any co-sharer desires to sell or pledge his share and all the co-sharers refuse to take it he is at liberty to sell or pledge it to an outsider." It would appear from this that the revenue authorities intended that the custom of pre-emption should be recorded in brief and general terms. Neither the regulation nor the circular says a word about contracts for pre-emption. On the other hand, it is notorious that a custom of pre-emption was very common. It will be observed that the clause relating to pre-emption in the village now in question gives the sense of the form given in the circular, and that in none of the cases from the Gorakhpur district cited during the arguments, does the extract from the wajib-ul-arz of the earlier settlement which was put in evidence go beyond the sample form given by the Board in 1839, though it does not appear whether all the wajib-ul-arzes were prepared after the issue of that circular or not. In every case the record was brief. [216] In all of them without exception the right to pre-empt is given to co-sharers without more and no provision is made for competition between

(1) (1879) I. L. R. 5 Cal. 744.

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co-sharers. The wajib-ul-arz of 1869 also was prepared in pursuance of Regulation VII of 1822, but in the meantime the Board of Revenue had issued fresh instructions as to the compilation of settlement files. At the time when the wajib-ul-arz of 1869 was prepared, the instructions in force were contained in the Board's Circular No. 24 of 1868. In paragraph 9 of it they say that the wajib-ul-arz should be a record of the customs and usages prevalent in the estate. In paragraph 17 they say that it is not their intention to prescribe a form of wajib-ul-arz which is to be undeviatingly followed by all Settlement Officers, but they wish to impress on all officers the extreme importance of a carefully prepared record and the necessity of their confining themselves in the wajib-ul-arz to a record of the usages and customs which they find to be actually in existence. In conclusion they say that the greatest care should be paid to the attestation of the khewat and wajib-ul-arz. The presence of all parties was to be secured and the papers carefully read over and explained to them. These instructions show very clearly that Settlement Officers were enjoined to record customs, not contracts, in matters like pre-emption and that much more detailed information was required in 1868 than in 1839. Attached to the circular of 1868 was a skeleton form of wajib-ul-arz paragraph 14 of which is headed. "The custom relating to pre-emption" and provides for several grades of pre-emptors. The history of the preparation of these wajib-ul-arzes shows that there is a strong presumption that what is entered in them regarding pre-emption is the record of a custom. We have all of us seen wajib-ul-arzes which contain provisions which ought not to be in them. In some, no doubt, language may be found which shows clearly an attempt to create a right of pre-emption. In others there is an obvious contract between the co-parceners for a right of pre-emption. But where the contrary is not shown, a provision in a wajib-ul-arz relating to pre-emption should be presumed to be the record of a custom, and this rule has been affirmed repeatedly by this Court. In all the cases from the Gorakhpur district in which the wajib-ul-arz of the earlier settlement has been held **[217]** to be evidence of a contract for pre-emption the preamble or opening clause or the last clause has contained some such words as "*ham iqrar karte hain,*" "*ham paband rahenge*" or "*ham kurband rahenge.*" In the present case the words are "*ham maratib zail khushi se apne upar manzur karte hain.*" In the form given in the Board's Circular the words are a good deal stronger; they are "*batashim sharait zail iqrar karte hain,*" yet it is certain that the Board never intended that a contract of pre-emption should be recorded. The word *iqrar* does not necessarily mean contract. In the sample forms it means no more than declared assent. Within certain limits the exact form of words used in the opening or attestation clause is immaterial. The form was prepared by officials and the words *iqrar*, *manzur* and so forth were intended to show that the malguzars admitted that the record which they were signing was correct and binding upon them. It appears to me that to hold that words in a wajib-ul-arz indicating assent or acknowledgment by the malguzars are sufficient to show that the malguzars entered into a contract with each other regarding pre-emption is to disregard the whole history of the preparation of wajib-ul-arzes.

Starting with the presumption that the intention was to record an existing custom I consider that words like *iqrar karte hain*, or *manzur karte hain*, or *paband rahenge* or the like are entirely insufficient by themselves to rebut that presumption. It would have been a difficult matter

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to get the malguzars all over the district to agree to the creation of a new right, but easy to get them to assent to the record of a notorious and existing custom. As AIKMAN, J., observed in the case of *Baldeo Sahai* v. *Nagai Ahir* (1), malguzars could agree to observe an existing custom as well as enter into a new contract.

The earlier wajib-ul-arz in the present case was signed by only four persons, but this does not appear to be sufficient reason for holding that it is a contract, not a custom, which is recorded. The construction which has been placed in many cases upon wajib-ul-arzes of the earlier settlement is due, I suspect, in no small degree to the fact that the whole wajib-ul-arz was not before the Court. Having carefully considered the language of **[218]** the wajib-ul-arz of the earlier settlement produced in the present case, I have been unable to find anything in it which indicates that it was intended to be the record of a contract for pre-emption.

It must, however, be admitted that the custom is not recorded in the same language in both wajib-ul-arzes, and the question is whether it should on this account be held that the custom is not certain. According to the decision of their Lordships in *Lekhraj Kuar* v. *Mahpal Singh* (2), the earlier wajib-ul-arz having been prepared in pursuance of Regulation VII of 1822 must be presumed to be correct so far as it goes, and the same presumption attaches to the later wajib-ul-arz. If the case rested here, I should have been disposed to hold that the later wajib-ul-arz should prevail having been prepared at a settlement made by way of revision of the previous settlement. One of the avowed objects of the later settlements was to correct errors and make good deficiencies in the old record. The whole settlement record of 1839 is brief compared with that of 1869. The Board's instructions in 1839 positively discouraged the recording of elaborate details. But further it appear to me that there is not necessarily any contradiction between the two wajib-ul-arzes with which we are concerned in the present case. The earlier gives the right of pre-emption to co-sharers as also does the later. It is incontestable that if the earlier wajib-ul-arz were the only record of the custom the appellant might prove by oral evidence that in case of competition between co-sharers, the nearer co-sharer was entitled to pre-empt. In fact it is always open to a person to supplement a wajib-ul-arz by oral evidence, and where large interests are at stake this is commonly done. Why then should not the appellant in the present case be entitled to supplement the earlier wajib-ul-arz by the later and presumably more correct one? I entirely agree with what my brother KNOX said in the case of *Hub Lal* v. *Ganga Sahu* (3) with reference to similar wajib-ul-arzes. The earlier one records the custom in brief and general terms. The later one goes more into details. It is more complete, and this is exactly what one would **[219]** expect." The words in the later wajib-ul-arz "in case of urgent necessity" may be disregarded. They have no bearing upon the question of pre-emption. It is notorious that the records of the earliest settlements were often found to be unsatisfactory and incomplete. Hence the necessity for the more elaborate records that were prepared afterwards.

In my opinion the reasons given by the Courts below, for holding that the earlier wajib-ul-arz was the record of a contract and that the custom set up by the appellant has not been proved by the wajib-ul-arzes are insufficient. I would allow this appeal, set aside the decree of the lower

(1) Weekly Notes, 1907, p. 17.
(2) (1879) I. L. R. 5 Cal. 774.
(3) (1910) 7 A. L. J. 519.

appellate court and remand the case through that court to the first Court to be disposed of according to law.

BY THE COURT :—The order of the Court is that the decrees of the lower courts be set aside, and inasmuch as the suit was dismissed by both the lower court on a preliminary point and we have reversed their decisions upon this point, we remand the suit to the Court of first instance, through the lower appellate court, under the provisions of order 41, rule 23, of the Code of Civil Procedure, with directions to re-admit it under its original number in the file of pending suits and dispose of it according to law. Costs here and hitherto will abide the event.

Appeal decreed. Cause remanded.

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33 A. 219 (=8 I. C. 783=7 A. L. J. 1146).

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Tudball.

JAGAT NARAIN AND ANOTHER (*Defendants*) *v.* SRI KISHAN DAS (*Plaintiff*).*

[25th October, 1910.]

Act No. IX of 1872 (*Indian Contract Act*), *section* 30—*Contract collateral to a wagering contract not unenforceable.*

Where an agent has incurred losses on behalf of his principal he is not disentitled to recover as against the principal by reason of the contract in respect of which such losses were incurred being a wagering contract, *Shibho Mal* v. *Lachman Das* (1) followed. *Thacker* v. *Hardy* (2) referred to.

[Fol. 36 All. 426; 73 I. C. 477=45 All. 503.]

[220] THE plaintiff in this case conducted certain transactions as agent for the defendants for the sale and purchase of silver bars. These transactions resulting in a loss to the defendants, they drew certain hundis in the plaintiff's favour. The plaintiff sued on the hundis so drawn, and the main question raised in the suit was whether the consideration for them was or was not the losses incurred in the transactions above referred to, and if so, whether the amounts were recoverable, if, as was alleged, these transactions were of the nature of wagering contracts, no actual delivery of silver ever having been intended. The court of first instance (Munsif of Cawnpore) dismissed the suit. The lower appellate court (District Judge) decreed it. The defendants appealed.

Dr. *Tej Bahadur Sapru*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Dr. *Satish Chandra Banerjee*, for the respondent.

At the first hearing the following order referring an issue to the lower appellate court was passed by RICHARDS and TUDBALL, JJ.:—

"The learned Judge has decided in the plaintiff's favour, assuming that the hundis were given for money due to the plaintiff's by the maker of the hundis on a wagering transaction. He has arrived at the conclusion that the plaintiff carried on business in three different places, on the ground that the accounts of business transacted at these different places were separately kept. In our opinion the decision based on this presumption cannot possibly be supported. If the consideration for the hundis were

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* Second Appeal No. 769 of 1909 from a decree of Austin Kendall, District Judge of Cawnpore, dated the 10th of May 1909, reversing a decree of Mohan Lal Hakku, Subordinate Judge of Cawnpore, dated the 10th March 1909.

(1) (1901) I. L. R. 23 All. 165. (2) (1878) L. R. 4 Q. B. D. 685.

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illegal, having regard to the provisions of section 30 of the Indian Contract Act, the plaintiff is not entitled to recover, notwithstanding that he carried on business in different places under different names. The learned Judge has refrained from recording a finding as to whether or not the consideration for the hundis was illegal. We must accordingly refer the following issue for trial to the lower appellate court;—

"Was the consideration for the hundis sued on illegal, having regard to the provisions of section 30 of the Indian Contract Act.

"On return of the finding ten days will be allowed for filing objections."

The court below found that the hundis were executed by the defendants for money lost by the plaintiff, as their agents, on wagering contracts and on the appeal again coming on for hearing the following judgment was delivered:—

RICHARDS and TUDBALL, JJ.—This appeal came before us on the 3rd of May 1910. The suit was one on foot of certain hundis. The defence was that the hundis were given for the [221] value of certain goods which the plaintiff failed to deliver, and that there had been certain wagering contracts between the plaintiff and the defendants, and that the plaintiff wrongfully applied the hundis to the satisfaction, not of the price of the goods which had been purchased, but to the settlement of the wagering account. The court of first instance decided in favour of the defendants on the ground that the hundis represented a wagering contract. The lower appellate court, in the first instance refrained from going into the question as to whether or not the hundis were given in settlement of a wagering contract, and decided the case on the ground that the different branches of the plaintiff's firm in different cities were separate entities, and that even if the contracts were wagering contracts, they were not wagering contracts entered into with the Cawnpore branch of the plaintiff's business. We accordingly referred an issue to ascertain what was the real consideration for the hundis, and whether it was illegal having regard to the provisions of section 30 of the Indian Contract Act. The finding on this issue has now been returned, and the court has found that the hundis represent the amount due by the defendants to the plaintiff on accounts settled between them as principal and agent, in other words, that even assuming that the transactions were gambling transactions in the sense that it never was intended that actual delivery of goods should be made, nevertheless the wagering contract was not between the plaintiff or the other branches of his firm and the defendants, but that the silver bars were purchased and sold by the plaintiff from or to third parties as agent for the defendants. An objection has been filed to this finding on various grounds; but it has not been suggested that there was no evidence on which the court was entitled to come to the finding at which it arrived. It has been argued that this finding was a new case which was not put forward at any time by either of the parties, at least until the issue was referred. We find, however, that in the third ground of appeal to the lower appellate court the plaintiff, in effect, took this very ground, namely, that even if the transactions were in their nature gambling transactions because the delivery of the goods was not contemplated, nevertheless, the plaintiff was the agent [222] of the defendants and was entitled to recover the loss he had sustained. We think that the finding on the issue is binding upon us, and that being so, we are bound by the authority of the case of *Shibho Mal* v. *Lachman Das* (1). In that case it was expressly held that an agent who has paid wagering losses for his principal is entitled to recover. The

(1) (1901) I. L. R. 23 All. 165.

learned Judges decided on the authority of the case *Thacker* v. *Hardy* (1). This last mentioned authority was decided when the law in England in respect of gambling transactions was practically identical with the present law in this country as provided by section 30 of the Indian Contract Act. The result is that the appeal must be dismissed with costs.

Appeal dismissed.

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33 A. 219=8 I. C. 783=7 A. L. J. 1146.

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33 A. 222 (=8 I. C. 785=7 A. L. J. 1149).

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

TOTA RAM (*Applicant*) *v.* RAM CHARAN (*Opposite party*).*

[27th October, 1910.]

Act No. VIII of 1890 (*Guardians and Wards Act*), *section* 17—*Guardian and ward—Considerations by which a court should be guided in the selection of a guardian.*

In considering the appointment of a guardian for a minor the proper test is the welfare of the minor. Where the applicant was a distant relation of the husband of a childless widow of some 12 or 13 years of age, who was living happily with her father, it was *held* that the father of the minor widow was her proper guardian. *Khudiram Mookerjee* v. *Bonwari Lal Roy* (2) referred to.

[**Ref.** 1911 M. W. N. 561=22 M. L. J. 63; 26 I. C. 300; 18 C. W. N. 1198=23 I. C. 112.]

THIS was an application by one Tota Ram asking that the applicant might be appointed guardian of the widow of one Joti Prasad, a child some 12 or 13 years of age. The applicant was a distant relative of the deceased Joti Prasad. The widow, Musammat Reoti, was living under the care of her father Ram Charan. The court (District Judge of Aligarh) rejected the application and appointed Ram Charan as guardian of the minor. The applicant appealed to the High Court.

Babu *Benoy Kumar Mukerji*, for the applicant.

Dr. *Tej Bahadur Sapru*, for the opposite party.

KNOX and KARAMAT HUSAIN, JJ.—The District Judge of Aligarh had before him an application made by Tota Ram, admittedly a very distant relative of one Joti Prasad deceased. [223] The application was to be appointed as guardian of the person and property of the widow of the deceased Joti Prasad. The said widow, Musammat Reoti, is a girl of only 12 or 13 years of age. She has been up to this time apparently in the custody of her father. Under these circumstances the court below considered it only expedient that she should remain under that custody and not under the custody of this admittedly very distant relative. On behalf of Tota Ram, who has appealed from the order of the District Judge refusing his application and appointing the father Ram Charan as guardian, our attention is called to the case of *Khudiram Mookerjee* v. *Bonwari Lal Roy* (2). In that case the learned Judges held that—under the text of Narada cited in the Dayabhaga, to the effect that when the husband is deceased, his kin are the guardians of his childless widow—if no other reason is made out against the husband's kin, preference should be given to them over

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* First Appeal No. 24 of 1910 from an order of D. R. Lyle, District Judge of Aligarh, dated the 11th December, 1909.

(1) (1878) L. R. 4 Q. B. D. 685.

(2) (1889) I. L. R. 16 Cal. 584.

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33 A. 222=8 I. C. 785=7 A. L. J. 1149.

the widow's paternal relations when a certificate of administration is required. No text has been cited to us from the Mitakshara or the Mitakshara school of law, but in a matter of this kind the real test which a court has to apply is the test laid down in section 17 of Act VIII of 1890. The point the courts have to consider is what will be for the welfare of the minor. We think it by no means for the welfare of the minior that a girl of twelve or thirteen should be relegated to the guardianship of a distant relative when she has already at her own door a guardian and is living happily under the guardianship of her own father. The court below has exercised a very proper discretion in the matter. We are not prepared to interfere with the order of the court below and dismiss the appeal with costs.

Appeal dismissed.

33 A. 224 (=8 I. C. 1095=7 A. L. J. 1184).

[224] APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

RAM LAKHAN RAI AND ANOTHER (*Defendants*) *v.* GAJADHAR RAI AND OTHERS (*Plaintiffs*).*

[28th October, 1910.]

Act No. XV of 1877 (*Indian Limitation Act*), *schedule ii, articles* 137, 142 144—*Adverse possession*—"*Defendant*"—*Successive but independent trespassers.*

Plaintiffs purchased certain property at an execution sale on the 20th November 1891, the property being at the time of purchase in the possession of trespassers, and formal possession was given to them on the 25th November 1892. In 1897 other persons, also trespassers, obtained possession of the property, against and not through the persons oringinally in possession. In 1908 the plaintiffs sued the second set of trespassers for possession, *Held* that article 144 of the second schedule to the Indian Limitation Act, 1877, applied and the suit was not time barred. *Ram Prosad, Janna* v. *Lakhi Narain Pradhan* (1) followed.

[Ref. 35 All. 432.]

THIS was an appeal under section 10 of the Letters Patent from a judgment of TUDBALL, J. The material facts appear from the judgment under appeal, which was as follows:—

"The facts of the case out of which this appeal arises are, so far as they are material for the disposal of the appeal, as follows:—Two brothers, Phenku and Sumeran, were separate owners each of a two annas share in a village. One Ram Sahai was the ancestor of the present plaintiffs. Phenku, Sumeran and Ram Sahai jointly brought a suit against certain defendants, which they lost in the year 1883, and costs were awarded to the defendant against them. Some-time between 1883 and 1887, both Phenku and Sumeran died. The former's estate was inherited by his sons. Sumeran left a daughter's son to succeed him. The latter, however, did not get possession of his estate, on the contrary the sons of Phenku, without any title, took possession of it, and in the year 1887 mortgaged it to one Subbe Rai. The defendants in the suit of 1883 executed their decree for costs as against Ram Sahai, the sons of Phenku and heirs of Sumeran. In 1891, the whole four annas (*i.e.*, the shares of both Phenku and Sumeran) was attached and sold and purchased by the present plaintiffs. The latter was put into formal possession on 25th November 1892. On an application for mutation of names, the Revenue Court ordered his name to be recorded subject to the mortgage of Subbe Rai. The latter's mortgage was one with possession. In 1894, that is, after their rights had been attached and sold in execution of the decree for costs, the heirs of Sumeran brought a suit against the heirs of Phenku and

* Appeal No. 29 of 1910 under section 10 of the Letters Patent.

(1) (1885) I. L. R. 12 Cal. 187.

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the mortgagee Subbe Rai to recover the two-anna share of Sumeran and after some litigation finally obtained a decree from this Court in their favour in 1897. In execution of that decree they obtained possession as against the heirs of Phenku and Subbe Rai. The present suit was brought by the plaintiffs against the heirs of Sumeran to recover [225] possession of this two anna share. It is brought some 16 years after the date on which formal possession was awarded to the plaintiffs as auction-purchasers, but within twelve years of the date on which the heirs of Sumeran obtained possession as against the sons of Phenku and their mortgagee, but considerably more than 16 years after the date on which the sons of Phenku took possession of their share adversely to the heirs of Sumeran. Among other defences to the suit, the plea of limitation was raised. Both the lower Courts have acceded to this plea, and holding that the plaintiffs have failed to prove possession within the period of twelve years (a possession which they actually alleged) have dismissed the suit. On appeal to this Court it is urged that the article applicable to the present suit, on the findings of fact by the lower Court is article 144 of the second Schedule of the Limitation Act. On behalf of the respondents it is urged that either article 137 or article 142 applies, and in either case the suit is barred by limitation. Article 137 relates to a suit by a purchaser at a sale in execution of a decree, when the judgment-debtor is out of possession at the date of the sale: and the period of limitation begins to run from the date when the judgment-debtor is first entitled to possession. The situation in the present case amounts to this, that while trespassers were in possession of the judgment-debtor's property that property was attached and sold in execution of the decree. If the auction-purchaser had then brought a suit to recover possession from the trespasser, it is quite clear that this article would apply. But the present suit is not directed against the trespasser. It is directed against the original judgment-debtor, who has subsequently to the sale ejected the trespasser and taken possession of the property himself. As against the present plaintiff, the judgment-debtor is equally a trespasser with the person who has been ejected by the judgment-debtor. Article 137, in my opinion, was not intended to apply to a suit such as is now before me, but to a suit directed against a third party other than the judgment-debtor. If this were not so, and the article applied to the circumstances of the present case, it would be tantamount to allowing the later of two trespassers to add to the period of his hostile possession, the period of possession of a former trespasser from whom he has not derived title in any way. In the case of *Ram Prosad Jamna* v. *Lakhi Narain Pradhan* (1), the facts were very similar to those of the present case. A vendor who was at the time out of possession of certain immoveable property, sold a portion of it, and after the date of sale the vendor recovered possession. The purchaser within twelve years after the vendor had recovered possession, but more than twelve years after the vendor had been orginally dispossessed instituted a suit to obtain possession of the property covered by the sale deed. It was held that article 136 (the article applicable to cases of private sales) did not apply, but that the case fell within the purview of article 144. Similarly in the case reported in I. L. R. 15 Bom. 26, a Bench of the Bombay High Court held that articles 136 and 137 applied to suits brought by purchasers against third persons in possession of lands, in whose favour limitation runs against the purchaser, in the same way as it would against the owner with whose rights the purchaser is clothed. The only decision of this Court to which my attention has been called is that to be found in I. L [226] R 2 All. 718. That decision, however, does not help me in the slightest, in the present case. It seems to me that the language in column 3 of schedule II against articles 136 and 137 is only intelligible in the view that I take. As regards article 142, it is urged that formal delivery of possession granted to the present plaintiffs on 25th November, 1892, is possession within the meaning of that article, as has been held in this Court and also by the Calcutta High Court. Formal delivery of possession as against a judgment-debtor in possession would, no doubt, constitute such possession as is contemplated by this article, but as against a third person, it is of no value whatsoever. At the date when formal delivery of possession was given to the present plaintiff, the judgment-debtors, who were then owners of the property in dispute, were not in possession. The mortgagee, Subbe Rai, a trespasser, was in possession, and as against him the plaintiff cannot be said to have obtained possession. The case of *Narain Das* v. *Lalta Prasad* (2) laid down that whatever might be the effect of the delivery of formal possession under section 319 of the Code of Civil Procedure as against the judgment-debtor himself, such formal delivery of possession will not take effect as actual possession as against a purchaser of the rights of the judgment-debtor who has previously obtained actual possession. In the present case there was no purchaser, but a trespasser who had obtained possession before the auction sale. In my opinion the formal delivery of possession of the 25th November, 1892, was not

(1) (1885) I. L. R. 12 Cal. 197.

(2) (1893) I. L. R. 21 All. 269.

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possession within the meaning of article 142. That article applies to a suit for possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession. The only article which can therefore apply is article 144 as was applied by the Calcutta High Court in the case of *Ram Prosad Jamna* mentioned above. In this view the period of limitation began to run when the possession of the defendants first became adverse to the plaintiffs. The adverse possession of the defendants clearly commenced when they recovered possession under their decree, against the heirs of Phenku and the mortgagee Subba Rai. They cannot add to that period the period during which the sons of Phenku held adversely to themselves. Their possessory title cannot be said to have been derived in any way whatever from the sons of Phenku, and therefore the two periods of adverse possession cannot be added together, so as to bar the present suit. It seems to me quite clear that it was not until the present defendants wrested the possession from the sons of Phenku, that any possession adverse to the present plaintiffs could have been arisen in them. It is true that the present plaintiffs in the plaint say that they had been in possession within twelve years, but the facts have been found against them. On the facts found, article 144 clearly applies and the present suit is within time. I therefore admit the appeal and set aside the decree of the Courts below. As the suit was dismissed on a preliminary point by the Court of first instance, and there are other issues to be decided between the parties. I remand the case through the lower Appellate Court to the Court of first instance for decision on the merits. Costs here and hitherto will abide the result.

[227] Munshi *Govind Prasad*, for the appellants, submitted that the burden of proving that they had a subsisting title on the date of suit lay on the plaintiffs. They had obtained formal possession in 1892, but the suit for possession was brought more than twelve years after that date. The suit was governed by article 137, Act XV of 1877, schedule II, and was barred by limitation. He relied on *Sheoprasad* v. *Udai Singh* (1). *Mazhar Husain* v. *Behari Singh* (2) and *Parmanand* v. *Saheb Ali* (3).

Babu *Sital Prosad Ghose*, for the respondents, submitted that as the plaintiffs did not claim through the person who was in possession in 1892, they could not tack their possession on to that of the preceding trespasser. The defendants entered into possession in 1897 when the plaintiffs had a subsisting title, and the defendants had not since acquired a title by prescription. The suit having been brought within 12 years of 1897, was not barred.

STANLEY, C. J., and BANERJI, J.—The facts of this case are fully set forth in the judgment of the learned Judge of this Court from whose decisions this appeal under the Letters Patent has been preferred, and it is unnecessary to recapitulate them. The plaintiffs acquired the property claimed by them under an auction purchase which took place on the 20th of November, 1891. Formal possession was delivered to their predecessors in title on the 25th of November, 1892. At that time Sumeran, whose rights the plaintiffs' father, Ram Sahai, purchased at auction, was dead and his legal representatives were out of possession. A trespasser, namely, the mortgagee from the sons of Phenku Rai, was actually in possession. It was in 1897 that the present defendants appellants obtained actual possession of the property by virtue of a decree which they obtained in a suit to which the plaintiffs, or their predecessor in title, was no party. It is contended that the claim comes within the purview of article 137 of the second schedule to the Limitation Act of 1877. We agree with our learned colleague that that article only applies to a suit against a third party and not to a suit against the judgment-debtor or his representative. This is manifest [228] from the language of the third column of the schedule as pointed out by our learned brother. We are also of opinion that article

(1) (1880) I. L. R. 2 All. 718.
(2) (1906) I. L. R. 28 All. 760.
(3) (1889) I. L. R. 11 All. 438.

142 is inapplicable. The plaintiffs were never in actual possession and were not dispossessed. The only article therefore of the Limitation Act which can apply is article 144, and the period of limitation is 12 years from the date on which the defendant's possession became adverse to the plaintiffs. The word " defendant " by its very definition includes a person from or through whom the defendant derives his liability to be sued. Therefore the adverse possession of the defendant, referred to in the article, necessarily means the adverse possession of the defendant himself or of any person from or through whom he derives his possession. In the present case the defendant did not derive his possession from or through the sons of Phenku or their mortgagee. Therefore the defendants are not entitled to add to their own possession the period of the possession of the first set of trespassers. In the year 1897 when the defendants actually obtained possession, the plaintiffs had a subsisting title to the property, more than 12 years not having elapsed from the date of their auction purchase. It is from the date on which the defendants obtained delivery of possession in execution of the decree obtained by them that their possession can be regarded as adverse, and, as such possession commenced only in 1897, they have not been in possession for a period sufficiently long to extinguish the plaintiff's rights. The claim is therefore not time-barred, and the decision of the learned Judge of this Court is correct. We dismiss the appeal with costs.

Appeal dismissed.

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33 A. 224=8 I. C. 1095=7 A. L. J. 1185.

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33 A. 229=8 I. C. 1096=7 A. L. J. 1194).

[229] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

BANK OF UPPER INDIA, LIMITED, MUSSOORIE (*Defendant*) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Plaintiff*) *and* DIGAMBAR SINGH AND ANOTHER (*Defendants.*)*

[29th October, 1910.]

Adverse possession—Limitation—Land situate in a cantonment—Presumption as to title.

Certain land situate in the cantonment of Dehra Dun was appropriated in the beginning of the nineteenth century by the predecessor in title of the defendant for the purpose of building a house. The land was held, subject to the rules from time to time applicable to cantonments, by various occupiers until the year 1884 when the cantonments were handed over to the civil authorities. In 1890 the Secretary of State sued the then occupant for a declaration of title and assessment of ground rent, or, in the event of the defendant refusing to pay rent, for possession. *Held* that the circumstances of the case warranted the presumption that the title to the land in suit was vested in the Crown, and that the possession thereof could not be regarded as adverse until at the earliest the year 1874, when the land in suit ceased to be a part of the cantonment. *Secretary of State for India* v *Jagan Prasad* (1) referred to.

[Ref : 66 I. C. 582.]

This was a suit brought by the Secretary of State for India in Council for a declaration of title to certain land situate in the old cantonment of Dehra Dun, which had been made over to the civil authorities in

*First Appeal No. 108 of 1903 from a Decree of W. R. Cole, Subordinate Judge of Dehra Dun, dated the 22nd of January, 1903.

(1) (1884) I. L. R. 6 All. 618.

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33 A. 229=8
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1874. The facts out of which the suit arose are fully stated in the judgment of the Court.

Mr. *B. E. O'Coor* and The Hon'ble Pandit *Sundar Lal*, for the appellant.

Mr. *W. Wallach* and Babu *Lalit Mohan Banerji* for the respondents.

STANLEY, C. J. and BANERJI, J.—In the suit which has given rise to this appeal, the Secretary of State for India seeks for a declaration of his proprietary right to a plot of land known as No. 4 Rajpore Road, Dehra Dun, containing 86 odd local bighas. He also asks for an assessment of the land to ground rent and for the execution of a lease for 90 years by the defendants, and in the event of refusal by the defendants to pay the rent when fixed for possession of the lands by their ejectment therefrom. The plaintiff further claims a sum in respect of rent from the 26th of December 1901 to the date of the institution of the suit.

[230] The main defence of the defendant Bank is a plea of limitation, the allegation of the Bank being that the Bank and its predecessors in title have been in adverse possession of the property for a period of upwards of 60 years.

The history of the property takes us back to the beginning of the 19th century, when an incursion was made into Dehra Dun and the adjoining territory, then belonging to the Raj of Garhwal by the troops of the King of Nepal, and this territory was wrested from the Raj. Then followed a war between the troops of the British Government and the Gurkha troops, with the result that the Gurkhas were ultimately defeated and the territory in question was ceded to the British Government in in the year 1816. Portion of the territory so ceded was restored to the Raj of Garhwal, but Dehra Dun was retained by Government. About this time a young officer, Lieutenant Young, who afterwards attained the rank of Colonel, raised a Gurkha regiment and located it in Dehra Dun. A cantonment was formed which was demarcated by pillars which are still standing. Within this cantonment, Lieutenant Young built a house for himself, and he appropriated the piece of ground which is the subject-matter of this litigation. This piece of land is situate within the boundary pillars at the north end of the cantonment. This cantonment remained under the control of the military authorities, subject to the regulations governing lands in cantonments, until it was made over by the military to the civil authorities on the 17th of August, 1874. No evidence is forthcoming as to the authority under which Lieutenant Young appropriated the land in question. It may be presumed that as he raised the regiment and formed the cantonment, he built his house and appropriated the land surrounding it without any specific authority being given to him for so doing. He was a man of considerable ability and force of character, as his letters which are on the record show, and in 1828 he was appointed Superintendent of the Dun. He appears to have transferred the property to an Assistant Surgeon, named Bruce, prior to 1843. Bruce in turn transferred his interest to one Leadbeater and on the 28th of January 1864, the Administrator-General of Bengal as the Administrator with the will annexed of Leadbeater [231] "according to his estate, right, title and interest therein, and so far as he could or might at law or in equity as such Administrator as aforesaid and not further or otherwise" granted and confirmed unto the Rev. John Simms Woodside "according to the nature of the premises," the dwelling house with the land belonging thereto, described as being "in the north end of the military cantonments at Dehra Dun and formerly

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the property of Collector Young." Mr. Woodside transferred his interest in the property to Colonel Peter Abbot in 1859, and ultimately after divers mesne transfers, the defendant appellant Bank purchased it.

So long as the property remained in cantonments, it appears to us clear that Colonel Young and his successors in title could acquire no title thereto by adverse possession. Colonel Young was an officer of Government and Superintendent of the Dun, and it must, we think, be presumed that he built the house in question and occupied the land adjoining it, subject to the regulations governing lands in cantonments and as Government property. In fact, he recognised throughout that the property belonged to the Crown. We have on the record a letter under his hand when Superintendent of the Doon, dated the 22nd of October 1829, in which he admitted that the zemindari or proprietary right in the property was vested in Government. In reply to a letter of one Captain McMullin, Executive Officer of the XIth Division, Meerut, he writes :—" I have the honour to inform you that the lands in the cantonments of the Sermoor Battalion (*i.e.*, the old cantonments) are held on the following terms, the zamindari or proprietary right being vested in Government : Lands farmed to *thikadars* and included in the last settlement and taken into cantonments subsequently 23 *pacca* bighas, 16 biswas and 15 biswansis for which Government pays Rs. 18. The claim ceases with the existing settlement. There are 23 *pacca* bighas, 16 biswas and 5 biswansis belonging to the *muafi* lands of Mahant Sarup Das, for which nothing is paid, no claim having been made. The remaining land, that is, 277 bighas *pacca*, 4 biswas and 10 biswansis is Government land." It is obvious from this letter that Lieutenant Young did not then set up any claim to the absolute ownership of the property. [232] So long as that property remained in cantonments, it must be regarded, we think, as land held for Government under Government regulations. If this be so, it follows that the plea of the statute of limitation must fail, inasmuch as the old cantonments remained under military authority up to the 17th August, 1874, when the control was handed over to the civil authorities. From that date up to the date of the institution of this suit 60 years have not elapsed.

The learned Subordinate Judge has very fully dealt with the facts of the case in his judgment, and we do not think it necessary to recapitulate them. He found against the defendant Bank on the plea of limitation, and we think rightly. The case is not unlike that which was the subject of decision by STRAIGHT, J., in *The Secretary of State for India* v. *Jagan Prasad* (1). In that case it was held that a party who built a house in cantonments must be taken to have derived his title to occupy the land from the military authorities and that their power to make a grant of it could only be co-extensive with their own tenure of the property, and that no assignment by them could subsist beyond the period the land might remain subject to cantonment regulations. Under the various transfers from Lieutenant Young and his successors in title the only interest in the land which passed was, whatever interest Young possessed. He could not under the circumstances dispose of the absolute interest, which belonged to Government. This accounts for the guarded manner in which the Administrator-General of Bengal purported to convey the property in the deed of transfer of the 28th of January 1854. He merely granted it according to his estate and interest therein ; and so far as he could at law or equity do so. This being the state of things up to the year

(1) (1884) I. L. R. 6 All. 148.

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33 A. 229=8 I. C. 1096=7 A. L. J. 1194.

1874, when possibly adverse possession for the first time might, with some show of reason, be set up, the defendant's plea of limitation must fail, 60 years not having elapsed from that year.

The fairness of the terms upon which a lease is offered by the Government to the defendant Bank has not been questioned before us. These terms appear to be just and reasonable.

We accordingly dismiss the appeal with costs.

[233] We are asked by Mr. O'Conor on behalf of the defendant Bank to fix a time within which the lease should be executed. Mr. Wallach, on behalf of the respondent, raises no objection. We think that the lease should be executed within a period of two months from this date, and so we direct.

Appeal dismissed.

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33 A. 233 (=8 I. C. 834=7 A. L. J. 1176.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

MUHAMMAD SAYEED AND OTHERS (*Defendants*) *v.* MUHAMMAD ISMAIL (*Plaintiff*) AND ZAFAR-ULLAH AND OTHERS (*Defendants*).*

[29th October, 1910.]

Civil Procedure Code (1882), *section* 325*A*—"*Alienation*"—*Muhammadan law*—*Gift during* marz-ul-maut—*Will.*

Held that a gift made by a Muhammadan during death-illness is (1) under the Muhammadan law a will and therefore valid as to one-third f the property comprised in it, and (2) is not an alienation which might fall under the prohibition contained in section 325A of the Code of Civil Procedure (1882).

[**Ref.** 67 I. C. 77=34 C. L. J. 444=49 Cal. 477 ; 82 I. C. 886=40 C. L. J. 331.]

THIS was a suit for a declaration that a deed of gift executed by one Saleh-un-nissa, was void on the ground that she was suffering from death-illness at the time of the gift and that the property was under the management of the Collector and therefore, according to section 325A, Civil Procedure Code, the lady was not competent to make the gift. It was found that the lady was suffering from death-illness when she executed the gift, but was in possession of her proper senses when the property was given to her daughter, son-in-law and maternal uncle. The Court of first instance (Munsif of Ghazipur) decreed the claim, and that decree was affirmed on appeal by the officiating District Judge. The defendant appealed to the High Court, and there raised the plea that the gift being made in *marz-ul-maut* operated as a will and was valid to the extent of one-third.

Maulvi *Muhammad Ishaq*, for the appellants. A gift made in *marz-ul-maut*, operates as a will. Ameer Ali, Vol. I, pp. 23—25. The gift to the extent of one-third is therefore valid. Section 325A of the Code of Civil Procedure is no bar to the lady making a will at least in favour of the donees who were [234] not her heirs. That section only prevents alienations which are to take effect immediately and not after death.

Mr. *Ishaq Khan*, for the respondents, submitted that the transfer amounted to an alienation and was not valid. The word alienation

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*Second Appeal No 136 of 1910, from a decree of Chhajju Mal, Officiating District Judge of Ghazipur, dated the 24th of November 1909, confirming a decree of Baij Nath Das, Munsif of Ghazipur, dated the 26th of March 1909.

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33 A. 233=8 I. C. 834=7 A. L. J. 1176.

includes all transfers including a will. The judgment-debtor purported to make a gift, but under the Muhammadan Law it amounts to a will. The will is not valid in favour of an heir for more than one-third. The will was made to daughter and son-in-law and maternal uncle. If valid, it operates in respect of one-third share given to those who are not heirs. Alienation by will is also an alienation which is to take effect after death. The will therefore cannot be made while the property is in the Collector's charge.

STANLEY, C. J. and BANERJI, J.—The suit out of which this appeal has arisen was brought by the plaintiff respondent, Muhammad Ismail, for a declaration that a deed of gift, dated the 29th of June 1908, executed by Musammat Saleh-un-nissa, is void on the ground, first, that she was suffering from death-illness at the time of executing the document, and secondly, that the property was under the management of the Collector under the provisions of the Code of Civil Procedure, and under section 325 (A) of Act No. XIV of 1882 the lady was not competent to make the gift. The Court of first instance decreed the claim and the lower Appellate Court has affirmed that decree. It has been found that the lady was suffering from death-illness when she executed the deed of gift. It has also been found on the issue referred by us to the Court below, namely, whether she was in possession of her senses and had full knowledge of the contents and effect of the deed of gift, that she was in possession of her senses and was fully cognisant of the contents and effect of the document.

Upon these findings it is contended before us that the gift being one made during death-illness is a will under the Muhammadan Law and is valid as regards one-third of the property comprised in it, and that it is not valid in so far as it bestows any part of the property on the heirs of the deceased and also as regards two-thirds of the remainder. Now under the [235] gift in question half of the property was given to Muhammad Sayeed, the paternal uncle of the lady, and out of the remaining half, one-third was given to her daughter and two-thirds to her son-in-law, the husband of another daughter. In so far as the document bestows any part of the property on the daughter Asghar-un-nissa, it is admittedly void as a will. It is conceded that if section 325 (A) of the Code of Civil Procedure was no bar to the right of the lady to make a will, the document is a valid will as regards one-third of the property given to Jawad Husain and Muhammad Sayeed, that is to say, that it is valid in regard to one-sixth share obtained by Muhammad Sayeed and one-ninth obtained by Jawad Husain. It is not denied that under the Muhammadan Law a gift made during death-illness operates as a will. So that if section 325 (A) is not a bar to the right of the lady to make the will, it would operate in respect of the one-sixth and the one-ninth shares mentioned above and would not be void as regards those shares.

We have therefore to determine whether section 325 (A) precluded Musammat Saleh-un-nissa, from making a will of her property. That section provides that so long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by sections 322-325, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector. It is urged that a will comes within the term "alienate" as mentioned in the section. We are unable to agree with this contention. The word "alienate" in our opinion was

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used *ejusdem generis* with the words preceding, namely, mortgage, charge, lease, and manifestly contemplates a transfer which would have present effect and not a devise which can only have operation after the death of the testator. In this view the will was not void and the lady was not incompetent to make it. That being so, the plaintiff's claim should be dismissed in so far as it relates to a one-sixth share acquired by Muhammad Sayeed and a one-ninth share acquired by Jawad Husain under the document in question, treating it as a will, and as regards the rest the said document is void.

[236] We accordingly allow the appeal and dismiss the claim as regards a sixth share of the property acquired by Muhammad Sayeed and a ninth share, acquired by Jawad Husain. We affirm the decree of the Court below as regards the remainder of the claim. Under the circumstances we direct the parties to pay their own costs in all Courts.

Appeal allowed.

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33 A. 236 (=8 I. C. 1096=7 A. L. J. 1189.)

REVISIONAL CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

LACHMAN PRASAD (*Plaintiff*) *Applicant v.* RAM KISHAN (*Defendant*) *Opposite party* *

[7th November, 1910.]

Civil Procedure Code (1908), *order XX, rule* 2—*Judgment written but not delivered before transfer of Judge—Successor in office competent to pronounce his own judgment.*

Where a Judge fixed a date for delivering judgment, wrote it out and placed it upon the record, but was transferred before the date fixed, and his successor took a different view and delivered his own judgment, *Held* that his successor in office was not obliged to deliver the judgment of his predecessor but was competent to pronounce a judgment of his own in the case. *In the Goods of Prem-Chand Moonshee* (1) followed. *Re Baker*; *Nicholas* v. *Baker* (2) referred to.

[Ref. 51 I. C. 405=29 C. L. J. 438.]

THE facts of this case, so far as they are necessary for the purposes of this report, are as follows. The Subordinate Judge of Jhansi having heard an appeal reserved judgment and appointed a certain date for delivery of judgment in the case. He also wrote a draft judgment and placed it on the record. Before delivering judgment, however, he ceased to be Subordinate Judge of Jhansi. His successor in office took a different view of the appeal from the former Judge and pronounced his own judgment which dismissed the appeal, whereas the first judgment was for decreeing it. The plaintiff appellant appealed to the High Court.

Babu *Piari Lal Banerji*, for the appellant.

Babu *Durga Charan Banerji* (with him Babu *Surendra Nath Sen*), for the respondent.

KNOX and KARAMAT HUSAIN, JJ.—The officer who held the post of the Subordinate Judge of Jhansi heard an appeal and had [237] inscribed in the order sheet that judgment would be delivered on a certain date. Further, he wrote out what took the form of a judgment in the case and place it upon the record. Before the appointed day arrived he ceased to be the Subordinate Judge of Jhansi. His successor in office did not pronounce the judgment written by his predecessor, but took a

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* Civil Revision No. 25 of 1910.

(1) (1894) I. L. R. 21 Cal. 832.

(2) (1890) 44 Ch. D. 262.

totally different view of the case from his pedecessor and delivered a judgment contrary to that which, it would appear, his predecessor had intended to deliver. It is contended before us that the judgment which was written but not pronounced by the predecessor should have been pronounced by the Judge who succeeded him in office. Authority for this contention is based upon the words used in order XX, rule 2, and it is contended that the words "it may pronounce" are mandatory and left the successor no option but to pronounce the judgment which he found upon the record. No authority has been given to us for this view. On the other hand, we are indebted to the other side who referred us to *Re Baker* ; *Nicholas* v. *Baker* (1), adopted by the Calcutta High Court in *In the Goods of Prem Chand* (2). We agree with the Calcutta High Court as to the meaning to be put upon the word "may," and dismiss the appeal with costs.

Application dismissed.

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REVISIONAL CIVIL.

33 A. 236=8 I. C. 1096=7 A. L. J. 1189.

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33 A. 237 (=8 I. C. 484).

REVISIONAL CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

KAPIL DEO SINGH (*Plaintiff*) *Applicant* v. RAM RIKHA SINGH AND OTHERS (*Defendants*) *Opposite parties.* *

[8th November, 1910.]

Civil Procedure Code (1908), *order XXXIII. rule* 1—*Inquiry into pauperism—Claim for redemption of mortgage—Applicant able to raise money upon security of equity of redemption.*

Held that a plaintiff seeking to sue for redemption *in forma pauperis* cannot claim to sue as a pauper so long as he can raise money on his equity of redemption and that in so doing he will not in effect be mortgaging his claim. *Vedanta Desikacharyulu* v. *Perindevamma* (3) distinguished.

[Dist ; 16 Bom. L. R. 774 ; Dis. 75 I. C. 993.]

THIS was an application for leave to sue *in forma pauperis*. The facts were these :—The applicant applied for leave to sue as a pauper for the redemption of a certain mortgage. He was [238] examined and he stated that he had no other property excepting that which he was suing to redeem. The Court fixed a date for inquiry into the alleged pauperism. On the date fixed the opposite party put in objections to the effect that the applicant was a man of means and not a pauper. Neither the applicant nor the opposite party produced any evidence. The Court made the following order :—"The applicant has, on his own showing, the equity of redemption, and there is nothing to show that he cannot obtain money on its security. I believe he is not a pauper, and dismiss the application with costs." The applicant applied to the High Court for revision of this order.

Babu *Sarat Chandra Chaudhri* (for Dr. *Satesh Chandra Banerji*), for the applicant :—

The Subordinate Judge did not enter into the merits of the application at all. He rejected it merely on the ground that as the applicant could possibly raise funds on the security of his equity of redemption he was not a pauper. But this very equity of redemption was the subject matter

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* Civil Revision No. 64 of 1910.

(1) (1894) I. L. R. 21 Cal. 832.
(2) (1890) 44 Ch. D. 262.
(3) (1881) I. L. R. 3 Mad. 249.

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of his suit. It has been ruled that a pauper is not obliged to raise funds by mortgaging his claim; *Vedanta Desikacharyulu* v. *Perindevamma* (1). The Subordinate Judge should have made a proper inquiry into the circumstances of the applicant and have ascertained whether or not he was a pauper within the meaning of order XXXIII, rule 1.

Mr. *M. L. Agarwala* (with him Munshi *Govind Prasad*), for the opposite party:—

The Subordinate Judge was right in his opinion. The applicant could raise money on the security of his equity of redemption, which might be of considerable value. The equity of redemption was not the subject-matter of the suit. What was sought to be redeemed was the physical property itself and not the equity of redemption, which is a right quite distinct and separate from the *corpus* of the property. If the applicant's contention were right, then there could be no *puisne* mortgages. Then, the case is not one in which a revision should be entertained. There is no question of jurisdiction; there has been no material irregularity. It is not alleged that the applicant tendered any [239] evidence which the Court refused to entertain or consider. There is no evidence on the record, other than the statement of the applicant himself. On that evidence the Court rightly or wrongly came to the conclusion that he was not a pauper. Misappraisement of evidence is no ground for revision. The case is governed by the ruling of *Kamrakh Nath* v. *Sundar Nath* (2) which followed the case of *Chattarpal Singh* v. *Raja Ram* (3).

Babu *Sarat Chandra Chaudhri*, in reply:—

In the present case the matter has not at all been gone into as to whether the applicant is a pauper or not. It is not the petitioner's plea that his evidence has been wrongly disbelieved, but that it has not been considered at all. The Subordinate Judge does not say that he disbelieved the petitioner's statement; if that had been the case, then no revision would have lain. A revision does lie if the Court has failed to deal with the question of the applicant's pauperism with reference to the definition of a "pauper"; *Muhammad Husain* v. *Ajudhia Prasad* (4), *Secretary of State* v. *Jillo* (5).

KNOX and KARAMAT HUSAIN, JJ.:—This application is for revision of an order passed by the Subordinate Judge of Ghazipur. The Subordinate Judge had before him an application on the part of the petitioner seeking to be permitted to sue *in forma pauperis*. The Subordinate Judge, as we find from the record, fixed a day for receiving whatever evidence the applicant might adduce in proof of his pauperism. He examined the applicant, and it was not shown to us that any evidence tendered by the petitioner was rejected by the Court unheard. After examining the petitioner, the Court wrote as follows:—

"The applicant has on his own showing the equity of redemption, and there is nothing to show that he cannot obtain money on its security, I believe he is not a pauper and dismiss the application with costs."

The suit which the petitioner desired to institute was a suit asking for redemption of the whole of a certain property set out in the schedule attached to the plaint. On behalf of the [240] petitioner we are referred to the case of *Vedanta Desikacharyulu* v. *Perindevamma* (1), and we were asked to hold that a person praying for the relief which the plaintiff

(1) (1881) I. L. R. 3 Mad. 249.
(2) (1898) I. L. R. 20 All. 299.
(3) (1885) I. L. R. 7 All. 661.
(4) (1888) I. L. R. 10 All. 467 (479).
(5) (1898) I. L. R. 21 All. 133 (136).

sought, should not be refused permission to sue *in forma pauperis* and to be left to raise funds by mortgaging his claims. It has, however, been pointed out to us by the other side, and we accept the contention, that the petitioner in trying to raise money upon the equity of redemption would not in effect be mortgaging his claim. The equity of redemption in many cases is property of far greater value than the mortgage which the person instituting the suit may be seeking to redeem. If any obscurity remains in the present case it is the fault of the plaintiff that de did not remove that obscurity. There is no right existing to sue *in forma pauperis*. It is an exemption from the ordinary rule which he claims from the court and the burden of proving the exemption lies upon the person who claims the exemption. We are not satisfied that the court was in error when it held that the petitioner had not proved his pauperism. As he had not proved his pauperism the court was within its jurisdiction in refusing permission. We dismiss the application with costs.

Application dismissed.

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33 A. 237 = 8 I. C. 484.

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33 A. 240 (=8 I. C. 835=7 A. L J. 1179).

REVISIONAL CIVIL.

Before Mr. Justice Sir George Knox aad Mr. Justice Karamat Husain.

NAGAR MAL AND OTHERS (*Applicant*) *v.* RAM CHAND (*Opposite Party*).*
[8th November, 1910.]

Civil Procedure Code (1908), *order XXI, rules* 18, 19, 20—*Execution of decree—Cross-decrees—Set-off—Money decree—Decree for enforcement of charge.*

Held that under the Code of Civil Procedure (1908) a court is competent to set off a simple decree for recovery of money against a decree for recovery of money by enforcement of a charge.

[Dist : 38 All. 669.]

The facts of this case were as follows :—The applicants held a simple money decree against the opposite party. The latter held a decree against the applicants for the recovery of a certain sum of money by enforcement of a charge against their immovable property. The first mentioned decree was for a smaller amount than the latter. The executing court (Subordinate Judge of Cawnpore) set off the two decrees against each other and [241] recorded the first as discharged. The applicants filed a revision in the High Court.

Babu *Surendra Nath Sen* (for Babu *Durga Charan Banerji*), for the applicants :—

The question is whether a court is competent to set off two decrees, one of which is a simple money decree and the other for the recovery of money by enforcement of a mortgage or charge. The rulings under section 246 of the old Code are conflicting. The present law on the subject of cross-decrees is embodied in order XXI, rules 18, 19 and 20 of the new Code. Rules 18 and 19 contain the general provisions as to set off. Rule 20, which is new, extends those provisions to the case of mortgage decrees. The evident intention of the Legislature is that where we have mortgage decrees the rules as to set-off shall also apply that is, two mortgaged decrees may be set off against each other. Just as rule 18 deals with the class of decrees " for the payment of two sums of money " and provides

* Civil Revision No. 72 of 1910.

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33 A. 240=8 I. C. 835=7 A. L. J. 1179.

rules for their setting off *inter se*, so rule 20 deals with the class of mortgage decrees and *their* setting off *inter se*. It is nowhere provided that a decree of the former class may be set off against one of the latter class. The two classes of decrees obviously differ in many respects. If it be said that a mortgage decree is also a money decree because a mortgage means a debt plus security, then there was no necessity for enacting rule 20. The use of the word " decrees " in the plural in rule 20 also indicates that the Legislature contemplated that the decrees should both be mortgage decrees.

Munshi *Iswar Saran*, for the opposite party, was not heard.

KNOX and KARAMAT HUSAIN, JJ. :—Nagar Mal and others, applicants, held a decree for money against Ram Chand. Ram Chand subsequent to the passing of that decree obtained a decree for money to be enforced by sale of property. The judgment-debtors were the holders of the decree first named. The petitioners took out execution of their decree. The court executing the decree set off the first decree against the other and marked the decree, dated the 16th of December, 1908, as discharged.

[242] It is contended before us that this order setting off the two decrees against each other was an order passed without jurisdiction. The contention is that while the first decree is, in strict terms, a decree to recover a sum of money, the second decree is a decree for sale in enforcement of a charge against immoveable property and that the Legislature in enacting rule 20 under order XXI meant to draw a distinct line of cleavage between the class of decrees contemplated in rules 18 and 19 and the class of decrees contemplated in rule 20. It has not been pointed out to us that anyone will be prejudiced by a decree of the kind contemplated by rule 20 being set off against a decree of the kind contemplated in rules 18 and 19 and *vice versa*. On the other hand, the practice of setting off decrees in this way is a very salutary procedure, and it is equally open to argument that rule 20 was expressly inserted in order to make it clear that though a decree might be a decree for sale in enforcement of a mortgage or charge, it might yet be dealt with on the same lines as where both the cross decrees are decrees to recover sums of money. At any rate in the present case we see no reason for interference, and we dismiss the application with costs.

Application dismissed.

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33 All. 242 (=8 I. C. 836=7 A. L. J. 1182).

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Griffin.

NATHU AND OTHERS (*Defendants*) *v.* KUNDAN LAL (*Plaintiff.*)*

[8th November, 1910.]

Hindu Law—Mitakshara—Joint Hindu family—Debt—Legal necessity—Money borrowed to comply with a decree for pre-emption in favour of the father.

A decree for pre-emption, providing that the pre-emptor shall acquire the property if he pays the amount mentioned therein but otherwise his suit will be dismissed, is a debt such as will support a bond given by the father of a joint Hindu family to raise money for its satisfaction.

[Diss : 67 I. C. 668 ; 74 I. C. 571=45 All. 407 ; Ref : 72 I. C. 1000 ; Rel : 74 I.C. 18.]

THIS was a suit upon a mortgage bond of joint family property executed by the father of the family for the purpose of raising

*Second Appeal No. 202 of 1910, from a decree of D. L. Johnston, Additional Judge of Meerut, dated the 18th of December, 1909, reversing a decree of Muhammad Husain, Additional Subordinate Judge of Meerut, dated the 16th of August 1909.

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33 A. 242=8 I. C. 836=7 A. L. J. 1182.

money to fulfil the conditions of a decree for pre-emption passed [243] in his favour. Amongst other defences it was pleaded that the bond had been discharged and that it was executed without necessity and not for family purposes. The Court of first instance (Additional Subordinate Judge of Meerut) found against the plaintiffs on both issues. On appeal the additional District Judge reversed the decree of the first court and decreed the plaintiff's claim. The defendants appealed to the High Court.

Mr. *E. A. Howard*, for the appellants.

Pandit *Rama Kant Malaviya* (for The Hon'ble Pandit *Madan Mohan Malaviya*), for the respondent.

RICHARDS and GRIFFIN, JJ.—This and the connected appeal appeal No. 201, arise out of suits brought on foot of two mortgage bonds. The bonds were made by the father of a joint Hindu family and the property pledged was ancestral property. A number of defences were raised, and, amongst others, defences that the bonds were discharged and that they were executed by a father without necessity and not for family purposes. The Court of first instance found against the plaintiffs on both these issues. The learned Additional District Judge has reversed the decree of the Court of first instance. He finds that the bonds were not paid off and after referring in his judgment to two witnesses who are attesting witnesses of the bonds, says as follows :—"Their evidence is sufficient to show that the money was obtained for a legal necessity, for the enlargement of family estate by exercising rights of pre-emption. It was entirely the interest of the family, even though there is no legal proof that the effect was given to this purpose. I hold that the debts were incurred for legal necessity." This judgment is not very satisfactory. The Court of first instance had given somewhat substantial reason for holding that it had not been proved that the bonds were given for family necessity. He has said that the allegation was that the money was advanced for pre-emptive decrees but that no such decrees had been filed. It would have been more satisfactory if the learned Additional District Judge had gone into these matters and given his reasons for over-ruling the Court below. In the present case it is not even alleged in the bond that the consideration was money advanced to acquire property pre-empted. We feel, however, that in second appeal we must [244] accept the judgment of the learned Additional District Judge as a finding that the money was borrowed on two bonds for the purpose of complying with the terms of one or more pre-emptive decrees. We think that in the absence of evidence to the contrary it must be assumed that these decrees were complied with and that the family acquired the property, the subject-matter of the pre-emptive decrees, by means of the money that was advanced on foot of the bonds. A pre-emptive decree provides that the decree-holder shall acquire the property therein mentioned provided he pays the purchase money within a time fixed. If he does not do so, his suit is to be dismissed with costs. It is very hard to say that such a decree with the liability that is attached to it is not a debt. It cannot be urged now that a creditor who has made honest and reasonable inquiry as to the object of the loan is bound to see to the application of the money he advances, and therefore the absence of a finding that the money advanced on foot of a bond was actually applied to the pre-emptive decrees is not fatal to the plaintiff's case. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

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APPELLATE CIVIL.

33 A. 244= 8 I. C. 689.

33 A. 244 (=8 I. C. 689).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

MUHAMMAD FAYAZ ALI KHAN (*Defendant*) *v.* KALLU SINGH AND ANOTHER (*Plaintiffs*).*

[7th November, 1910.]

Civil Procedure Code (1882), *section* 43 —*Civil Procedure Code* (1908), *schedule* 1, *order II, rule* 2—*Competence to give leave to omit remedies or split causes of action not limited by pecuniary jurisdiction of Court—Suit for surplus collections made by mortgagee—Limitation—Act No. IX of* 1871, *schedule II, article* 105—*Act No. XV of* 1877, *section* 2, *schedule II, articles* 105, 109—*Act No. IX of* 1908, *schedule I, articles* 105, 109.

The competence of a Court to give leave to a plaintiff to omit to sue for a relief to which he may be entitled is not affected by the pecuniary value of the relief in respect of which such leave is sought.

A suit by a mortgagor after the mortgage has been satisfied to recover surplus collections received by the mortgagee may be brought within three years from the time when the mortgagor re-enters on the mortgaged property under article 105 of the second schedule to the Limitation Act of 1877 (schedule I to the Limitation Act of 1908) and there is no restriction as to the way in which the mortgagor may obtain possession *Ram Din* v. *Bhup Singh* (1) discussed.

[245] THE facts of this case were as follows :—

The plaintiffs, mortgagors to a mortgage deed of the year 1850, brought a suit for redemption in the Court of a Munsif in 1905. They divided their claim, having obtained the leave of the Court to bring a separate suit for surplus collections alleged to have been made by the defendant mortgagee while in possession of the mortgaged property. The plaintiffs' suit for redemption was decreed on the 21st of May, 1908, and on the 21st of August of the same year they filed their suit for recovery of the surplus collections. The Court of first instance (Subordinate Judge of Aligarh) decreed the claim. The defendant appealed to the High Court.

The Hon'ble Nawab *Muhammad Abdul Majid*, Maulvi *Ghulam Mujtaba* and Maulvi *Rahmatullah*, for the appellant.

The Hon'ble Pandit *Sundar Lal* and Dr. *Tej Bahadur Sapru*, for the respondents.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit brought by the plaintiffs respondents for surplus collections alleged to have been received by the defendant as mortgagee of the property of the plaintiffs. The mortgage was made in the year 1850, and a redemption suit was instituted in the year 1905. Before the hearing of the earlier suit an application was made to the Judge before whom the suit was pending, namely, the Munsif of Khurja, for liberty to bring a suit for recovery of surplus collections. This application was made pursuant to the provisions of section 43 of the Code of Civil Procedure of 1882, which corresponds with order II, rule 2, of the Code of 1908. The learned Munsif granted the applicants' prayer. The suit for redemption was decreed on the 21st of May, 1908, and on the 21st of August of the same year the suit out of which this appeal has arisen was instituted. The claim in respect of mesne profits is for a sum of Rs. 5,500. The Court below gave

* First Appeal No. 227 of 1909, from a decree of Banke Behari Lal, Subordinate Judge of Aligarh, dated the 31st of May, 1909.

(1) (1908) I. L. R 30 All. 225.

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8 I. C. 689.

a decree in the plaintiffs' favour, and against this decree the present appeal has been preferred.

Several points have been raised by the learned vakil for the appellant, with which it is unnecessary for us to deal. The first and main contention is, that the suit is not maintainable in view of the fact that the present suit was not cognizable by the learned Munsif who gave permission to bring the suit, the amount [246] of the claim being in excess of his pecuniary jurisdiction. It is admitted that the suit for redemption was within the cognizance of the Munsif of Khurja and that he was competent to try that suit. But it is said that he was not competent to give the leave which is contemplated by section 43 of the Code of 1882. That section provides that " a person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies, but if he omits, except with the leave of the Court obtained before the first hearing to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted." We think that this rule contemplated that the leave to bring the subsequent suit should be obtained from the Court before which the original suit was pending and that the Munsif of Khurja before whom the suit for redemption was pending was competent to give leave to bring the later suit. We have on the record the order of the Munsif granting that permission. It is dated the 12th of May, 1905. So far as we can see, no other Court was competent to give leave to bring the second suit. The suit therefore out of which this appeal has arisen was not a suit brought contrary to the provisions of section 43, but a suit which the plaintiffs were authorized to bring under that section, they having obtained the permission of the Munsif of Khurja to omit the remedy in respect of which the present suit has been brought and sue for it thereafter. There is no force therefore in this contention.

The next contention addressed to us by the learned vakil for the appellants is that article 109 and not article 105 of schedule II to the Limitation Act of 1877 (schedule I to the Act of 1908) is applicable to the case. In 1871 Act No. IX of 1871 came into force, and in article 105, of the second schedule appended to that Act, provision was made for the recovery by a mortgagor of surplus collections received by the mortgagee after the mortgage had been satisfied, the period of limitation being three years from the date of receipt, *i.e.*, the receipt of the collections. This Act was in force up to the passing of Act No. XV of 1877 which came into operation on the 1st October, 1877. Article 105 of the second schedule to that Act prescribed a period of three years' limitation for a suit for surplus collections to date from the time when the mortgagor re-enters on the mortgaged property. The same provision in [247] regard to limitation is contained in article 105 of the recent Act, Act No. IX of 1908. In section 2 of Act No. XV of 1877, it is prescribed that nothing therein contained shall be deemed to revive any right to sue barred under Act No. IX of 1871, or under enactment thereby repealed. It has been contended before us, as we have said, that the article applicable to this case is article 109 and not article 105 of the Acts of 1877 and 1908, and reliance has been placed upon a ruling of a Bench of this Court in the case of *Ram Din* v. *Bhup Singh* (1). In that case the plaintiffs, who were usufructuary mortgagors brought a suit for redemption on the ground that the mortgage debt had been satisfied from the profits of the mortgaged property. In that suit the plaintiffs did not claim any

(1) (1903) I. L. R. 30 All. 225.

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surplus profits, nor did they obtain, as in this case, leave of the Court to bring a subsequent suit for surplus profits. It was held by Mr Justice AIKMAN and Mr. Justice KARAMAT HUSAIN that the suit was barred by the provisions of section 43 of the Code of Civil Procedure of 1882. Mr. Justice AIKMAN in his judgment remarked :—" In my opinion this article must not be construed so as to conflict with the provision of section 43 of the Code of Civil Procedure and must be deemed to refer to cases in which the mortgagor has got possession of the mortgaged property otherwise than by means of a suit for redemption." In that case the suit did conflict with the provisions of section 43 of the Code of Civil Procedure, and therefore is unlike the suit which is now under consideration, in which there is no conflict between section 43 of the Code of Civil Procedure of 1882 and article 105 of the Limitation Act. But the learned Judges who decided that case go on to remark that article 105 must be deemed to refer to cases in which the mortgagor has got possession of the mortgaged property otherwise than by means of a suit for redemption. In the circumstances of that case this is merely an *obiter dictum* and we are not bound by it. We may say, however, that we are unable to accept the *dictum* so expressed. We are of opinion that if permission to bring a subsequent suit for surplus profits has been given in accordance with section 43 of the former Code of Civil Procedure or order II, rule 2, of the present Code, there being no conflict between the provisions of the [248] articles and the provisions of the section and order respectively, there is no reason why article 105 of the Limitation Act should not apply as it is expressed in terms to do. The language of the article precisely meets the case before us. In a suit by a mortgagor after the mortgage has been satisfied as in this case, a suit to recover surplus collections received by the mortgagee may be brought within three years from the time when the mortgagor re-enters on the mortgage property. Article 109 does not apply to a case of the kind. There is no restriction as to the way in which the mortgagor may obtain possession, and we see no grounds for holding, as did the learned Judges in the case above referred to, that it only applies to cases in which the mortgagor has obtaind possession otherwise than by means of a redemption suit. We are of opinion that the suit is maintainable and that the only article which can apply is article 105. Article 109 is applicable to a different state of things. It contemplates a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant, and not a suit by a mortgagor for surplus collections.

Another point has been raised by the learned vakil for the appellants, and that is, that under Act No. IX of 1871, limitation ran from the date of the receipt of the surplus collections and that this provision was in no way affected by the provisions of Act XV of 1877, which altered the period from which limitation began to run. As we have said section 2 of the Act of 1877 prescribes that nothing therein contained should revive any right which had been barred under the earlier Statutes. We think that this contention is well founded, and that the plaintiffs are not entitled to recover surplus profits which were received prior to the 1st of October, 1874. To this extent the argument addressed to us must prevail. The learned advocate and vakil for the respective parties have calculated what sum should be allowed in respect of the surplus collections for the period prior to the 1st of October, 1874, and they are agreed that Rs. 500 represents the amount of the surplus collections for that period.

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These are the only matters which have been discussed before us. We allow the appeal in so far that we reduce the amount [249] decreed to the plaintiffs by a sum of Rs. 500. In other respects the decree of the Court below will stand. We direct that the parties shall pay and receive costs in proportion to failure and success in both Courts.

Appeal allowed.

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33 A. 249 (=8 I. C. 687=8 A. L. J. 88=11 Cr. L. J. 699).

APPELATE CRIMINAL.

Before Mr. Justice Richards and Mr. Justice Tudball.

EMPEROR v. KADIR BAKHSH.*

[22nd November, 1910.]

Act No. XLV of 1860 (*Indian Penal Code*) *section* 409—*Criminal Misappropriation—Evidence—What prosecution has to prove.*

On a charge under section 409, of the Indian Penal Code it is not necessary for the prosecution to prove in what manner money alleged to have been misappropriated has actually been disposed of by the accused. If it is shown that money entrusted to the accused was not accounted for nor returned by him in accordance with his duty, it lies on the accused to prove his defence.

[Dist. 18 Cr. L. J. 655=15 A. L. J. 517=40 I. C. 303.]

THE facts of this case were as follows:—The accused was a process-server attached to the Court of the Munsif of Fatehabad. On the 25th September, 1909, he was given a number of summonses for service together with the sum of Rs. 26-8-0, for diet money of the witnesses to be served. The summonses were returnable by the 5th October. On the 13th October he was given another batch of summonses, returnable on the 22nd November, together with Rs. 18 for diet money. The summonses were not returned on the due dates nor was any report made by the accused as to their service, or non-service, nor was the money returned. On demand being made the accused afterwards returned the summonses unserved, but did not even then refund the diet money, merely saying that it was lost. He never made any report either to the police or to his superior officer of the loss of the money and failed to give any satisfactory explanation of this omission. Subsequently he refunded the whole of the amount. He was prosecuted under section 409 of the Indian Penal Code. His defence was that he had been robbed of the money. The trying Magistrate found him guilty and sentenced him to six month's imprisonment. On appeal the Sessions Judge was of opinion that the prosecution had failed to establish the charge and [250] acquitted him. The Sessions Judge made the following remarks in his judgment, after setting out the facts as above-mentioned:—"On the other hand the prosecution has not produced any evidence to establish conclusively that he had misappropriated the money to his own use. There were two decrees out against him at that time, but it has not been shown that he used that money for payment of those decrees. The prosecution ought to have shown by some evidence that the amount with the embezzlement of which he has been charged had in reality been appropriated by him to his own use and that his defence was groundless." The story of the accused that the accused had been robbed was not regarded by the Sessions Judge

* Criminal Appeal No. 680 of 1910 against an order of Muhammad Ishaq Khan, Sessions Judge, Farrukhabad, dated the 30th of April, 1910.

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33 {A. 249=8 I. C. 687=8 A. L. J. 88==11 Cr. L. J. 699.

as established. On this point he remarked :—" It is true that his defence on the face of it does not appear to be very convincing, but it does tend to throw some doubt on his guilt." The local Government appealed against the acquittal.

The Government Advocate (Mr. *A. E. Ryves*) for the Crown :—The Sessions Judge is wrong in law in holding that on the facts found the prosecution has failed to establish the charge. On an indictment under section 409, Penal Code, it is not incumbent upon the prosecution to prove that any sum was spent by the accused for himself, or brought to his own use on any specific occasion. The prosecution has proved that the accused failed, on due date, to return the summonses, served or unserved, and to refund the money entrusted to him or give a satisfctory explanation for his default. A sufficient *prima facie* case was thereby made out, and it then rested on the accused to prove that he had a sufficient and satisfactory justification for his default. He has failed to do so, and he should, therefore, have been convicted. It is no defence that the money was subsequently refunded.

Mr. *D. R. Sawhny*, for the accused :—

Under section 101 of the Evidence Act it is entirely upon the prosecution to prove the guilt of the accused. It should be established by clear evidence that he committed a misappropriation in fact. Mere delay or negligence in rendering prompt account of the money is not enough to establish his guilt. He could be rightly convicted if he had declined to account for the money or made a false account. No specific act of misappropriation has [261] been proved. I rely on the case of *Imam Din* v. *The Emperor* (1).

RICHARDS and TUDBALL, JJ.—Kadir Bakhsh was charged under section 409, Indian Penal Code, on two counts with criminal misappropriation of certain money entrusted to him. The learned Magistrate convicted and sentenced the accused to six months' rigorous imprisonment on each charge to run concurrently. The learned Sessions Judge reversed the finding of the Magistrate and acquitted the accused. Government has appealed. Most of the facts connected with the case are practically undisputed. The accused is a process-server. He received on the 25th of September, 1909, from the Munsif's Court, Rs. 26-8-0 as diet-money for witnesses and then again he received Rs. 18 on the 13th of October, 1909. The first summonses should have been returned on the 5th of October and the second lot on the 22nd of November. The accused did not return the summonses until the 9th of December, 1909, when he returned them unserved, but without the money. He stated that the money was lost. Between the 15th of December, 1909, and the 17th of December, 1909, the accused made good the money. The evidence showed that there were decrees out against the accused which he was apparently unable to satisfy. The evidence also showed that the accused when asked to return the summonses stated that some of them had been served and some of them not. This statement of the accused was untrue, because the summonses were all finally returned unserved. The evidence further showed that until the summonses were returned unserved the accused never made any report of the loss of the money either to the police or to his own superior officer. The learned Sessions Judge says in dealing with the case :—" His defence was that he had lost the money while suffering from severe illness, but he failed to explain why he did not report the alleged loss to the police or his

(1) (1901) 3 Punjab, L. R. 157.

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APPELLATE CRIMINAL.

33 A. 259=8 I. C. 637=8 A. L. J. 88==11 Cr. L. J. 699.

own superior officer. No satisfactory explanation is given as to this omission. On the other hand the prosecution has not produced any evidence to establish conclusively that he had misappropriated the money to his own use. There were two decrees out against him at that time, but it has not been shown that he used that money for payment of those decrees. [252] The prosecution ought to have shown by some evidence that the amount with the embezzlement of which he has been charged had in reality been appropriated by him to his own use and that his defence was groundless." In our opinion the learned Sessions Judge is quite wrong in the proposition which we understand him to lay down in this paragraph of his judgment. There is no doubt that if the accused had shown that he had really been robbed of the money he would not be guilty of the offences with which he is charged. It is also true that if the evidence for the defence coupled with the surrounding circumstances and the statement of the accused himself created a doubt in the learned Sessions Judge's mind as to the guilt of the accused, the latter would be entitled to get the benefit of that doubt. But it is entirely wrong to suggest that it lay on the prosecution to prove the actual mode of misappropriation of the money. They were not called upon to prove that he applied this money in the discharge of the decrees against him or in any other way. When they proved that he had not returned the money in accordance with his duty when he returned the summonses unserved, the Crown had proved their case, and it lay on the accused to prove his defence. We might refer the learned Judge to the provisions of section 114 of the Indian Evidence Act. The learned Judge himself seems to have altogether disbelieved the story of the alleged loss, which is unsupported by any evidence. No doubt some evidence was given that the accused was ill. But it by no means follows that because the accused was ill, he was robbed of the money. We think on the evidence that the conclusion arrived at by the learned Magistrate was right and that arrived at by the learned Sessions Judge was wrong. On the other hand, when we come to consider the question of punishment, we think that we ought to take into consideration the good character which the accused has borne, also the fact that he made good the money which he had misappropriated, and that it is possible also that he will lose his office, and taking all these matters into consideration we do not intend that the accused should be kept any longer in jail. We allow the appeal and finding the accused guilty of two offences under section 409, Indian Penal Code, we sentence the accused to six weeks' rigorous imprisonment on each count, the sentences to run concurrently. As [253] the accused has already served more than six weeks pending the appeal to the Sessions Judge, the result of order will be that the re-arrest of the accused will be unnecessary and the bail bond will be discharged.

Appeal allowed.

33 All. 253 (=8 A. L. J. 13=8 I. C. 832).

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NOV. 24.

APPELLATE CIVIL.

33 A. 253=8 A. L. J. 13=8 I. C. 832.

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Tudball.

CHATARBHUJ AND ANOTHER (*Defendants*) *v.* CHATARJIT AND ANOTHER (*Plaintiffs*) AND HAR PRASAD (*Defendant*).*

[24th November, 1911.]

Hindu law—Gift—Gift in favour of an idol which is to be subsequently consecrated—Possession given to manager.

By a deed of gift certain zamindari property was expressed to be given to an idol which was not at the time of execution in existence and possession of the property was made over to a certain person as *pujari*. *Held* that the deed was valid and created a trust in favour of the idol. *Mohar Singh* v. *Het Singh* (1) and *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* (2) referred to.

[Ref. 33 All. 793 : Dist. 29 C. L. J. 366=23 C. W. N. 645=51 I. C. 215 ; Rel. 78 I. C. 1018=44 All. 130.]

THE facts out of which this appeal arose were as follows :—

Mathura Prasad and Chhatarjit acquired a certain share in a village. They made a gift of it in favour of "Thakur Ramlalaji Mandir (or Dewalaya), mauza Kailiya," an idol which was not then in existence, and, appointing one Bhola as *pujari* and manager of the said idol, made over the property to him for the idol. After Mathura Prasad's death his widow and the other donor, Chhattarjit, sued to have the gift set aside on the ground that the gift was void. The Courts below set aside the gift. The defendants appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* (with him Dr. *Tej Bahadur Sapru*), for the appellants :—

The validity of the gift does not depend on there being any idol of that name : the gift was in favour of a specific deity. I rely on *Mohar Singh* v. *Het Singh* (1) and *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* (2). These were cases of wills, but on principle there is no difference between a bequest and a gift of this kind.

[254] The respondents were not represented.

RICHARDS and TUDBALL, JJ.—This appeal arises out of a suit brought for possession of certain property on the setting aside of a deed of endowment, dated the 5th of December, 1905. The suit was based on two grounds ; first, that undue influence and fraud had been practised, and secondly, that on the date of the endowment the image had not been duly consecrated and that therefore under the Hindu law the gift was invalid. The lower Appellate Court held that no fraud or undue influence had been established, but found that the idol had no legal existence at the time of the execution of the gift and that therefore the gift is invalid under the Hindu Law.

On appeal it is urged that in view of the ruling of this Court in *Mohar Singh* v. *Het Singh* (1), which followed the ruling of the Calcutta High Court in *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* (2), the decision of the lower Court is wrong. The only difference between the case which is now before us and the cases which were the subject-matter of the two abovementioned decisions, is that the gift in the latter cases

* Second Appeal No. 310 of 1910 from a decree of J. C. Smith, District Judge of Jhansi, dated the 3rd of February, 1910, modifying a decree of Udit Narain Singh, Subordinate Judge of Jhansi, dated the 21st of June, 1909.

(1) (1910) I. L. R. 32 All. 337.

(2) (1909) I. L. R. 37 Cal. 128.

came into force on the death of the donor, whereas in the present case the gift was made during the lifetime of the donor. In principle there is no difference whatsoever between the two cases. A trust was clearly created in the present case for the worship of an idol which was to be consecrated and placed in a temple, and the original defendant, Bhola, was made manager and trustee thereof.

Following the two abovementioned decisions we hold that the lower court was in error on this point of law and therefore the suit should have been dismissed.

We allow the appeal and set aside the decrees of the courts below, the plaintiffs' suit standing dismissed with costs in all courts.

Appeal allowed.

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NOV. 24.
APPELLATE CIVIL.
33 A. 253=8 A. L. J. 13=8 I. C. 832.

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33 A. 255 (=9 I. C. 199=8 A. L. J. 13).

[255] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

MAKHAN LAL (*Defendant*) *v.* GAYAN SINGH AND OTHERS (*Plaintiffs*).*

[24th November, 1910.]

Hindu law—Widow—Money borrowed for legal necessity—Construction of well—Feast on return from pilgrimage—Daughter's marriage.

Money borrowed to defray the expenses of the marriage of the daughter of a Hindu widow in possession of her husband's property, is money borrowed for legal necessity, but a feast given on return from pilgrimage is not so connected with the pilgrimage as to justify its allowance as money expended for legal necessity.

Expenses incurred in the construction of a well may be a legal necessity if it be proved to be for the benefit of the estate.

[Not Fol. 18 C. W. N. 1303=20 C. L. J. 285=24 I. C. 670; Ref. 84 I. C. 685=40 C. L. J. 197.]

THE facts of this case were as follows :—

The plaintiffs were the reversionary heirs of one Nohar Singh. They instituted the suit out of which this appeal has arisen for a declaration of their title and for possession of the property of Nohar Singh. Nohar Singh left a widow, Musammat Mendo, who executed three hypothecation bonds in favour of Zalim Singh and Chandan Singh, both since deceased. Suits were brought upon these bonds, and the property now in question was sold in execution of decrees obtained in these suits and a portion of the property was purchased by the mortgagees. The suit of the plaintiffs in the present case was resisted on the ground that the mortgages in question were executed by Musammat Mendo to raise money for legal necessity. The court below (Additional Subordinate Judge of Aligarh) held that there was legal necessity for a portion only of the loan taken by her and gave a decree accordingly to the plaintiffs for possession and for mesne profits. The learned Subordinate Judge deducted, however, from the mesne profits, the sums representing the amount borrowed by Musammat Mendo for legal necessity.

Against this decree Makhan Lal, son of Chandan Singh, appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

* First Appeal No. 248 of 1909, from a decree of Jagat Narain, Additional Subordinate Judge of Aligarh, dated the 30th of April, 1909.

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NOV. 24.

APPELLATE CIVIL.

33 A. 255=9 I. C. 199=8 A. L. J. 13.

Dr. *Tej Bahadur Sapru*, for the respondents.

STANLEY, C. J., and BANERJI, J.—The plaintiffs are the reversionary heirs of one Nohar Singh. They instituted the suit out [256] of which this appeal has arisen for a declaration of their title and for possession of the property of Nohar Singh. Nohar Singh left a widow, Musammat Mendo, who executed three hypothecation bonds in favour of Zalim Singh and Chandan Singh, both now deceased. Suits were brought upon these bonds, and the property now in question was sold in execution of decrees obtained in these suits and a portion of the property was purchased by the mortgagees. The suit of the plaintiffs in the present case was resisted on the ground that the mortgages in question were executed by Musammat Mendo to raise money for legal necessity. The court below held that there was legal necessity for a portion only of the loan taken by her and gave a decree accordingly to the plaintiffs for possession and for mesne profits. The learned Subordinate Judge deducted, however, from the mesne profits, the sums representing the amount obtained by Musammat Mendo for legal necessity.

Makhan Lal, a son of Chandan Singh, appeals against this decree. His case is that Musammat Mendo obtained the entire of the loans, and executed the bonds to which we have referred, for legal necessity. The consideration for the first bond is stated to be money due on account and cash for constructing a well. The second bond was for money taken to satisfy accounts and money due on a bond of the 21st of December, 1880. The third was for money raised to meet money due on accounts and a decree of one Maula Baksh. The accounts of Chandan Singh and Zalim Singh were examined to ascertain the particulars of the expenditure referred to in these bonds, and it was ascertained that the money was advanced under three principal heads :—(1) for the construction of a well ; (2) for defraying the expenses of a feast on the return of Musammat Mendo from Gaya, and (3) for the expenses of the marriage of Mendo's daughter. The money borrowed for the expenses of the marriage of Mendo's daughter was clearly for legal necessity, and the court below rightly allowed the money so expended. But in respect of the other matters to which we have referred, it held that there was no legal necessity for the borrowing. Expenses incurred in the construction of a well may be a legal necessity if it be proved to be for the benefit of the estate; but there is no [257] evidence to satisfy us that the well which was constructed by Musammat Mendo was constructed for the benefit of the estate or for the good of her tenants and cultivators. We, therefore, think that the court below was right in disallowing this item. The other item, namely, the expenses of a feast on the return of Mendo from pilgrimage, appears also to us not to have been incurred for legal necessity. A feast given on the return of a pilgrim cannot be said to be so intimately connected with the pilgrimage as to justify its allowance as money expended for legal necessity. We know of no authority for allowing such an item as coming within the meaning of legal necessity and none has been cited to us. For these reasons we agree in the view taken by the court below and dismiss the appeal with costs.

Appeal dismissed.

33 A. 257 (=9 I. C. 198).

1910
NOV. 24.

APPELLATE CIVIL.

33 A. 257=
9 I. C. 198.

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Tudball.

SHADI LAL AND OTHERS (*Defendants*) *v.* MUHAMMAD ISHAQ KHAN AND OTHERS (*Plaintiffs*).*

[24th November, 1910.]

Custom—Evidence—Presumption—Inference of existence of a custom from continued user of land for a particular purpose.

It is open to a court to infer from long enjoyment not exercised by permission, stealth or force, the existence of a custom. If after considering the evidence the court comes to the conclusion that an alleged custom is unreasonable or that the privilege is enjoyed as a result of permission given or that it is exercised by stealth or force the court is entitled to find against the custom. *Kuar Sen* v. *Mamman* (1) referred to.

THE facts of this case were as follows :—

The plaintiffs were the zamindars of the village Jahangirabad and the defendants were cloth printers and sellers. On a particular plot in the village rain water accumulated in the rainy season. The defendants made use of this water for the purposes of their trade, according to the plaintiffs with their permission on payment of rent. The plaintiffs alleged that the defendants prevented them from making other use of the pond and hence they prayed for an injunction to restrain them from interfering with them (the plaintiffs). The defendants denied the permission or payment of rent. They alleged that they [258] were making use of the pond for hundreds of years and that there was a custom prevalent in the village by which the defendants were entitled to use the water of the pond. The Court of first instance (Additional Subordinate Judge of Aligarh) dismissed the claim, but on appeal the lower appellate court (District Judge) reversed the decree. The defendants appealed to the High Court.

Babu *Jogindra Nath Chaudhri* for the appellants.

Mr. *B. E. O'Conor* (with him Mr. *G. P. Boys*, The Hon'ble Pandit *Sundar Lal* and the Hon'ble Pandit *Moti Lal Nehru*), for the respondents.

RICHARDS AND TUDBALL, JJ.—After hearing the parties in this appeal we have come to the conclusion that the appeal ought not to be decided without determination of some further matters by the learned District Judge. Notwithstanding that the defendants claimed actual title to the land in dispute, the case was fought out upon the issue whether or not the defendants had a right to soak their cloth and dry it on the property in dispute, which has now been found to be the property of the plaintiffs. It seems to us that the learned District Judge was of opinion that no court under any circumstances could find that a customary right existed where the evidence in support of the custom consisted of user. In this we think the learned Judge was wrong. In our opinion it is open to the court to infer from long enjoyment not exercised by permission, stealth, or force, the existence of a custom. Of course, if the court after considering the evidence came to the conclusion that the alleged custom was unreasonable, or that the privilege was enjoyed as the

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* Second Appeal No. 1018 of 1908, from a decree of H. J. Bell, District Judge of Aligarh, dated the 3rd of June, 1908, reversing a decree of Pitambar Joshi, Additional Subordinate Judge of Aligarh, dated the 4th of March, 1907.

(1) (1895) I. L. R. 17 All. 87.

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NOV. 24.

APPELLATE CIVIL.

33 A. 257=
9 I. C. 198.

result of permission given, or that it was exercised by stealth, or force, he would be equally entitled to find against the alleged custom: vide *Kuar Sen* v. *Mamman* (1). We accordingly refer the following issues to the lower appellate court:—

(1) Does any custom exist by reason of which the defendants are entitled to exercise the right of soaking and drying their cloth on the plaintiff's property?

(2) Over what portion of the land in dispute are the defendants entitled to enjoy this right?

[259] In determining these issues the court will have regard to the remarks expressed above. If the court finds that there was a custom extending over some portion, but not over the whole, of the land in dispute, the court, by means of a map or otherwise, will clearly define the area over which the right exists.

The court will also be entitled to take into consideration the reasonableness of the alleged custom. For example, we consider that it might be unreasonable for tenants to claim to prevent a zamindar using a large piece of land for building, agricultural, or other purposes, merely because without interference on the part of the zamindar they had for many years used the land for the purpose of drying cow-dung cakes. In the present case we think that the court might, in conjunction with the evidence of user, consider such matters as the importance of the industry, the length of time it has been established and the possibility or impossibility of carrying on the industry elsewhere if the land is turned into a grove. The court will be entitled to take any additional evidence it finds necessary; on return of the findings 10 days will be allowed to file objections.

On return of the findings the following judgment was delivered:—

The finding on the issues referred by us is against the appellants. Objections have been filed, and the particular objection is that there was a finding by the lower appellate court before the remand that "there had been a user which extended over a period of fifty years," and that the finding of the court upon remand that there was "no evidence that the families of the appellants have constantly and without intermission made use of the tank for a very long time" is inconsistent with the first finding.

In our order of remand we explained to the learned Judge that user under certain circumstances might establish a custom. It appears that when the case went back, very few of the appellants appeared or were represented. A compromise, which the learned Judge says, was most advantageous to the appellants, was agreed upon by their representatives. Shadi Lal, however, refused to abide by the compromise and the case had to proceed. The learned Judge has found against the custom, and we have no [260] reason to think that he did not fully carry out the directions we gave him in the order of remand. We, however, were ready to hear the learned pleader for the appellants and were ready that he should refer us to the evidence which was taken in the court below originally and also on remand, so that we might dispose of the case ourselves without any further delay. The learned pleader admitted that he is not in a position to refer us to this evidence.

We, accordingly, must dismiss the appeal with costs.

Appeal dismissed.

(1) (1895) I. L. R. 17 All. 87.

33 A. 260 (=8 I. C. 817).

APPELLATE CIVIL.

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APPELLATE CIVIL.

33 A. 260= 8 I. C. 817.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

MAHARAJA OF BENARES (*Defendant*), *v.* BALDEO PRASAD (*Plaintiff*).*

[25th November, 1910.]

Act (Local) No. II of 1901 (*Agra Tenancy Act*) *section* 177—*Appeal—Question of proprietary title—Jus tertii pleaded by defendant—Third person added as a defendant—Question decided against latter.*

In a suit for assessment of revenue on land in the possession of the defendant, the defendant pleaded that the land belonged, not to the plaintiff but to a third person. The third person was brought upon the record as a defendant and claimed the land as his, and, on the question of ownership being decided against him, appealed. *Held* that the question raised in the suit was a question of proprietary title which arose directly and substantially in the suit and that an appeal lay to the District Judge.

THIS was an appeal under section 10 of the Letters Patent from a judgment of GRIFFIN, J. The facts of the case are stated in the judgment under appeal which was as follows :—

"This is a plaintiff's appeal arising out of a suit instituted under sections 150 and 158 of the Tenancy Act. The plaintiff's claim was that the defendants should be assessed to revenue in respect of certain land in their possession. According to the plaintiff he was the zamindar of the land in dispute and the defendants had no right to hold it free of revenue. The defendants pleaded that the Maharaja of Benares was the zamindar and that they were entitled to hold the land rent and revenue free. The Assistant Collector decreed the suit. There was an appeal to the Commissioner, who remanded the case with directions that the Maharaja of Benares be made a party. This was done, and the Assistant Collector again decreed the suit. The Maharaja of Benares appealed to the Commissioner, who returned the memorandum of appeal with directions that it should be presented to the District Judge. The latter has now decreed the appeal preferred to him by the Maharaja of Benares. The plaintiff comes here in second appeal. It appears that in the Court of the Assistant Collector certain public records were produced and it was on the strength of the entries in these records [261] that the Assistant Collector decided the case in favour of the plaintiff. No copies of these entries, however, were placed on the record, so that when the case came before the District Judge there was practically no evidence on the record to support the finding of the Assistant Collector. The District Judge was asked to receive certified copies of the entries in the public records, but he refused to do so. This refusal is made one of the grounds of appeal to this Court. I think that under the circumstances of the case the learned District Judge would have exercised a proper discretion in receiving certified copies of the entries in the public record which had been inspected by the Assistant Collector.

"The next ground of appeal is that the District Judge had no jurisdiction to hear the appeal. The question is one of some difficulty. The section giving a right of appeal under the provisions of the Tenancy Act is section 177 which is to the following effect: —'An appeal shall lie to the District Judge from a decree of an Assistant Collector of the first class in all suits in which (*e*) a question of proprietary title has been in issue in the court of first instance and is a matter in issue in the appeal.' In the present case there was an issue in the Court of first instance as to whether the plaintiff or the Maharaja of Benares was the zamindar of the land in suit, and the same issue was raised in the appeal preferred by the Maharaja of Benares. It is, however, pointed out that there was no decree against the Maharaja of Benares and as such he was not competent to appeal against the decree. I am referred to a Full Bench ruling reported in I. L. R. 3 All. 150, in which, however, the facts were different from those of the present case. There is no doubt whatever that in a series of decisions of this Court where a third party had been brought in under the provisions of section 148 of Act XII of 1881 it has been held that the remedy of an unsuccessful intervenor lay in a suit in a Civil Court and not by an

* Appeal No. 149 of 1909 under section 10 of the Letters Patent.

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APPELLATE CIVIL.

38 A. 260=
8 I. C. 817.

appeal. It is true that the corresponding section of the Tenancy Act, section 198, does not apply to the facts of the present case, inasmuch as the suit is not a suit between a landholder and his tenant. But I think the principle deducible from these rulings is applicable to the present case. It is desirable that a question of proprietary title should be fought out and decided in a Civil Court. The present suit is a suit for assessment of revenue. So far as the original defendants are concerned, the only question was whether the land was liable to be assessed to revenue or not. The Maharaja of Benares was brought in by the order of a Revenue Court, with the result that there was a question of proprietary title raised between him and the original plaintiff. This question of title, no doubt, was of considerable importance both to the plaintiff and the Maharaja of Benares, but it made no difference to the original defendants whether they should have to pay the revenue which was assessed to the one or the other. Following, therefore, the principle laid down in I. L. R., 13 All. 364, and other rulings to the similar effect, I think the remedy of the Maharaja of Benares lay in a separate suit in a Civil Court and not by an appeal to the District Judge. I therefore allow this appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs."

Babu *Jogindra Nath Chaudhri*, for the appellant.

Dr. *Satish Chandra Banerji*, for the respondent.

[262] STANLEY, C. J., and BANERJI, J.—This appeal arises in a suit which was brought by Pandit Baldeo Prasad, respondent, against the principal defendants for assessment of revenue on land held by the said defendants, on the allegation that they were the tenants of the plaintiff, that the land was held rent free by them in the plaintiff's zamindari, and that it was liable to assessment to revenue. The principal defendant in answer to the claim urged that the plaintiff had no right to bring the suit inasmuch as the land in question was a part of the property of the Maharaja of Benares. The Maharaja was added as a defendant and urged that the land lay in his zamindari. The conclusion to which the court of first instance came was that the land in question lay in the zamindari of the plaintiff and that he was entitled to a decree. It accordingly made a decree to the effect that the principal defendant should pay Rs. 3-11-2, exclusive of cesses, to the plaintiff, on account of revenue. From this decree the Maharaja of Benares appealed to the District Judge of Benares. The appeal was entertained, and the learned District Judge held that as a question of proprietary title had been determined by the court of first instance, and was also raised in the appeal, the appeal lay to his court. As regards the merits of the case he held that, as the documents upon which the court of first instance relied were not on the record, the plaintiff had failed to establish his claim. The learned Judge accordingly dismissed the suit.

From this decree an appeal was preferred to this Court. The learned Judge who heard the appeal was of opinion that no appeal lay to the District Judge and accordingly reversed his decision and restored that of the court of first instance.

From the decision of the learned Judge of this Court this appeal has been preferred under the Letters Patent and the first and main contention raised is that the appeal from the decree of the court of first instance was properly entertained and heard by the learned District Judge. In our opinion this contention is well-founded. Section 177 of Act No II of 1901 provides that an appeal shall lie to the District Judge from the decree of an Assistant Collector of the first class in all suits in which a question of proprietary title has been in issue in the court of first instance and is a matter in issue in the appeal. The question **[263]** whether the land which formed the subject-matter of the suit was the property of

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8 I. C. 817.

the plaintiff or of the Maharaja defendant, was a question which arose directly and substantially in the suit brought by the plaintiff. The plaintiff could not obtain a decree unless that question was determined and found in his favour. The court of first instance determined the question of title and decreed it in favour of the plaintiff. The decree of that court was a decree not only against the principal defendant but also against the Maharaja of Benares. Upon the question of title it was clearly a decree against the Maharaja by which he was prejudiced. As a question of title was in issue in the court of first instance and was also in issue in the appeal, the appeal lay to the District Judge, and we think the learned Judge was right in holding that he was competent to entertain it.

As regards the merits of the case the learned District Judge commented on the conduct of the court of first instance and of the plaintiff in not placing on the record copies of documents, which the court of first instance inspected after sending for the records which contained them. The learned Judge held that as those documents were not placed on the record, he was justified in holding that there was no evidence on the record which supported the plaintiff's claim. The conduct of the court of first instance in sending for records and not directing copies to be produced was no doubt irregular, but we do not think that on that ground alone the plaintiff's claim should have been dismissed. We agree with our learned colleague that under the circumstances of the case the learned District Judge would have exercised a proper discretion if he had received certified copies of the entries of public records which had been inspected by the court of first instance. We think it is not right to visit the plaintiff with the consequences of the neglect of duty of the court of the first instance. The appeal to the District Judge was not therefore tried according to law, and we must hold that there has been no proper trial.

We recordingly allow this appeal, set aside the decree of this Court and the decree of the lower appellate court, and remand the case to the lower appellate court with directions to readmit it under its original number in the register and dispose of it on the merits after allowing the plaintiff to produce certified [264] copies of the documents relied upon by him, the originals of which had been inspected by the court of first instance. Both parties will be at liberty to adduce any further evidence which may be relevant to the matters in issue. The plaintiff will pay the costs of the appeal to this Court and of the abortive appeal to the District Judge. All other costs will follow the event.

Appeal decreed—cause remanded.

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PRIVY COUNCIL.

33 A. 264=15 C. W. N. 370 =8 A. L. J. 332=13 C. L. J. 351=9 M. L. T. 380=13 Bom. L. R. 367=9 I. C. 975=4 Bur. L. T. 121=21 M. L. J. 1140 =(1911) 2 M. W. N. 177=38 I. A. 37.

33 A. 264 [=15 C. W. N. 370=8 A. L. J. 332=13 C. L. J. 351=9 M. L. T. 380=13 Bom. L. R. 367=9 I. C. 975=4 Bur. L. T. 121=21 M. L. J. 1140=(1911) 2 M. W. N. 177=38 I. A. 37].

PRIVY COUNCIL.

ASHFAQ HUSAIN AND OTHERS (*Judgment-debtors*) *v.* GAURI SAHAI (*Decree-holder*). *

Two appeals consolidated.

[10th and 11th November, 1910 and 1st February, 1911.]

[On appeal from the High Court of Judicature at Allahabad.]

Limitation—Execution of joint decree—Decree set aside as against one of several joint judgment-debtors, against whom it has been ex parte*—Decree passed subsequently against the exempted party—Civil Procedure Code* (1882), *section* 108—*Order on a former application whether* res judicata.

A decree for sale on a mortgage was passed against several defendants jointly on the 25th August, 1900, and made absolute on the 21st December, 1901. As against one defendant, however, the decree was *ex parte*, and it was set aside as against her on appeal on the 11th March, 1902. Subsequently, a decree was passed on the merits against this defendant on the 15th August, 1902, and her appeal was dismissed by the High Court on the 16th November, 1904, and as against her that decree was made absolute on the 27th November, 1905. An application for execution was made against all the defendants on the 21st December, 1905, based on the decrees of the 25th August, 1900, the 15th August, 1902, the 16th November, 1904, the 21st December, 1901, and the 27th November, 1905. The defendants filed an objection to the application on the 7th February, 1906, alleging that they were no parties to the decrees of the 15th August, 1902, and the 27th November, 1905, and that, as to the decrees of the 25th August, 1900, and the 21st December, 1901, they were time barred.

Held (affirming the decision of the High Court) that the decrees of the 25th August, 1900, and the 16th November, 1904, were steps in granting the plaintiff the relief to which he was entitled. The latter decree supplemented and completed the former, and for the first time justified the plaintiff in applying for the joint execution of the decree. Time under the Limitation Act (XV of 1877) began to run from the date of the latter decree, or rather from the date it was made absolute—the 27th November, 1905, and consequently the application was not barred.

Held, also, that the plaintiff was not estopped, in the present proceedings, by the order of the 27th November, 1905, dismissing his former application for [265] execution of the 15th February, 1905, which was based on the decree of the 15th August, 1902, alone; whereas the present application was based on the joint effect of the two orders absolute of the 21st December, 1901, and the 27th November, 1905, which were in effect one decree of the later date. The applications therefore were different and the former did not operate as *res judicata*.

[Dist: 31 I. C. 917; 30 Mad 488; Foll: 15 I. C. 732; 17 I. C. 759=23 M. L. J. 675; 36 Mad. 104; Ref: 29 I. C. 237; 26 M. L. J. 255=1914 M. W. N. 622=23 I. C. 390; 40 Mad. 989: 46 Cal. 25; 53 I. C. 213=37 M L. J. 284=1919 M. W N. 640; Dist: 68 I. C. 919; Fol: 79 I. C. 477;]

Two consolidated appeals 50 and 51 of 1909 from two decrees (27th June, 1907) of the High Court at Allahabad, which reversed orders (17th April, 1906, and 5th May, 1906) of the Subordinate Judge of Moradabad.

The only question in the appeal was whether or not the execution of a mortgage decree in favour of the respondent was barred by limitation.

The facts are stated in the judgment of their Lordships and also in in the report of the hearing before the High Court (RICHARDS and GRIFFIN, JJ.) which will be found in I. L. R. 29 All. 623.

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* *Present*:—Lord MACNAGHTEN, Lord MERSEY, Lord ROBSON, Sir ARTHUR WILSON and Mr. AMEER ALI.

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370=8 A. L.
J. 332=13 C.
L. J. 351=9
M. L. T. 380
=13 Bom L.
R. 367=9 I.
C. 975=4
Bur. L. T.
121=21 M.
L. J. 1140=
=(1911) 2 M.
W. N. 177=
38 I. A. 37.

On those facts the Subordinate Judge in his judgment on 17th April, 1906, said :—

"The decree-holder contends that he can count time from the decree of the appellate Court of the 16th November, 1904. It has been noticed that the *ex parte* decree was set aside so far as Sakina was concerned. The case was reheard on the merits as between the plaintiff and her only, and the decree of the 15th August, 1902, was passed as between the plaintiff and her only. She appealed from this decree, and the High Court decree was confined between her and the plaintiff only. The defendants (objectors) were not parties to the decree of the first Court of the 15th August, 1902, nor to that of the High Court of the 16th November, 1904 The cases referred to by the decree-holder, *Nur-ul-Hasan* v. *Muhammad Hasan* (1), *Basant Lal* v. *Najm-un-nissa Bibi* (2) and *Ram Lal* v *Jagannath* (3), are distinguishable, in that in each of them the decree itself was under question before the Appellate Court, though all the persons who were parties before the first Court were not before the Appellate Court. Here neither the decree of the 25th August, 1900, nor that by which it was made absolute, that is, the decree of the 21st December, 1901, was subject of the appeal. It may be added that while Sakina's appeal against the order refusing her application of section 103 was before the Court, and again when the case was being tried on the merits so far as she was concerned, and again when the decree passed on the merits was the subject of appeal to the High Court which ended in the decree of the 16th November, 1904, there was nothing that could prevent the decree-holder from putting the decree of the 21st December, 1901, in execution against the defendants and to have such interest in the property as was in the hands of these defendants sold. Nor, having [266] regard to the judgment of the High Court setting aside the *ex parte* decree, can it be said that the whole *ex parte* decree was set aside.

"I cannot help but hold that the application for execution as against the defendants (objectors) is beyond time from the decree of the 21st December, 1901. This is a case in which there were two decrees: one against the defendants (objectors), the other against Sakina. The latter decree may be executed in respect of the whole sum against the interest of Sakina, but the decree of the 21st December, 1901, is barred. I accept the objection with costs, allowing execution against Sakina and her interest only."

On the same day (17th April 1906) the Subordinate Judge made an order directing the appellants to specify the amount of the share of Sakina in the mortgaged property and postponed the further hearing of the application for execution to the 27th April, 1906.

On that date the respondent filed a petition stating that his decree was a joint decree, and the mortgage was also joint, and the Subordinate Judge thereupon, on the 5th May, 1906, ordered the execution case to be struck off on the ground that, as Sakina's share was not specified, it could not be sold.

From these two orders (17th April and 5th May, 1906) the respondent appealed to the High Court. The appeal from the former order is reported as above stated. On appeal from the latter order the High Court said :—

"Having regard to our judgment in the connected appeal, it is perhaps unnecessary to give any further judgment in this case. However, inasmuch as the Court below dismissed the application for execution against Sakina Bibi, we set it aside so far as it is inconsistent with our judgment just delivered in the connected appeal. As Sakina Bibi did not appear in the Court below and does not appear now, we make no order as to costs."

Both orders having been reversed by the High Court, the present appeals 50 and 51 were brought from the respective orders of reversal. On these appeals :—

De Gruyther, *K. C.* and *Ross*, for the appellants, contended that the application for execution dated the 21st December, 1905, was made more than three years after the decree of the 25th August, 1900, was made absolute against the appellants on the 21st December, 1901, and was

(1) (1886) I. L. R. 8 All. 573.
(2) (1883) Weekly Notes, 179.
(3) (1884) Weekly Notes, 138.

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therefore barred by lapse of time; and that the decree of the 16th November, 1904, was not the decree in the suit capable of being executed against the appellants. Reference was made to the Transfer of Property Act (IV of 1882), sections 88, 89; Limitation Act (XV of 1877), [267] schedule II, article 179 : Civil Procedure Code (XIV of 1882), sections 108, 540, 545 : *Sheo Prasad* v. *Anrudh Singh* (1), *Jivaji* v. *Ramchandra* (2) and *Baikanta Nath Mittra* v. *Aughore Nath Bose* (3). It was also contended that the decree of the Subordinate Judge, dated the 27th November, 1905, became final as between the appellant and respondent, not having been appealed from, and the High Court had no jurisdiction to question its validity; and the cases of *Ram Kirpal* v. *Rup Kuari* (4) and *Beni Ram* v. *Nanhu Mal* (5) were referred to. It was further contended that the same decree had the effect of a *res judicata* between the parties, and prevented the making of a further application substantially the same, reference being made to the case of *Krishna Behari Roy* v. *Bunwari Lall Roy* (6).

E. U. Eddis, for the respondent, contended that under article 179 of schedule II of the Limitation Act, 1877, limitation did not begin to run until the date of the decree of the High Court of the 16th November, 1904, and consequently the application for execution of the 21st December, 1905, was not barred. In all these proceedings the Subordinate Judge had treated the original decree against all the judgment-debtors, and the subsequent decree against Sakina as being totally distinct and independent decrees which must be executed separately; but the correct way of dealing with them, it was submitted, was to take them together, and so treated they formed only one decree against all the judgment-debtors jointly, and the whole decree should be executed at one time and in one proceeding. Reference was made to *Gopal Chunder Manna* v. *Gosain Das Kalay* (7) and *Kristnama Chariar* v. *Mangammal* (8). The reasons given by the High Court were right, and the judgment should be upheld.

De Gruyther, K. C. in reply referred to and distinguished the case of *Sham Sundar* v. *Muhammad Ihtisham Ali* (9), which [268] was referred to by the High Court as being applicable in principle to the present case.

1911, *February 1st.*—The judgment of their Lordships was delivered by LORD MERSEY :—

The substantial question in this case is whether an application for the execution of a decree absolute obtained by the respondent for the sale of some property which had been mortgaged to him by the appellants is barred by section 4 of the Indian Limitation Act, 1877. There is also a further question, namely, whether a similar application had not already been made to the Court and dismissed on the 27th November, 1905, so as to make the present application *res judicata*.

The litigation which has led up to this dispute has been very long, and it has been somewhat complicated, but the story can be told for present purposes, in a few sentences.

(1) (1879) I. L. R. 2 All. 273.
(2) (1891) I. L. R. 16 Bom. 123.
(3) (1893) I. L R. 21 Cal. 387.
(4) (1883) I. L. R. 6 All. 269 : L. R. 11 I. A. 37.
(5) (1884) I. L. R. 7 All. 102 : L. R. 11 I. A. 181.
(6) (1875) I. L. R. 1 Cal. 144 (146) : L. R. 2 I. A. 283 (286).
(7) (1898) I. L. R 25 Cal. 594 (599—600 and 601—602).
(8) (1902) I. L. R. 26 Mad. 91 (92).
(9) (1905) I. L R. 27 All. 501.

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The respondent was the holder of a mortgage of the interest of the appellants and of a lady named Musammat Sakina in certain lands. The mortgage debt, was a joint debt, and the mortgaged property was joint property. Default was made in payment of the debt, and thereupon the respondent instituted proceedings for the recovery of the money. He also asked for a decree that if payment were not made the property should be sold.

The present appellants put in defences, but the lady failed to appear. The case was tried, and the defences were found to be untrue, whereupon a decree was pronounced against all the defendants, the judgment against the lady going by default of appearance. This decree was dated the 25th August, 1900, and it was made absolute on the 21st December, 1901.

If nothing more had happened there should have been no difficulty about obtaining an order for execution of the decree. But before the decree absolute was made, namely, on the 19th September, 1900, the lady Musammat Sakina had bestirred herself and had applied for a review of the judgment of the 25th August, 1900, on the ground that she had never been served with process. The lady's application was refused by the Subordinate Judge before whom it came. This was on the 13th May, 1901. **[269]** The learned Judge did not believe her statement that she had no notice of the proceedings and he was of opinion that she had been put forward by the principal defendant in the suit, the present appellant Ashfaq Husain, in order to delay the execution. Musammat Sakina then appealed; and her appeal was allowed, the Court directing "that the decree passed *ex parte* be set aside so far as the appellant, Musammat Sakina is concerned," and that the case should be reheard upon the merits as against her. This was on the 11th March, 1902. The case was accordingly set down for rehearing, and Musammat Sakina then pleaded that the plaintiff had received certain sums of money from her deceased husband on account of the mortgage debt for which he had not given credit. This defence of payment had not been put forward by any of the other defendants, and at the hearing Musammat Sakina was unable to support it by satisfactory evidence. Accordingly judgment was given against her on the 15th August, 1902. She then again appealed, but the High Court, agreeing with the Subordinate Judge that her witnesses were unworthy of credit, dismissed her appeal. This was on the 16th November, 1904. Nothing was paid, and on the 15th February, 1905, the plaintiff filed an application against all the defendants in the action asking that the decree of the 15th August, 1902, might be made absolute, and for an order for the sale of the property. To this the appellants filed an objection alleging that the decree of the 15th August, 1902, was passed against Musammat Sakina alone, and that the original decree of the 25th August, 1900, passed against the appellants, "had become extinct" by operation of the Statute of Limitation. The objection was heard on the 27th November, 1905, when the Subordinate Judge held that the decree of the 15th August, 1902, concerned Musammat Sakina only, and that therefore no order absolute could be made against the objectors on the basis of that decree. He also found that the plaintiff had already, namely, on the 21st December, 1901, obtained a decree absolute against the objectors, so that there were two binding decrees (namely, the decree against the objectors and the decree against Musammat Sakina) in respect of the same mortgage. The learned Judge therefore came to the conclusion that he could not help but disallow the plaintiff's **[270]** application; and the application was accordingly dismissed. The

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learned Judge, however, made a decree absolute (dated the 27th November, 1905), against Sakina. Later on, namely, on the 21st December, 1905, the plaintiff filed an application against all the defendants for execution by way of sale of the property. This application was based on the decrees of the 25th August, 1900, the 15th August, 1902, the 16th November, 1904, the 21st December, 1901, and the 27th November, 1905, before-mentioned. The present appellants filed an objection to this application on the 7th February, 1906, alleging that they were no parties to the decrees of the 15th August, 1902, and the 27th November, 1905, and that as to the decrees of 25th August, 1900, and 21st December, 1901, they were time barred.

These are the facts, and the first question is whether the remedy against the present defendants is statute barred. The limitation applicable to the case is to be found in the fourth section of the Indian Limitation Act, 1877, which provides that every application made after the period of limitation prescribed therefor by the second schedule annexed to the Act shall be dismissed, although limitation has not been set up as a defence. The second schedule (Art. 179) provides that the time for an application for the execution of a decree shall be three years from the date of the decree or (where there has been an appeal) from the date of the final decree or order of the Appellate Court. The answer to the question, therefore, depends upon the date of the decree on which the application for execution is based. If the date of the decree is more than three years before the date of the application, then the respondent's remedy is statute barred, but otherwise not. Now the respondents originally claimed a decree against all the defendants jointly in respect of a joint mortgage debt, and he obtained on the 25th August, 1900, what purported to be a judgment in accordance with his claim. But it subsequently appeared that by reason of non-service of process on one of the defendants the judgment ought not to have been given, and accordingly the Court re-opened the matter by setting aside the judgment so far as it affected the one defendant who had not been served, and directed another inquiry to ascertain whether that defendant had any defence. It might [271] have been more in accordance with strict procedure if the Court had set aside the whole judgment and had proceeded to re-try the case as against all the defendants. But it was apparently considered that such a course would involve unnecessary delay and expense, and no one objected to the procedure adopted by the Court.

Thus the original judgment of the 25th August, 1900, was treated by the Court and by the parties as a mere step in the granting of the relief for which the plaintiff was asking and to which, as it ultimately turned out, he was entitled, namely, a decree against all the defendants jointly. The irregularity (if any) in the procedure has, in their Lordships' opinion, worked no wrong and is of no real consequence. Subsequently, and after many delays, for which the respondent was in no way responsible, it was ascertained that the defendant who alleged that she had not been served had no defence, and a decree was made against her. This decree, which was dated the 16th November, 1904, was the second step in granting to the plaintiff the relief to which he was entitled. It supplemented and completed the decree granted on the 25th August, 1900, and for the first time gave to the plaintiff that which would alone justify him in applying for the joint execution to which he was entitled. It is from the date of this last judgment (the 16th November, 1904), or rather from the date

when it was made absolute (the 27th November, 1905), that the time under the statute began to run. It was then for the first time that the Court granted a complete decree to the respondent. It follows therefore that the plaintiff's remedy is not statute barred. This seems to have been the view taken by the High Court in the judgment from which this appeal is brought, and in their Lordships' opinion it is right.

As to the second point taken on behalf of the appellants, namely, that the plaintiff is estopped in the present proceedings by the judgment given against him on the 27th November, 1905, upon his application of the 15th February, 1905, it is sufficient to say that the present application is different from the application then before the Court. The application of the 15th February, 1905, was based on the decree of the 15th August, 1902, and on that alone, whereas the present application is based upon the joint [272] effect of the two orders absolute of the 21st December, 1901, and the 27th November, 1905, made against the appellants and Sakina respectively, and which two orders are in effect on the decree of the later date.

Their Lordships will humbly advise His Majesty that the appeals should be dismissed. The appellants will pay the costs.

Appeals dismissed.

Solicitors for the appellants :—*Ranken Ford, Ford and Chester.*
Solicitors for the respondent :—*Sanderson, Adkin, Lee and Eddis.*

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33 A. 272 [=9 I. C. 739=15 C. W. N. 321=8 A. L. J. 256=9 M. L. T. 343=13 C. L. J. 345=21 M. L. J. 378=13 Bom. L. R. 359=(1911) 2 M. W. N. 395=38 I. A. 45.]

PRIVY COUNCIL.

KISHAN PRASAD AND OTHERS (*Plaintiffs*) *v.* HAR NARAIN SINGH AND OTHERS (*Defendants*).*

[*On appeal from the High Court of Judicature at Allahabad.*]
[11th and 15th November, 1910 and 1st February, 1911.]

Parties—Parties to suits—Joint Hindu family—Managing members—Suit to recover debt due to members of family in family business—Power of managers to sue alone —Act No. XV of 1877 (*Indian Limitation Act*), *section* 22—*Parties added after expiry of period of limitation.*

Where a joint family business has to be carried on in the interests of the joint family as a whole, the managing members may properly be entrusted with the power of making contracts, giving receipts, and compromising or discharging claims ordinarily incidental to the business; and where they are so entrusted and empowered they are entitled as the sole managers of the family business to make in their own names contracts in the course of that business, and to maintain suits brought to enforce those contracts without joining in the suit with them either as plaintiffs or defendants the other members of the family.

Arunachala Pillai v. *Vythialinga Mudaliyar* (1) approved. *K. P. Kanna Pisharody* v. *V. M. Narayanan Somayajipad* (2), *Ramsebuk* v. *Ramlall Koondoo* (3), *Imam-ud-din* v. *Liladhar* (4) and *Alagappa Chetti* v. *Vellian Chetti* (5) distinguished.

In this case the original plaintiffs were the managing members of a joint family business of money-lending, entrusted with and regularly exercising the power of doing everything necessary to carry on the business. In the course of

Present :—I Lord MACNAGHTEN, Lord MERSEY, Lord ROBSON, Sir ARTHUR WILSON, and Mr AMEER ALI.

(1) (1882) I. L. R. 6 Mad. 27.
(2) (1881) I. L. R. 3 Mad. 234.
(3) (1881) I. L. R. 6 Cal. 815.
(4) (1892) I. L. R. 14 All. 524.
(5) (1894) I. L. R. 18 Mad. 33.

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9 I. C. 739=
15 C. W. N.
321=8 A. L.
J. 256=9 M.
L. T. 343=13
C. L. J. 345
=21 M. L. J.
78=13 Bom.
L. R. 359=
=(1911) 2 M.
W. N. 395=
38 I. A. 45.

such business they contracted in their own names with the defendants for a loan, and on the accounts a balance was struck between the parties on the 9th August, 1901. In a suit brought by the managing members on the 3rd June, 1904, and therefore within the period of limitation, to recover the amount due, the other members of the family were, on an objection by the defendants that the suit [273] was improperly constituted, joined as plaintiffs on the 22nd August, 1904, after the period of limitation for the suit had expired, and the defence was set up that under section 22 of the Limitation Act (XV of 1877) the whole suit was barred.

Held (reversing the decision of the High Court) that the suit as originally brought was properly constituted; that the members of the family subsequently added were unnecessary parties; and that the suit was consequently not barred.

[Fol : 27 M. L. J. 621=1914 M. W. N. 684=26 I. C. 35; 1 Pat. L. J. 154; 39 I C 427; **Ref**: 12 I. C. 410; 21 C. L. J. 454=27 I. C. 425; 34 All. 572; 16 I. C. 674; 14 I. C. 35; 19 C. W. N. 565; 38 I. C 111; 1917 M. W. N. 805=31 M. L. J. 271=41 Mad. 454; 50 I. C. 243; **Rel**: 13 I. C. 206; 37 Bom. 340; 35 Mad. 685; 50 I. C 353=9 L. W. 377=1919 M. W. N. 435; 63 I. C. 564=1921 Pat. 289; 64 I. C. 966; **Ref**: 82 I. C. 369; 72 I. C. 722=36 C. L. J. 234; 81 I. C. 303; **Fol**: 1 Pat. L. J. 468; **Ref**: 43 Bom. 575; 45 Bom. 446; 61 I. C. 590; 65 I. C. 367; 26 C. W. N. 805.]

APPEAL from a judgment and decree (2nd February 1907) of the High Court at Allahabad, which reversed a judgment and decree (24th September 1904) of the Subordinate Judge of Ghazipur.

The facts of the case are stated in the judgment of their Lordships, and also in the report of the appeal before the High Court (SIR JOHM STANLEY C. J., and SIR WILLIAM BURKITT, J.) which will be found in I. L. R. 29 All. 311, *Shamrathi Singh* v. *Kishan Prasad*.

The two issues alone material in this appeal were (1). Whether it is necessary to make other members of the family parties to the suit: if so, what persons have not been made parties, and what is the result of such omission?

(3) Is the plaintiff's suit barred by time against all the defendants, or the defendants aforesaid?

On the facts the Subordinate Judge found that the original plaintiffs with whom the contract sued on was entered into were the managing members of the joint family, and as such were entitled to institute the suit in their own names alone on behalf of themselves and the other members of the family. He was of opinion therefore on the above issues that it was not necessary that all the members of the family should be made parties to the suit, or that it should be brought on behalf of them all, that the parties added as plaintiffs by the order of the 8th September, 1904, were unnecessary parties to whom the provisions of section 22 of the Limitation Act (XV of 1877) were not applicable; and that the suit was not barred against any of the defendants.

On appeal by the defendants that decision was reversed by the High Court and the suit was dismissed. The High Court judgment will be found at page 312 of the report above referred to.

[274] On this appeal :—

DeGruyther K. C. and *B. Dube* for the appellants contended that the contract of loan having been made with the original plaintiffs only, they alone were entitled to enforce it; and that they were entitled as the managing members of a joint Hindu family to maintain a suit for the recovery of a debt due to the joint family. In that view the suit was not barred by the law of limitation. Reference was made to the Limitation Act (XV of 1877) section 22, and schedule II, articles 57, 59, 64, 85, 115 and 120; and the following cases were cited and discussed, *Pragi Lal* v.

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Maxwell (1); *Kasturchand Bahiravdas* v. *Sagarmal Shrisam* (2); *Kattusheri Pisharetee Kanna Pisharody* v. *Vallotil Marnakel Narayanan Somayajipad* (3); *Ramsebuk* v. *Ramlall Koondoo* (4); *Narayan Gop Habbu* v. *Pandurang Ganu* (5); *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (6); *Ramayya* v. *Venkataratnam* (7); *Allagappa Chetti* v. *Vellian Chetti* (8); and *Arunachala Pillai* v. *Vythialinga Mudaliyar* (9). Reference was also made to Ameer Ali and Woodroffe's Civil Procedure Code (Act V of 1908), page 127. Under the particular circumstances of the case the added plaintiffs should in equity be considered parties to the suit from the date of its institution; and in no case ought the suit to have been wholly dismissed.

Ross, for the respondent, contended, mainly for the reasons given by the High Court, that the managing members of a joint Hindu family carrying on a joint family business were not entitled to maintain a suit in their own names against debtors of the family without joining with them either as plaintiffs or defendants all the other members of the family. He referred to *Hari Gopal* v. *Gokaldas Kushabashet* (10); *Angamuthu Pillai* v. *Kolandavelu Pillai* (11); Mayne's Hindu Law, 7th Ed., page 379 [LORD MERSEY referred to page 381]; *Ramsebuk* v. *Ramlall Koondoo* (12); and *Kalidas Kevaldas* v. *Nathu* [275] *Bhagvan* (13). The suit was barred by section 22 of the Limitation Act, and had been rightly dismissed by the High Court.

The appellants were not called upon to reply.

1911. *February* 1*st*.—The judgment of their Lordships was delivered by.

LORD ROBSON:—

The question to be determined in this appeal is whether or not the suit is barred by the Indian Limitation Act of 1877.

There is no doubt that when first brought, it was well within the statutory period of three years, but it is contended by the respondents that it was not then brought by all the proper and necessary plaintiffs, and that afterwards, when the record was amended in that respect, the statutory time had expired.

The suit was commenced by the first three plaintiffs on the record. They are the managing members of an undivided Hindu joint family governed by the Mitakshara Law, and, as such managing members, they carry on the business of money-lenders together at Hanumanganj in the district of Ballia, as a firm, under the name and style of Manorath Bhagat Dhana Ram.

The other members of the joint family do not participate in the management of that business or "shop," as it is called, and the loan transactions out of which the claim arises were negotiated and concluded by the members of the said firm alone, with the first three defendants, who are also members of another undivided Hindu family.

The accounts between the parties began in 1895, and balances were periodically agreed, between them until the 9th August, 1901, when the last balance was struck and the period of limitation began to run. On

(1) (1885) I. L. R. 7 All. 284 (287).
(2) (1892) I. L. R. 17 Bom. 413 (416).
(3) (1891) I. L. R. 3 Mad. 234.
(4) (1881) I. L. R. 6 Cal. 815.
(5) (1881) I. L. R. 5 Bom. 685.
(6) (1883) I. L. R. 7 Bom. 467 (470).
(7) (1893) I. L. R. 17 Mad. 122 (126).
(8) (1894) I. L. R. 18 Mad. 33.
(9) (1902) I. L. R. 6 Mad. 27 (28).
(10) (1887) I. L. R. 12 Bom. (158).
(11) (1899) I. L. R. 23 Mad. 90 (194).
(12) (1881) I. L. R. 6 Cal. 815 (825).
(13) (1883) I. L. R. 7 Bom. 217 (220).

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PRIVY COUNCIL.

38 A. 272=
9 I. C. 739=
15 C. W. N.
321=8 A. L.
J. 256=9 M.
L. T. 343=13
C. L. J. 345
=21 M. L. J.
78=13 Bom.
L. R. 389=
(1911) 2 M.
W. N. 395 =
38 I. A. 45.

that date the defendants duly acknowledged the correctness of the balance then appearing in the plaintiffs' books, and executed a sarkhat or agreement admitting it to be due and payable by them. It is found by the learned Subordinate Judge that this agreement was made between the defendants and the first three plaintiffs, who accordingly brought their action for the balance in question on the 3rd June, 1904. The defendants objected that all the members of the family to which the plaintiffs belonged ought to be joined with them as [276] plaintiffs. On the 22nd August, 1904, the original plaintiffs, while denying that the other members of the family were necessary parties, and alleging themselves to be the proprietors and managers of the firm, yet with a view to removing the defendants' objection for what it was worth, prayed for leave to add the other members of the family as plaintiffs. Leave was accordingly given, and the amendment was made on the 8th September, 1904. By this time the three years allowed by Act XV of 1877, second schedule, article 64, had expired, and it became necessary to determine whether or not the additional plaintiffs were really necessary parties, because if not, the suit had always been properly constituted and the time under the statute stopped running on the 3rd June, 1904, within the three years.

The learned Subordinate Judge of Ghazipur decided in favour of the plaintiffs, but the High Court for the North-Western Provinces reversed his judgment. Their Lordships are of opinion that the judgment of the learned Subordinate Judge ought to be restored.

The Indian decisions as to the powers of the managing members of an undivided Hindu joint family are somewhat conflicting. It is, however, clear that where a business like money-lending has to be carried on in the interests of the family as a whole, the managing members may properly be entrusted with the power of making contracts, giving receipts and compromising or discharging claims ordinarily incidental to the business. Without a general power of that sort, it would be impossible for the business to be carried on at all, and there is no reason to doubt the correctness of the finding of the learned Subordinate Judge that the first three plaintiffs here were in fact entrusted with, and regularly exercised, such a power in regard to this money-lending business. He finds in broad terms that all the business relating to the shop had been carried on in the names of the first three plaintiffs only, and that all law suits relating to the shop, or the family, had also been instituted in their names alone.

Is there any principle of law, or any custom applicable to a case like this, according to which the managing members of a Hindu joint family intrusted with the management of a business must be held incompetent to enforce at law the ordinary business [277] contracts they are entitled to make or discharge in their own names? The defendant is, of course, entitled to insist on all the persons with whom he expressly contracted being made parties to the suit, and that was done in the action as originally framed in this case. There were no other parties to the contract of the 9th August, 1901, than the respondents and the first three plaintiffs. The respondents are demanding, however, that persons who are incompetent to interfere in the business of the contract, or to give a receipt under it, and are merely interested in its profits shall be treated as parties necessary to its enforcement. The High Court thought there was much to be said in favour of the view taken by the Court below, but considered the matter concluded by authority. They cited the case of *K. P. Kanna*

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33 A. 272=
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J. 256=9 M.
L. T. 343=13
C. L. J. 345
=21 M. L. J.
378=13 Bom.
L. R. 359=
(1911) 2 M.
W. N. 395=
38 I. A. 45.

Pisharody v. *V. M. Narayanan Somayajipad* (1) which was a case turning on the co-ownership of land. The co-owners were an association of individuals of which only some brought the action while others supported the defendants. Knight, C. J., held that all the co-owners in such a case must join and that they could not invest the managers of their property with the right to sue in their own names or in a representative capacity. Their Lordships think that this proposition, thus broadly stated as to co-ownership, cannot be applied to the managing members of a business carried on for an undivided Hindu joint family. It was not so applied in the later case of *Arunachala Pillai* v. *Vythialinga Mudaliyar* (2), where it was stated that the managing member of an undivided Hindu family, suing as such, is entitled to bring a suit to establish a right belonging to the family without making the other members of the family parties to the suit.

Stress was laid by the High Court on the judgment in *Ramsebuk* v. *Ramlall Kondoo* (3). In that case a business was carried on for the benefit of a Mitakshara family by a firm consisting of four members of the family. The action in question was brought by two only of the partners, and the other two were not added until after the period of limitation had expired. The Court held that the plaintiffs must fail because all the co-contractors had not been added as plaintiffs. Garth C. J., says, p. [278] 824 : —" If in this case it had been found in the Court below as a fact that the contract was made *between the defendant and the two original plaintiffs only* there would be no difficulty in deciding in their favour, because the joinder of the other two plaintiffs would only have been a *misjoinder*, which, by section 31 of the Code of Civil Procedure, is never now fatal to a suit." Again (p. 825) the learned Chief Justice says :— " The lower Court has found in this case that all the four plaintiffs were partners in the concern, and that the defendants contracted with all jointly." It is to be observed that there were other members of the family who had an equal family interest in the profits of the business, but it was not suggested that they should be joined as plaintiffs or that they were to be treated as partners in the firm of managing members. In the present case, however, the defendants were originally sued by all the partners or persons with whom they had made their contract, and therefore they cannot avail themselves of *Ramsebuk's* case as an authority in their favour.

The same observations apply to the case of *Imam-ud-din* v. *Liladhar* (4). There the decision simply was that, except in the case of an assignment by the other surviving partner, it is not competent to one only of two or more surviving partners to sue for a debt due to the firm.

The decision in the case of *Alagappa Chetti* v. *Vellian Chetti* (5), cited by the respondents, may be supported on the ground that the single plaintiff in that case was not shown to be the managing member of the family or to be the only partner of the business with which the litigation was concerned.

Their Lordships think, however, that the proposition there laid down to the effect that the manager cannot sue without joining all those *interested* with him, if literally construed, goes too far.

In the opinion of their Lordships, the original plaintiffs in this case

(1) (1881) I. L. R. 3 Mad 234.
(2) (1882) I. L. R. 6 Mad. 27.
(3) (1881) I. L. R. 6 Cal 815.
(4) (1892) I. L. R. 14 All. 524.
(5) (1891) I. L R. 18 Mad. 33.

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PRIVY COUNCIL.

33 A. 272=9 I. C. 739=15 C. W. N. 321=8 A. L. J. 256=9 M. L. T. 343=13 C. L. J. 345=21 M. L. J. 378=13 Om. L. R. 359=(1911) 2 M. W. N. 395=38 I. A. 45.

were entitled, as the sole managers of the family busines, to make in their own names, the contracts which gave rise to the claim, and that they properly sued on such contracts without joining the other members of the family.

[279] Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed; that the decree of the High Court should be reversed with costs, and that of the Subordinate Judge restored.

The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants :—*Barrow, Rogers & Nevil.*

Solicitors for the respondents :—*T. L. Wilson & Co.*

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33 A. 279 (=8 I. C. 743).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

SURAJ DIN (*Judgment-debtor*) *v.* MAHABIR PRASAD (*Purchaser of decree*).*

[25th November, 1910.]

Civil Procedure Code (1882), *sections* 341 *and* 349—*Execution of decree—Arrest of debtor—Discharge pending an insolvency petition—Re-arrest in execution of the same decree—Act No. XV of* 1877 (*Indian Limitation Act*), *schedule II, article* 179—*Application in accordance with law.*

Where a judgment-debtor who has been arrested and sent to jail in execution of a decree obtains an *interim* release under section 349 of the Code of Civil Procedure, 1882, such a release is not a discharge under section 341 of the Code and does not exempt the judgment-debtor from liability to be re-arrested in execution of the same decree. An application, therefore, in such circumstances, for execution of the decree by re-arrest of the judgment debtor is one in accordance with law and saves limitation. *Shamji Deokaran* v. *Poonja Jairam* (1) followed. *Secretary of State for India* v. *Judah* (2) dissented from.

THIS was an appeal under section 10 of the Letters Patent from a judgment of KARAMAT HUSAIN J. The facts of the case appear from the judgment under appeal, which was as follows :—

"The decree-holder in this case obtained the decree on the 19th November, 1904. The first application was made on the 6th February, 1905. The prayer was to have the judgment-debtor arrested, but that application was struck off for default. The second application for execution was made on the 2nd July, 1905, and the judgment-debtor was arrested on the 3rd of July and sent to jail. The judgment-debtor applied to be declared an insolvent, and by the order of the District Judge of the 28th July, 1905, an interim order was passed by the District Judge for the release of the judgment-debtor. The application of the judgment debtor for a declaration that he was an insolvent [280] was rejected. Notice of this was given to the court executing the decree. That court, on the 30th August, 1905, gave notice to the decree-holder to proceed, and on the 6th September, 1905, the court struck off the decree-holder's application for default. On the 10th August, 1907, the decree-holder made a third application which was struck off for default on the 24th August, 1907. That application was also for the arrest of the judgment-debtor. The fourth application was made on the 3rd September, 1908, praying for the attachment of certain property of the judgment-debtor.

"The objection taken by the judgment-debtor is that this fourth application is time-barred for the following reason. The judgment-debtor, who was arrested under the second application, was released, and, as he could not be arrested for a second time,

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* Appeal No. 34 of 1910 under section 10 of the Letters Patent.

(1) (1902) I. L. R. 26 Bom. 652. (2) (1886) I. L. R. 12 Cal. 652.

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APPELLATE CIVIL.

33 A. 279 = 8 I. C. 753.

the third application of the 10th August, 1907, which was also for his arrest, could not have been made and therefore could not be regarded as a step in aid of execution of the decree.

"The Court of first instance came to the conclusion that the application of the 10th August was an application in accordance with law and that therefore the execution of the decree was not barred by limitation. The judgment-debtor appealed and his appeal was rejected by the District Judge of Allahabad. He in his judgment says :—'The judgment-debtor was released under an order of the Court of Insolvency, but his application in insolvency was ultimately rejected by the Court and he was liable to be sent to jail. Therefore, as held in I. L. R. 26 Bom 652, the judgment-debtor who was arrested and imprisoned in execution of a decree and had obtained an interim protection under the Insolvency Act was liable to be arrested in execution of the same decree. Therefore the order of the Court below is correct.'

"The judgment-debtor comes here in second appeal, and it is argued by his learned advocate that if a judgment-debtor is released once, no matter how he is released, the decree-holder cannot apply for his arrest a second time. In support of his contention he relies on I. L. R. 12 Cal. 652 ; I. L. R. 20 Cal. 874 and 72 L. J. p. 46.

"The authorities relied on by the learned advocate have no application to the facts of this case. Section 341 of the old Code of Civil Procedure, Act No. XIV of 1882, enacts that 'a judgment-debtor discharged under this section is not thereby discharged from his debt ; but he cannot be re-arrested under the decree in execution of which he was arrested.'

"In the case before me the judgment-debtor was not discharged under section 341, and therefore the application for execution of the 10th of August, 1907, was an application in accordance with law. This view is supported by the ruling in *Shamji Deokaran* v. *Poonja Jairam* (1).

"The result is that I dismiss the appeal with costs."

The judgment-debtor appealed.

Mr. *A. P. Dube*, for the appellant :—

The case of *Shamji Deokaran* v. *Poonja Jairam* (1) does not govern this case. That was under the Insolvency Act (11 [281] and 12 Vict., C. 21), which makes special provision for the re-arrest of persons released by an interim order. That Act only applies to Presidency towns. I rely on *Secretary of State for India in Council* v. *Judah* (2) and *Chureh's Trustees* v. *Hibbard* (3). If the time intervening between release and application for a second writ of arrest was greater than the original period for which imprisonment was ordered the judgment-debtor could not be re-arrested. The debtor ought to have been re-arrested immediately after his application was rejected.

Maulvi *Shafi-uz-zaman*, for the respondent, was not called upon.

STANLEY, C. J. and BANERJI, J.—The question for determination in this appeal is whether or not an application of the 10th of August, 1907, made by the judgment-creditor respondent, was an application in execution of his decree made in accordance with law. The respondent obtained a decree against the appellant on the 19th November, 1904, and on an application for execution made on the 7th of July, 1905, the judgment-debtor was arrested and sent to jail. He then applied to be declared an insolvent, and by the order of the District Judge of the 28th of July, 1905, an interim order was passed for his release from imprisonment. Subsequently the application of the appellant for declaration of insolvency was rejected. An application was then made by the judgment-creditor on the 10th of August 1907, for the arrest of the judgment-debtor. An objection was raised to this application that it does not save the operation of the Statute of

(1) (1902) I. L. R. 26 Bom. 652.
(2) (1886) I. L. R. 12 Cal. 652.
(3) (1902) L. R. 2 Ch. 784.

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33 A. 279= 8 I. C. 713.

limitation by giving a fresh start for limitation, it being contended that it was not made in accordance with law. An application was made on the 3rd of September, 1908, praying for the attachment of certain property of the judgment-debtor, and to this application the plea of limitation was set up. The Court of first instance came to the conclusion that the application of the 10th of August, 1907, was an application in accordance with law, and that therefore the execution of the decree was not barred by limitation. The judgment-debtor appealed, with the result that his appeal was dismissed. He then filed [284] a second appeal, which was also dismissed, and now he comes before us in appeal under the Letters Patent.

The learned Judge of this Court, after a review of the authorities, came to the conclusion that the application of the 10th of August, 1907, was in accordance with law, and that application saved the operation of limitation. We think in this view our learned brother was correct.

The present appeal has been ably argued by Mr. *Dube*, His argument was based largely upon a ruling in the case of *The Secretary of State for India* v. *Judah* (1). In that case the learned Chief Justice, Sir COMER PETHERAM, undoubtedly laid down that, under circumstances similar to those in the present case, a re-arrest of a judgment-debtor was not in accordance with law. He was clearly of opinion that " the Code only contemplates one arrest, and that if the defendant is to be remitted to jail, or if he is in custody now, he is in custody under the original arrest, and can be in custody under no other." It seems to us, with all deference, that the learned Chief Justice did not give a true interpretation to the language of section 341 of the Code of Civil Procedure of 1882. That section provides that a judgment-debtor shall be discharged from jail in certain events, and amongst others, on the decree being satisfied, or at the request of the judgment-creditor, or on the judgment-creditor omitting to pay the allowance directed to be paid for diet, *et cetera*. It further prescribes that a judgment-debtor *discharged under the section* is not thereby discharged from his debt, but that he cannot be re-arrested under the decree in execution of which he was imprisoned.

In the present case the judgment-debtor was not discharged under that section. He obtained an interim discharge by the Court in the insolvency matter under section 349. It seems to us that the discharge so obtained by him cannot be deemed to be a discharge within the meaning of section 341 of the Code of 1882, as the learned Chief Justice seemed to think.

The case of *The Secretary of State* v. *Judah*, was the subject of consideration by a Bench of the Bombay High Court in the case of *Shamji Deokaran* v. *Poonja Jairam* (2). In that case [283] it was held by the learned Chief Justice, Sir LAWRENCE JENKINS and CROWE, J., that a judgment-debtor who has been arrested and imprisoned in execution of a decree and has obtained an interim protection order under section 13 of the Indian Insolvency Act, is liable to be re-arrested in execution of the same decree. In this case there was an appeal from a decision of STARLING, J., and the appeal came before JENKINS, C. J., and CROWE, J,. In his judgment the learned Chief Justice reviewed the authorities and criticised at length the judgment of PETHERAM, C. J., to which we have referred. The learned Chief Justice observed :—"I confess I do not follow the train of reasoning which led Sir COMER PETHERAM to the conclusion that the Code only contemplates one arrest, if by that is

(1) (1886) I. L. R., 12 Cal. 652. (2) (1902) I. L. R., 26 Bom. 652.

meant that there is anything in the Code, which forbids a second arrest apart from the express prohibition it contains. If the Chief Justice's proposition is correct, then it is difficult to see why a special prohibition was inserted in section 341. The mere fact that a general power of retaking the person is not expressly given by the Code cannot be a prohibition, for were it so, then a retaking of property in attachment would equally and by parity of reasoning be illegal; but that no one suggests." We entirely agree in the view thus expressed and in the conclusion arrived at by our learned brother against whose decision this appeal has been preferred. We therefore dismiss the appeal with costs.

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Appeal dismissed.

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33 All. 283 (=8 A. L. J. 15=8 I. C. 719).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

CHUTTAN LAL (*Plaintiff*) *v.* KALLU AND OTHERS (*Defendants*).*

[26th November, 1910.]

Hindu law—Joint Hindu family—Alienation of family property—Right of subsequently born member of family to object to alienation.

Held that a member of a joint Hindu family who was born after the alienation of the family property by another member of that family cannot question the validity of that alienation. *Chattarpal Singh* v. *Natha* (1) followed. *Hurodoot Narain Singh* v. *Beer Narain Singh* (2) and *Bunwari Lal* v. *Daya Shunker* (3) distinguished.

[**Fol**: 14 I. C. 251; **Ref**: 8 Pat. L. J. 163; 33 All. 651; 83 I. C. 840=11 O. L. J. 164; 66 I. C. 945; **Fol**: 79 I. C. 234=45 All. 49.]

[284] THIS was an appeal under section 10 of the Letters Patent from a judgment of GRIFFIN, J. The facts of the case are stated in the judgment under appeal, which was as follows:—

"A certain property was mortgaged to one Bhawani Das, ancestor of the plaintiff, in 1873. After his death his son, Nain Sukh Das, acquired proprietary rights in the property in his own name and that of his son, Madho Ram Subsequently Gulzari Lal, brother of Nain Sukh Das, brought a suit for recovery of a ¼ share in the property, and on the 7th of June 1888, obtained a decree. On the 10th of October 1891, Madho Ram conveyed the remaining ¾ share to defendant No. 1. After that date Naurang Mal, son of another brother of Nain Sukh Das, brought a suit for the recovery of a 1/12 share in the property and obtained a decree. The present suit has been brought by Chuttan Lal, brother of Naurang Mal, claiming a 1/12 share in the property. The suit was dismissed by the courts below on the ground that he was not born on the date of the alienation by Madho Ram, and that therefore he had no right in the property in suit. In second appeal it is contended that a member of a joint Hindu family born after alienation of the family property has taken place is entitled to have the alienation set aside if it is illegal for any reason. A passage from the Mitakshara is quoted in support of this contention:—'Those who are born, and those who are yet unbegotten, and those who are still in the womb, require means of support. No gift or sale should therefore be made.' Mitakshara, chapter I, section 1, clause 27. Further a passage from the ruling in *Bunwari Lal* v. *Daya Shunker* (3) is cited:—'It is well-settled that any co-parcener who was born at the time of the completion of an alienation would be entitled to sue to set aside the invalid alienation, and such alienation if invalid because made without the consent of all co-parceners then in existence can be set aside even at the instance of another co-parcener who was born subsequent to the alienation.' In the case of *Hurodoot Narain Singh* v.

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* Appeal No. 54 of 1910 under section 10 of the Letters Patent.

(1) Weekly Notes, 1906, p. 26.
(2) (1869) 11 W. R. 480.
(3) (1900) 13 C. W. N. 815 (822).

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33 A. 283=8 A. L. J. 16=8 I. C. 719.

Beer Narain Singh (1) it was found that the father had made a family arrangement which was not a legal one, and therefore the after-born son was entitled to share in the family property as if no such arrangement had taken place. There is, however, authority for an opposite view in Mayne's Hindu Law, 7th edition paragraph 342, that "a son cannot object to an alienation validly made by his father before he was born or begotten, because he could only by birth retain an interest in property which was then existing in his ancestor.' The right to sue to have an alienation set aside can scarcely be called a right to ancestral property In the present case the alienation was made not by the father but by a cousin of the plaintiff. The plaintiff's father took no steps whatever to have alienation set aside. The plaintiff, as it seems to me, must be content with his share in the family property as it actually stood at the time of his birth. In my opinion the Court below was right in dismissing the plaintiffs suit. I dismiss his appeal with costs.

Pandit *Mohan Lal Sandal* for the appellant :—

The sole question in the appeal is whether a subsequently born co-parceners can impugn the alienation made before his [285] birth. I rely on the following authorities :—Mitakshara Chap. I., Sec. I. Cl. 27. *Bunwari Lal* v. *Daya Shanker* (2), *Hurodoot* v. *Beer Narain* (1). The case of *Chattarpal Singh* v. *Natha* (3) is distinguishable, inasmuch as the mortgage was made by the father, and it was for the benefit of the family, in the present case, the alienation was made by a co-parcener who had no right to do so.

Mr. *G. W. Dillon*, for the respondents :—

The alienation was made so long ago as 1891 ; the father of the plaintiff did not object to it. The presumption is that the alienation had been made with the consent of all the co-parceners then living and that it was for their benefit. If such alienations made before the birth of a co-parcener in a joint Hindu family are to be impugned subsequently by such co-parcener, then it is very unsafe to get a sale-deed from the father of a Hindu family.

Pandit *Mohan Lal Sandal*, replied.

STANLEY, C. J. and BANERJI, J.—The question raised in this appeal is whether a member of a joint Hindu family, who was born after the alienation of the family property by another member of that family can question the validity of that alienation. The facts are these :—One Bhagwan Das acquired certain property under a mortgage in 1873. He had four sons, Nainsukh Das, Gulzari Mal, Hazari Lal and Kishan Lal. Nainsukh Das, after the death of his father, purchased from the mortgagor his equity of redemption jointly with his son, Madho Ram. So that the absolute ownership of the property was aequired by Nainsukh Das and Madho Ram. Gulzari Mal, the brother of Nainsukh Das, brought a suit and obtained a decree for a fourth share of the property. After this, on the 10th of October, 1891, Madho Ram sold the remaining three-fourths share to the defendant No. 1. The plaintiff, who is one of the sons of Kishan Lal, brought the suit which has given rise to this appeal for a twelfth share of the property on the ground that the sale by Madho Ram was not binding on him.

[286] The Court of first instance dismissed the suit, holding that at the date of the sale impugned by the plaintiff he had no interest in the family property, he not having been born at that date, and that therefore he had no right of suit. This judgment was affirmed by the lower Appellate Court and on appeal to this Court the decree of the lower Appellate Court was affirmed.

(1) (1869) 11 W. R. 480.
(2) (1909) 13 C. W. N. 815 (822).
(3) Weekly Notes, (1903) p. 26.

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33 A. 283=8 A. L. J. 15=8 I. C. 719.

The plaintiff has preferred this appeal under the Letters Patent. The learned vakil for the appellant in support of the contention that the plaintiff is entitled to maintain the suit, relies upon a passage in the Mitakshara to which reference is made in the judgment of our learned colleague. That passage in our opinion does not support the plaintiff's contention. He further relies upon a decision of the Calcutta High Court in *Hurodoot Narain Singh* v. *Beer Narain Singh* (1). That case in our opinion has no bearing upon the question before us. There it was held that a Hindu father had no power to settle ancestral property by conveyance in his lifetime or by a will to take effect after his death without the consent of all his sons living at the time; and where such a settlement was not assented to by the sons living at the time and another son was afterwards born, no subsequent assent of the former would be binding on the latter. That is not the case here. The learned vakil also relies upon a *dictum* of the learned Judges who decided the case of *Bunwari Lal* v. *Daya Shunker* (2). The *dictum* is to the effect that an alienation, if invalid, because made without the consent of all the co-parceners then in existence, can be set aside even at the instance of another co-parcener who was born subsequent to the alienation. The authority cited for this view is the case of *Hurodoot Narain Singh* v. *Beer Narain Singh*, to which we have referred. That case, as we have pointed out above, did not decide the question whether an alienation validly made at a time when a co-parcener was not in existence could be questioned by such a co-parcener. It seems to us to be clear that a plaintiff can question the validity of an alienation of such property only in which he had an interest at the date of the alienation. If his interest came into existence subsequently to the alienation, he cannot question the validity thereof. As Mr. Mayne observes in [287] his well-known work on Hindu Law, 7th edition, p. 449, "a son cannot object to alienations validly made by his father before he was born or begotten, because he could only by birth obtain an interest in property which was then existing in his ancestor." Hence, if at the time of the alienation there had been no one in existence whose assent was necessary, or if those who were then in existence had consented, he could not afterwards object on the ground that there was no necessity for the transaction. The same view was held by this Court in *Chattarpal Singh* v. *Natha* (3). In that case BLAIR and BURKITT, JJ., held that the plaintiffs, not being in existence at the date of the mortgage which was impugned in that case, had no right or interest in the property and were not therefore entitled to possession of it. As the alienation now in question was made so far back as 1891, the presumption would be, in the absence of any evidence to the contrary, that it was made with the assent of the other co-parceners then alive. This presumption is strengthened by the fact that the plaintiff's father, who is still alive, never questioned the validity of the transaction. Under these circumstances we are of opinion that the view taken by our learned colleague in this case is perfectly correct and is in accordance with Hindu Law. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1869) 11 W. R. 480.
(2) (1909) 13 C. W. N. 815.
(3) Weekly Notes, 1906, p. 26.

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APPELLATE CIVIL.

33 A. 287=8 A. L. J. 19=8, I. C. 808.

33 A. 287 (=8 A. L. J. 19=8 I. C. 808.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

RAMA CHANDRA (*Defendant*) *v.* JOTI PRASAD AND OTHERS, (*Plaintiffs*).*

[November 1910]

Tort—Public nuisance—Closure of public road—Right of suit—Special damage.

Held that stopping a highway, and thereby rendering it necessary for a person to make a detour is such a special damage as would justify him in instituting a suit for removal of the obstruction. *Hart* v. *Bassett* (1) and *Blagrave* v. *The Bristol Waterworks Company* (2) referred to.

[Ref. 82 I. C. 659=46 All. 573.]

THE plaintiffs respondents were owners of the temple of Raghunathji at Rikhi Keshi. Beyond the grounds of the temple was a plot of land, marked R. S., on the survey maps of 1884. Round this plot ran a public road. Across the plot R. S., which belonged to the defendant, was a track which was used as [288] a short cut to the temple by pilgrims. The servants and tenants of the plaintiffs also were in the habit of using the track. In 1903, the defendants put up certain huts with fences around them and thus blocked the passage completely. Subsequently, he removed the fences, so that foot passengers could use the path thus left open, but wheeled traffic had to go by the modern and longer road, thus making a circuit of about half a mile.

The plaintiffs sued for a declaration of a right of way over the road R. S. and an injunction for demolition of the huts erected by the defendant on the ground that they inconvenienced them, their tenants, and servants in so far as they had to take a longer route than before.

The first Court found that the road R. S. had once been a public way and was still so, and dismissed the suit as no special damage had been made out.

The lower Appellate Court decreed the suit and its decision was affirmed by KARAMAT HUSAIN J., who delivered the following judgment :—

" This was a suit for an injunction and for the removal of the obstructions made by the defendant. In paragraph 4 of the plaint the plaintiffs stated as follows :— 'This unlawful act is likely to cause great loss to the plaintiffs. The plaintiffs and their servants and tenants and the pilgrims are put to much inconvenience.' It is now admitted that the way regarding the obstruction of which the suit was brought is a public way and not a private one. The finding of the lower Appellate Court with reference to the particular damages suffered by the plaintiffs is in the following terms;— 'It appears that persons coming from the directions of Hardwar and bound for plaintiff's temple and dharamshala would, if cut off from access by the R. S. road, be obliged to go along the more modern road towards the Baghpur turning and then turn to the right and come back through the Rikhi Keshi village to their destination. It would be a longer and more circuitous route than that by R. S. The lower Court puts the difference at possibly half a mile, and although the inconvenience is perhaps not very great, still there is substaintial damage such as would entitle the plaintiffs to a decree." The learned advocate for the appellant argues that the finding does not show that the plaintiffs suffer any greater inconvenience than other members of the public and that therefore the plaintiffs have no cause of action. The plaintiffs, their servants and tenants are residing on the premises of the temple, and so far as the user of the public road is concerned, they have the same right as any other of His Majesty's subjects. But when the plaintiffs, their servants and tenants are obstructed in bringing their carts and ekkas from the short road, R. S., a greater inconvenience and

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*Appeal No. 52 of 1910 under section 10 of the Letters Patent.

(1) 13 Jones' Reports, 156.

(2) 1 H. and N. 369.

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a substantial loss of time must be caused to them, and these to my mind constitute a particular damage beyond that which is suffered by [289] other members of the public ; see *Abzul Miah* v. *Nasir Muhammad* (1) followed in *Gopal Chandra Naskar*, v. *Gajadhar Man* (2). See also *Caledonian Railway Co.* v. *Walker's Trustees* (3). where Lord Selborne observes:—'The obstruction by the execution of the work, of a man's direct access to his house or land whether such access be by a public road or by a private way is a proper subject for compensation'. The result is that the appeal fails and is dismissed with costs."

The defendant appealed.

Mr. *Sham Nath Mushran* (with him the Hon'ble Pandit *Moti Lal Nehru*), for the appellant :—

In so far as the road was a public one, no civil suit was maintainable unless special damages were proved. Mere inconvenience was no ground; *Satku valad Kadir Sausare* v. *Ibrahim Aga valad Mirza Aga* (4), *Mahomed Alam* v. *Dilbar Khan* (5), *Siddeswara* v. *Krishna* (6), *Bhawan Singh* v. *Narottam Singh* (7), *Hubert* v. *Groves* (8) and *Ricket* v. *The Metropolitan Ry. Co.* (9).

The little inconvenience that the plaintiff suffered here he suffered with the other members of the public. Special damage meant damage particular to the position of the plaintiff in his relation to the obstruction.

Mr. *B. E. O'Conor* (with him Mr. *W. Wallach*), for the respondent, was not called on.

STANLEY, C. J. and BANERJI, J.—This is an appeal under the Letters Patent. The plaintiffs respondents are the managers of the temple of Lachmi Narain and of lands and shops appertaining thereto and also of another temple, all situate at Rikhi Kesh. The defendant appellant is Mahant of the Bharatji temple at Rikhi Kesh and the zamindar of Rikhi Kesh. There is a public road leading from the temple of the plaintiffs which was obstructed by the defendant, he having erected thereon some buildings. The suit out of which this appeal has arisen was instituted for the purpose of having the obstruction removed and of obtaining a perpetual injunction restraining the defendants from obstructing the way in future. The Court of first instance dismissed the plaintiff's claim, but upon appeal the lower Appellate [290] Court reversed that decision. A second appeal was then perferred which came before the learned Judge against whose decision this appeal has been preferred. He held that as the plaintiffs, their servants and tenants, who lived on the premises connected with the temple, were obstructed in bringing their carts and *ekkas* by the road in question, which was a shorter route, the plaintiff's thereby suffered greater inconvenience and more substantial loss of time than would be suffered by the ordinary members of the public.

The grounds upon which this appeal under the Letters Patent is supported are that it is not shown that the plaintiffs suffered any special inconvenience or injury from the obstruction. It is well-settled law that in the case of a public road a private action cannot be maintained in respect of an obstruction to it by a person, unless he suffers particular damage beyond what is suffered by him in common with all other persons affected by the nuisance ; see *Bhawan Singh* v. *Narrotam Singh* (7), also *Gehanaji ban Kes Patil* v. *Ganpati bin Lakshuman* (10). In this case it is

(1) (1895) I. L. R. 22 Cal. 551.
(2) 11 C. L. J. Notes, 27.
(3) L. R. 7 App. Cas. 259 (276).
(4) (1877) I. L. R. 2 Bom. 457.
(5) (1901) 5 C. W. N. 285.
(6) (1890) I. L. R. 14 Mad. 177.
(7) (1909) I. L. R. 31 All. 444.
(8) 1 Esp., 148.
(9) L. R. 2 H. L. 188.
(10) (1875) I. L. R. 2 Bom. 469.

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found by the lower Appellate Court that the plaintiff did suffer special inconvenience and injury from the obstruction, and it is obvious that this is so; they occupy the premises belonging to the temple, and it is necessary for them to use carts for the supply of provisions and ekkas for their servants and tenants and the detour which they were obliged to make by reason of the obstruction caused to them not merely loss of time but particular inconvenience. In view of this we think that our learned brother was right in the decision at which he arrived. He upheld the view of the lower Appellate Court. The cases of *Hart* v. *Bassett* (1) and *Blagrave* v. *The Bristol Waterworks Company* (2) show that the stopping of a highway and thereby rendering it necessary for a person to make a detour was such special damage as justified him in instituting a suit for the removal of the obstruction. We dismiss the appeal with costs.

Appeal dismissed.

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33 A 291 (=8 A. L. J. 27=9 I. C. 200).

[291] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

UMDA BEGAM (*Plaintiff*) *v.* MUHAMMADI BEGAM AND OTHERS (*Defendants*).*

[29th November, 1910.]

Muhammadan law—Sunnis—Dower—No determination at marriage whether dower is to be prompt or deferred—Presumption—Civil Procedure Code (1908) *order II, rule 2—Estoppel.*

In the case of Muhammadans of the Sunni persuasion, where it is not settled at the time of the marriage whether the wife's dower is to be prompt or deferred, part will be prompt and part deferred, the proportion referable to each category being regulated by custom, or, in the absence of custom, by the status of the parties and the amount of the dower settled. *Eidan* v. *Mazhar Husain* (3) and *Taufik-un-nissa* v. *Ghulam Kambar* (4) followed.

A suit, therefore, brought by the wife during the lifetime of her husband for the recovery of the prompt portion of her dower will be no bar to a subsequent suit for the recovery of the deferred portion.

[Ref. 50 I. C. 740.]

THIS was a suit brought by one Musammat Umda Begam, against the heirs of her husband to recover a portion of her dower debt. The plaintiff was the wife of one Muhammad Ali Bahadur Khan, and her dower had been fixed at Rs. 1,25,000, but it had not been determined at the time of the marriage whether such dower was prompt or deferred. In 1886, during the lifetime of her husband, the plaintiff had sued for the recovery of Rs. 25,000 out of her dower, which she said was payable to her as "prompt" dower. The defence was that the whole of the dower was "deferred," but this contention was overruled, and a decree passed in favour of the plaintiff upon the finding that, under the rules of Muhammadan law governing the parties, the amount claimed was recoverable. The present suit sought to recover a further sum of Rs. 30,000, the plaintiff relinquishing her claim to the balance. The suit was defended on the ground, amongst others, that the whole amount of the plaintiff's dower

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* First appeal No. 301 of 1909 from a decree of Nihal Chandra, Subordinate Judge of Moradabad, dated the 15th of July 1909.

(1) 13 Jones' Reports, 156.
(2) (1856) 1 H. and N. 369.
(3) (1877) I. L. R. 1 All. 483.
(4) (1877) I. L. R. 1 All. 506.

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was recoverable at the time when she instituted her suit in 1886, and that, as she did not then claim the whole amount, the present suit was barred by the provisions of order II, rule 2 of the Code of Civil Procedure, 1908. The Court of first instance (Subordinate Judge of Moradabad) accepted this contention and dismissed the suit. The plaintiff applied to the High Court.

[292] The Hon'ble *Nawab Muhammad Abdul Majid*, for the appellant.

Messrs. C. *Dillon* and *Abdul Raoof*, for the respondents.

STANLEY, C. J., and BANERJI, J.—This appeal arises in a suit brought by the plaintiff appellant for a portion of her dower. She is the widow of Muhammad Ali Bahadur Khan, and it is admitted that the amount of her dower was Rs. 1,25,000. During the lifetime of her husband she brought a suit in 1886 to recover Rs. 25,000 out of her dower, which she said was payable to her ; as it had not been settled at the time of her marriage whether her dower was to be prompt or deferred. In answer to her claim her husband alleged that according to the contract entered into by the parties at the time of the marriage the whole amount of the dower was deferred. The Court overruled this contention and made a decree in the plaintiff's favour on the 26th of June, 1886, holding that the amount claimed was recoverable under the rules of Muhammadan law governing the parties. Muhammad Ali Bahadur Khan having since died, the plaintiff brought the suit out of which this appeal has arisen to recover Rs. 30,000 out of the balance of her dower, and she relinquished her claim to any sum in excess of that amount.

The suit was defended on the ground, among others, that the whole amount of the plaintiff's dower was recovereble at the time when she instituted her suit in 1886, and that as she did not claim the whole amount of her dower in that suit the present claim is barred by the provisions of order II, rule 2, of the Code of Civil Procedure, 1908, which corresponds with section 43, Act XIV of 1882. This contention has found favour with the Court below, which has dismissed the claim.

This appeal is preferred by the plaintiff, and it is urged that the Court below has erred in holding that the whole amount of the dower was recoverable at the time when the suit of 1886 was instituted. In our opinion this contention is well founded, and the weight of authority is in support of it. In *Eidan* v. *Mazhar Husain* (1) Sir ROBERT STUART, C. J. and PEARSON, J., held that when at the time of marriage the payment of dower has not been stipulated to be deferred, payment of a portion of the [293] dower must be considered prompt ; and the amount of such portion is to be determined with reference to custom ; where there is no custom it must be determined by the Court with reference to the status of the wife and the amount of the dower.

The same view was held by PEARSON and OLDFIELD, JJ, in *Taufik-un-nissa* v. *Ghulam Kambar* (2). This is in accordance with what is stated in Mr. Ameer Ali's work on Muhammadan law, Vol. II, page 483. The learned author observes :—" Under the Hanafi doctrines, each case will be decided on its own individual merits. ' When it has been explained how much of the dower is prompt that much should be promptly paid. When this has not been done, regard should be had to the [qualifications of the] woman and the dower mentioned in the contract, with the object

(1) (1877) I. L. R., 1 All. 483.
(2) (1877) I. L. R. 1 All. 506.

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of determining how much of such dower should be considered prompt in the case of such woman; and the amount so determined is to be prompt accordingly, without regard to the proportion of a fourth or a fifth, but what is customary is also to be considered.'" In support of this view he refers to the Fatawa Kazi Khan, the Fatawa Alamgiri and the Radd-ul-Muhtar. He distinguishes the rule of the Hanafi School from that of the Shia School, under which the whole of the dower is considered prompt, when the nature of it is not mentioned in the contract of marriage, that is, how much of it is prompt and how much is deferred. The same doctrine of the Hanafi School is also stated in Baillie's Moohummudan Law (Hanifeea), p. 127, and in Shama Charan Sarkar's Tagore Law Lectures, 1873, p. 359.

The parties to this case are governed by the Hanafi doctrines, they being Sunnis. Therefore the rule referred to above applies to them and not the doctrine of the Shia School.

Mr. *Dillon*, the learned counsel for the respondents, relies on a passage in Sir William Macnaghten's Principles and Precedents of Muhammadan law, page 59 and also on the case of *Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor* (1). In Macnaghten's Muhammadan law it is stated that where it was **[294]** not stipulated at the marrige whether the dower was to be prompt or deferred, the whole amount of the dower should be regarded as prompt. This undoubtedly is the rule of the Shia School of Muhammadan law. As pointed out in the Tagore Law Lectures for 1873, no authority is cited in support of the view propounded in Sir William Macnghten's work, and it may be that the proposition which he lays down in the rule of the Shia School. In *Mirza Bedar Bukht* v. *Mirza Khurrum Bukht* their Lordships of the Privy Council after referring to the passage in Macnaghten's Muhammadan law at page 59, relied upon by the learned counsel for the respondents, held that when it is not stated whether the dower is to be prompt or deferred, the whole amount of the dower should be held to be prompt. That case was manifestly one governed by the Shia School of Muhammadan law. The parties to it were, as the judgment points out, members of the royal family of Oudh, and it is well known that the royal family of Oudh followed the Shia School of Muhammadan law; see introduction to Baillie's Moohummudan Law (*Imameea*). That case, therefore, must be regarded as an authority in the case of persons subject to the Shia School.

The ruling of their Lordships was followed by the Madras High Court in *Masthan Sahib* v. *Assan Bivi Ammal* (2). The arguments of counsel in that case clearly show that it was a case to which the Shia law applied. These rulings, therefore, do not support the respondent's contention.

In *Inayat Husain* v. *Muhammad Husain* (3), which is also relied upon by Mr. *Dillon*, a Bench of this Court held, following the decision of their Lordships of the Privy Council to which we have referred and the dictum in Macnaghten's Principles and Precedents of Muhammadan law; that where it was not expressed whether the payment of dower was to be prompt or deferred, it must be held that the whole was due on demand. It does not appear from the report or from the paper book of the case, to which we have referred, whether the parties to it were governed by Shia doctrines or by the doctrines of the Hanafia School. If the learned Judges intended to lay down as a general rule applicable to all Muhammadans

(1) (1875) 19 W. R. 315.
(2) (1899) I. L. R. 23 Mad. 371.
(3) Weekly Notes, 1889, p. 153.

that the whole amount of the [295] dower in a case like this was to be deemed to be prompt, we are, with all deference, unable to agree with them. As we have pointed out above, the decision of their Lordships of the Privy Council, which the learned Judges followed, related to the case of persons, governed by the Shia law, according to which the whole amount of the dower would, in such circumstances, be deemed to be prompt. But the weight of authority, as shown above, in the case of persons of the Sunni persuasion, is in favour of the view that the amount of dower payable to a wife, where it was not settled, at the time of the marriage whether it was to be prompt or deferred, would be regulated by custom, or in the absence of custom by the status of the parties and the amount of the dower settled. In this view the Court below was wrong in holding that the whole amount of the plaintiff's dower was payable to her when she instituted her suit in 1886, and that her present claim offends against the rule laid down in order II, rule 2.

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We may also observe that the decision in the previous suit precludes the defendants from raising the contention which they put forward. One of the issues laid down in that suit was what was the amount of dower which the plaintiff could at time of that suit claim according to Muhammadan law, legal enactments and custom. The defendant's case was that the whole amount of the dower was deferred. The Court repelled the contention and held that the plaintiff was entitled to claim Rs. 25,000, *i.e.*, one-fifth of the whole amount of her dower. This was the case of the defendants. In the face of that decision, it seems to us that it is no longer open to the defendants to dispute the correctness of the plaintiff's contention that the whole amount of her dower was not payable at the date of the former suit.

We accordingly allow the appeal and set aside the decree of the Court below, and, as the suit was erroneously decided on a preliminary ground, we remand it to that Court under the provisions of order XLI, rule 23, of the Code of Civil Procedure, with directions to re-admit it under its original number in the register and dispose of the other questions which arise in the case according to law. The appellants will have their costs of this appeal. Other costs will abide the event.

Appeal decreed: cause remanded.

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33 A. 296 (=9 I. C. 23).

[296] APPELLATE CIVIL.

Before Sir John Stanley Knight, Chief Justice, and Mr. Justice Banerji.

CHEPHUR AND OTHERS (*Defendants*) *v.* ABDUL HAKIM (*Plaintiff*) AND ABDUL WAHID AND OTHERS (*Defendants*).*

[30th November, 1910.]

Pre-emption—Wajib-ul-arz—Construction of document—Partition of village—New wajib-ul-arzes prepared after partition.

The wajib-ul arz of a village before partition provided for pre-emption in the following way :—" Rights of co-sharers as among themselves on the basis of custom or agreement The custom of pre-emption obtains. In case of sale of

* First Appeal No. 372 of 1909 from a decree of Hari Mohan Banerji, Additional Subordinate Judge of Cawnpore, dated the 8th of September 1909.

(1) (1905) I. L. R. 28 All. 286.

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property by a co-sharer, another co-sharer in the mouza can bring a suit for pre-emption. If he offers a low price then the vendor can sell the property to a stranger." The village was divided by perfect partition, into three mahals. New wajib-ul-arzes were drawn up after partition and the condition as to pre-emption in each ran as follows :—" Rights of co-shares *inter se* based on custom or agreement. The custom of pre-emption prevails. In case one co-sharer sells his share (*hakikat*), another co-sharer in the village (*hissedar sharik mauza*) can claim pre-emption. If he offers a smaller price the seller can sell it to a stranger." The plaintiff pre-emptor was a co-sharer in a different mahal from that in which the property sold was situate. The vendee was a stranger to the village. The entire body of co-sharers in the village were Muhammadans of the same stock, and continued so up to the time of partition.

Held, upon a construction of the language of the wajib-ul-arz and the circumstances of the case that the pre-emptor must succeed as against the stranger vendee, notwithstanding that a partition had taken place. *Janki* v. *Ram Partab Singh* (1) referred to.

THE facts of this case were as follows :—

A village was partitioned into three mahals in 1888. The wajib-ul-arzes prepared subsequently to the partition were exactly the same as the earlier wajib-ul-arz of the village. In that wajib-ul-arz a right of pre-emption was given to co-sharers " among themselves".

On a case of sale arising in one of the mahals a co-sharer in another mahal sought to pre-empt it and his claim was allowed by the Court below. The defendant vendee appealed to the High Court on the ground that being a co-sharer in a different mahal, the pre-emptor was precluded from bringing the suit by the provision in the wajib-ul-arz that the right was to be confined to co-sharers " among themselves."

Munshi *Gobind Prasad*, for the appellants :—

[297] The words of the wajib-ul-arz limited the right to co-sharers in the mahal ; *Sahib Ali* v. *Fatima Bibi* (2), *Auseri Lal* v. *Ram Bhajan Lal* (3), *Dori* v. *Jiwan Ram* (4), *Badri Prasad* v. *Hashmat Ali* (5) and *Mathra Prasad* v. *Nem Chand* (6).

Mr. *B. E. O'Conor* (with him Mr. *M. L. Agarwala*), for the respondent :—

No gradation in class of persons seeking to pre-empt was specified. The only idea was to keep strangers out, and the vendor was selling to a stranger. The actual word used was " *mauza*," which would include all the three mahals into which the village had been partitioned.

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit for pre-emption of a share in the village of Mendla Patti in the district of Fatehpur. The vendee is a stranger to the village, while the pre-emptor is a share-holder in a mahal of the village, but not in the mahal in which the property which has been sold is situate. A partition of the village was effected in the year 1888, but prior to that partition, the wajib-ul-arz of the village had a provision in regard to pre-emption. The chapter in it dealing with pre-emption is headed " Rights of co-sharers as among themselves on the basis of custom or of agreement," and the custom is set forth as follows :—" The custom of pre-emption obtains. In case of sale of property by a co-sharer, another co-sharer in the mauza can bring a suit for pre-emption. If he offers a low price, then the vendor can sell the property to a stranger." Upon partition of the village three mahals were formed, and in one of these mahals the plaintiff is a co-sharer. This mahal however, is not, as we have said, the mahal in which the property sold is

(1) (1905) I. L. R. 28 All. 286.
(2) (1909) I. L. R. 32 All. 63.
(3) (1905) I. L. R. 27 All. 602.
(4) (1910) I. L. R. 33 All. 265.
(5) (1904) 1, A. L. J. 83.
(6) (1905) 2 A. L. J. 261.

situate. Upon partition a new wajib-ul-arz was framed, and it is largely upon the language of this wajib-ul-arz that the arguments before us have been based. It is practically in identical terms with the older wajib-ul-arz of 1876, so far as regards the custom set forth therein as to the right of pre-emption. The chapter is headed "Rights of co-sharers *inter se* based on custom or agreement," and the material portion of the paragraph dealing with pre-emption runs as follows:—The [298] custom of pre-emption prevails. In case one co-sharer sells his share (*hakiat*) another co-sharer in the village (*hissadar sharik mauza*) can claim pre-emption. If he offers a smaller (*sic*) price, the seller can sell it to a stranger." Now it has been repeatedly held that the determination of an alleged right of pre-emption must depend upon the particular circumstances of each case and the evidence adduced in support of the pre-emptive right. We apply that rule to the case before us. It is clear that under the older wajib-ul-arz of 1876, upon the sale of a share in the village any co-sharer in the village had a right to pre-empt. There was, as it has been said, no gradation of parties to exercise the right. In the later wajib-ul-arz of 1888 the same right is maintained by the co-sharers in the mahal in respect of which the wajib-ul-arz was prepared. The language of the wajib-ul-arz is clear and explicit. It gives the right of pre-emption, in case of a sale to a stranger, to a sharer who is a sharer in the village, and to no other party. From its language we gather that it was the intention of the parties that the rule of pre-emption, as it had existed, should continue to prevail. In the column for observations are to be found the words "as before," which indicate that the old custom was to prevail. It has been stated by the learned counsel for the respondents, and not contradicted, that the co-sharers in the village in 1876 were Muhammadans, belonging to the same family, and that in 1888 the representatives of the same family were the sole proprietors of the village. If this be the case, then it seems to us to throw some light upon the wajib-ul-arz which is before us. As the entire body of co-sharers in the village were Muhammadans of the same stock and continued so up to the time of partition, it seems very probable that their intention in adopting the custom to be found in the earlier wajib-ul-arz was to exclude strangers, and to confine the right of pre-emption to the sharers in the village, whether they belonged to the same mahal or not. In view of the language of the wajib-ul-arz and of the circumstances, we think that the Court below rightly interpreted it.

It is very difficult to distinguish the case from that of *Janki* v. *Ram Partap Singh* (1). In that case in a village which [299] consisted of two pattis, or mahals, the wajib-ul-arz recorded a custom of pre-emption to the effect that in the case of a sale or mortgage by a shareholder, a claim for pre-emption might be brought by persons mentioned in several categories and ultimately by shareholders in the village. The village was subsequently divided into more mahals but no new wajib-ul-arz was framed. It was held by one of us and by RICHARDS, J., that a co-sharer in the village had a right of pre-emption as against a stranger, even though he did not own a share in the mahal in which the property sold was situate.

For the foregoing reasons we hold that there is no force in the appeal and we dismiss it with costs.

Appeal dismissed.

(1) (1905) I. L. R. 28 All. 286.

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33 A. 299=
9 I. C. 49.

33 A. 299 (=9 I. C. 49).

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Tudball.

LAKHAN SINGH AND ANOTHER (*Defendants*) *v.* BISHANNATH (*Plaintiff*).*

[2nd December, 1910.]

Pre-emption—Wajib-ul-arz—Construction of document—"Apna shafi"—Muhammadan law.

A wajib-ul-arz provided that if any co-sharer of a patti in the *khalisa* wished to sell his share, he would do so paying due respect to his own pre-emptor (*apna shafi*), and if the latter refused and all the other pre-emptors of the village (*aur sab shafian deh*) refused then he might sell to a stranger. *Held* that the expression *apna shafi* connoted nearness in space and not a blood-relationship, and therefore where the vendor and pre-emptor were co-sharers in the same patti, the vendee being a co-sharer in a different patti, the co-sharer in the same patti had a preferential right.

THE facts of this case were as follows :—

Property situate in mauza Pingri-Pingra was sold to the apellants. The respondent, who was a co-sharer in the same patti in which the property sold was situate, sued for pre-emption. The vendees were shareholders in the village in the same mahal but in a different patti. The pre-emptive clause in the wajib-ul-arz ran as follows :—"*Agar koi hissedar kisi patti khalisa wah muafi bazuyafita,*" etc., wishes to sell his property, he should do so, "*ba lehaz apna shafi ke*" ; and "*dar surat inkar uske aur sab shafian deh*" he may transfer to a stranger. Both the Courts below decreed the plaintiff's suit.

[300] The defendants appealed.

Babu *Sital Prasad Ghosh*, for the appellants :—

There are two classes of pre-emptors mentioned in the wajib-ul-arz : "*apna shafi*" and then, "*aur sab shafian deh.*" The terms used are very vague ; the word '*shafi*' is not at all defined. The only reasonable construction to be placed on the terms of the wajib-ul-arz is that the term "*apna shafi*" means pre-emptors who are near to the vendor by blood-relation ; and the second category, that of "*aur shafian deh,*" comprises pre-emptors who derive their title from nearness in space. But it is conceivable that the term "*apna shafi*" may be interpreted to mean pre-emptors who are near in space ; both meanings are possible. If there is such a doubt, then it is the position of the plaintiff, and not of the defendant, that gets worse ; for it is for the plaintiff, who seeks pre-emption, to establish his right to succeed, beyond a doubt. Unless and until he shows that the construction he wishes to put upon the terms of the wajib-ul-arz is the only reasonable construction, or at any rate, is a far more reasonable construction than that advanced by the defendant, he is not entitled to a decree.

Maulvi *Muhammad Ishaq*, for the respondent :—

As the wajib-ul-arz is silent as to the definition of the term "*apna shafi,*" we have to look to the real meaning of the word '*shafi*' for our guidance. The meaning of the word '*shafa*' is conjunction and this signifies participation or contiguity in space. The word '*shafi*' therefore primarily signifies a person who is near in space, and not one who is near

* Second Appeal No. 601 of 1910 from a decree of E. E. P. Rose, District Judge of Shahjahanpur, dated the 11th of March, 1910, confirming a decree of Jogmohan Narain Mushran, Munsif of Shahjahanpur, dated the 30th of September, 1909.

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in blood; indeed, relationship is never a ground for pre-emption under the Muhammadan Law, which is the original law of pre-emption.

Again, the term "*apna shafi*" is to be interpreted in connection with the use of a words "*kisi patti*" immediately after the words "*agar koi hissedar*"; the addition of these words clearly indicates an intention that "*apna shafi*" should refer to a pre-emptor within the same patti; relationship was not contemplated at all.

Babu *Sital Prasad Ghosh*, in reply:—

The original etymological meaning of the word '*shafi*' as understood in Muhammadan Law, is not a proper guide. The [301] question is, what was the meaning intended by the framers of the wajib-ul-arz? Presumably they were quite ignorant of the original meaning of the Arabic word '*shafi*.'

RICHARDS and TUDBALL, JJ.—This appeal arises out of a suit brought to enforce a right of pre-emption in respect to a share in patti Munna Lal, mauza Pingri-Pingra, situated in the Shahjahanpur district. The vendor and pre-emptor were both co-sharers in the same patti. The vendee is a co-sharer in another patti, Bahadur Singh, of the same mahal. The sole question before us is whether on a true construction of the wajib-ul-arz the plaintiff respondent has or has not a preferential right over the defendant appellant. The court of first instance held that as the vendor and the pre-emptor were co-sharers in the same patti, the plaintiff had a right preferential to that of the defendant to purchase this property. On behalf of the vendee it was contended that the co-sharers in the village were divided into two classes, namely, those who were blood relations of the vendor, and those who were not. The court of first instance, however, held that the words *apna shafi* which occurred in the wajib-ul-arz, were equivalent to *hissedar qaribi* and that the plaintiff was entitled to pre-empt. The point was raised in the lower appellate court in grounds 3 and 4 of the memorandum of appeal. But as there is no mention whatsoever of the point in the lower court's judgment, it appears that it was not pressed to any extent in that court. The wajib-ul-arz runs as follows:—"If any co-sharer of a patti in the *khalisa* wishes to sell his share, he will do so paying due respect to his own pre-emptor (*apna shafi*), and if the latter refuse and all the other pre-emptors of the village (*aur sab shafian deh*) refuse, then he may sell to a stranger." The only other evidence in respect to the right of pre-emption is the judgment in a suit which was decided in 1902 which is of no use to us in construing the wajib-ul-arz as the point was not raised therein. On behalf of the appellant it is urged that it is for the plaintiff to clearly establish the custom upon which he relies, that the wajib-ul-arz now before the court is ambiguous in its meaning, and that it is impossible to say whether it gives a preferential right to one who is nearer in blood or to one who is nearer in space, and that the plaintiff has [302] therefore failed to establish any custom under which he has a preferential right, and that therefore the suit should be dismissed. In so far as the original meaning of the word *shafi* is concerned, it is quite clear that it never contemplated the question of blood relationship. It means a conjunction, and under the Muhammadan Law there are three classes of pre-emptors: co-sharers in the subject-matter of sale: co-sharers in its appurtenances, and contiguous neighbours. If the original meaning be applied to the word *shafi* in the present case, it is clear that the interpretation placed by the court of first instance upon this document is a correct

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one. It is true that there are instances in these provinces of blood relations having a prior right of pre-emption under customs existing in certain villages. But these instances are comparatively rare as compared to those in which the prior right of pre-emption depends upon nearness of space. It seems to us that the interpretation placed by the court below is justified. In addition to this it seems to us that the wording of this wajib-ul-arz, wherein it speaks of a co-sharer of a patti in the *khalisa* selling his right, indicated that his co-sharers in that same patti would be his pre-emptors (*apna shafi*). We see no reason to differ from the interpretation placed by the court below. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

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33 A. 302 (=9 I. C. 53=8 A. L. J. 47).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

RAM SAHAI (*Defendant*) *v.* AHMADI BEGAM AND OTHERS (*Plaintiffs*).*

[21st December, 1910.]

Civil Procedure Code (1882), *sections* 13, 43—*Res judicata—Dismissal of suit for redemption of a mortgage—Second suit for redemption of another mortgage of the same properties—Civil Procedure Code* (1908), *section* 11 ; *order II, rule* 2.

Held that the dismissal of a previous suit for redemption of an alleged oral mortgage was no bar to the institution of another suit for redemption of a written mortgage in respect of the same properties of a different date. *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnen Nair* (1) followed.

[Ref : 60 I C. 909=33 C. L. J. 232=25 C. W. N. 129.]

THIS was an appeal under section 10 of the Letters Patent from a judgment of KARAMAT HUSAIN J. The facts of the **[303]** case are fully stated in the judgment under appeal, which was as follows :—

"The facts of the case are these :—In 1881, one Achroo brought an action against Sheo Prasad for redemption of a mortgage. The judgment of the learned Munsif, dated the 30th September, 1881, a certified copy of which is on the record of this case, shows that the claim of Achroo was as follows:—Jhando, father and Purani uncle of the plaintiff, who were co-sharers in equal share in 3 pies, 16 krants, 7 jau, in pargana Jalalpur, mortgaged the property in suit in Sambat 1915, corresponding to 1859-1860 A. D , to Mohan, father of the defendants, under an oral mortgage, with this condition that the mortgagee during his possession would not be entitled to interest. One of the pleas in defence to that suit was that the transaction of mortgage was evidenced by the written mortgage deed of the 19th July, 1858. The following issues were framed by the learned Munsif :—(1) Was the mortgage in suit an oral or a written mortgage and, if it was written, was the mortgage deed produced by the defendant, the mortgage executed by the predecessors in title of the plaintiff? (2) Was the plaintiff bound to comply with the terms of the written mortgage produced by the defendant ? (3) If the mortgage was oral, then did the plaintiff offer to pay the money secured by that oral mortgage to the defendant for redemption, and if he did offer, did the defendant deny to take it? The court found that the mortgage deed produced by the defendant was a genuine document and dismissed the suit. The learned Munsif towards the end of his judgment says in effect 'when the mortgage deed (*rehan-namah*) is proved, it is not necessary for the court to adjudge upon other issues. As the plaintiff could not prove his claim, which under the circumstances he was bound to prove, his claim is dismissed with costs.'

" There was an appeal by the plaintiff Achroo to the lower appellate court, and the paper book of S. A. 390 of 1882, decided on the 9th March, 1883, shows that the follow-

* Appeal No. 53 of 1910, under section 10 of the Letters Patent.

(1) (1906) I. L. R. 29 Mad. 153.

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ing pleas among others were taken in the memorandum of appeal to the lower court :— (1) The evidence of the appellant's trustworthy witnesses sufficiently proves that the mortgage was effected verbally and that it was agreed upon that it should be redeemed upon repayment of the principal mortgage money. The respondent's father, as *dakhilkar*, has been in possession of the disputed share since the time of the mortgage alleged by the appellant, and in the Revenue Court records also he has been entered as *dakhilkar*, therefore the evidence of the appellant's witnesses is considered probable. The second plea attacks the genuineness of the mortgage deed. The fifth plea is as follows :—" Since the parties agree as to the amount of the principal mortgage money and the respondent admits the fact of the mortgage of the property, the dispute is only with the reference to the interest, therefore even if it be assumed that the document was correct, it was necessary to determine the rights of the parties and find the correct amount of interest, therefore the dismissal of the claim is legally improper.'

" The lower appellate court affirmed the decree of the first court. That court in its judgment said :—" The mortgage was effected between the predecessors of the present parties. Achroo says it was a verbal transaction that no interest was to be paid because the mortgagee took possession of the land and enjoyed [304] the profits. The defendant produces a deed of mortgage which he says was drawn up at the time. It is dated 19th July, 1858, and states that the land was mortgaged till Baisakh Sudi 15, 1915 (Sambat), and that Rs. 2 per cent. per mensem is payable. It is not stamped, but Sheo Prasad has paid the penalty on it. Achroo says that the deed is a forgery and that no interest was payable as the mortgagee was to enjoy possession of the land. The lower court has held this deed to be genuine and consequently dismissed the claim. In appeal, the plaintiff prays that the question of interest may be inquired into and settled, but this he should have stated to the lower court. As he contested the suit in order to redeem the land without paying interest, I do not consider myself authorized to enter now into the question of how much interest is payable. The terms of the deed produced by Sheo Prasad are not clear, and it seems strange that the mortgagee should both enjoy the profits of the land and also receive interest for his money. However, it is certain that some interest was payable and that perhaps only for the period during which the land was to be mortgaged. For the settlement of all these points, Achroo should bring a suit for settlement of accounts.'

" The plaintiff Achroo preferred a second appeal to this Court which was S. A. 390 of 1882. The point taken in the memorandum of appeal was that the lower appellate court was wrong in dismissing the appeal without finding whether or not the mortgage deed produced by the defendant was genuine. A Bench of this Court by the order, dated 13th December, 1882, sent down the following issue for determination by the lower appellate court :—' Is the mortgage deed produced by the defendant genuine or not ?' The lower appellate court submitted the following finding :—' After considering the whole of the evidence, I cannot but come to the conclusion that the deed is genuine.' Objections were taken to this finding. The first was to the effect that the finding was not based on good evidence. The second was that even if the mortgage deed was a genuine document, the learned Judge should have given the plaintiff a decree making him liable to pay interest at 24 per cent. per annum and that the Judge was wrong in referring the plaintiff to a fresh suit The appeal was dismissed by this Court by the following order :—' We accept the finding on remand and overrule the first objection. The second objection cannot be entertained now. We dismiss the appeal with costs.'

" After the above mentioned litigation, Achroo, under a sale-deed of 13th June, 1886, sold the equity of redemption to one Parichat. His widow .Mahrain, succeeded him. Niamat Ullah Khan in execution of a decree against Mahrain purchased the equity of redemption on the 21st November, 1898. His representatives are the plaintiffs in the present suit and they sue for redemption of the mortgage of the 19th July, 1858. One of the pleas taken in defence is that the suit is barred by section 13, Civil Procedure Code. The first portion of the first issue framed by the court of first instance is in these terms :—' Is the present suit barred by section 13 of the old Code in consequence of the previous suit of Achroo for redemption of the property being dismissed ?'

" The finding of the court on this portion of the issue is to the effect that the suit brought by Achroo was for redemption of the alleged oral mortgage and not for redemption of the mortgage evidenced by the deed produced by the father of [306] defendant No. 1, dated the 19th July, 1858, and that therefore the suit is not barred by the doctrine of *res judicata*.

" There was an appeal by the defendant to the lower appellate court which reversed the decree of the court of first instance. That court came to the conclusion that

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the present suit was to redeem the same mortgage, to redeem which the former suit was brought and that therefore it was not maintainable.

"The plaintiff comes here in second appeal and his contention is that the suit is not barred by the doctrine of *res judicata*. This contention is, in my opinion, sound. The history of the previous litigation very distinctly shows that. on the pleadings of the parties in the former suit, the basis of the claim was an oral mortgage executed between the years the 1859 and 1860, with terms different from the terms of written mortgage, dated 19th July, 1858, and the suit of Achroo was dismissed by the learned Munsif on the ground that he failed to prove his case. The former suit was not brought for redemption of the mortgage transaction embodied by the document of the 19th July, 1858. This being so, it cannot be said that the dismissal of the suit instituted by Achroo, upon an oral mortgage of a different date and with different terms, operates as *res judicata* in the present suit. The former suit was rightly dismissed, having regard to the ruling reported in I. L. R. 18 All. 403, and the present suit is not barred by the doctrine of *res judicata*. I therefore set aside the decree of the lower appellate court and remand the case under order XLI, rule 23, for trial on the merits."

The defendant appealed.

Mr. *A. H. C. Hamilton*, and Babu *Piari Lal Banerji*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

STANLEY, C. J., and BANERJI, J.—This is an appeal under the Letters Patent from an order of remand made by a learned Judge of this Court. The facts of the case are fully set forth in the judgment of our learned colleague. It is contended that the dismissal of the suit brought by the predecessor in title of the plaintiffs in 1881 is a bar to the present suit, which is one for the redemption of a mortgage of 1858. The former suit was brought for the redemption of an oral mortgage alleged to have been made at some time between 1859 and 1860. It was found in that suit that no such mortgage existed and the claim was accordingly dismissed. It was further found that the property in question was held by the defendant under a mortgage of 1858. It is this mortgage of 1858 which the plaintiffs now seek to redeem. We agree with our learned colleague that the second suit is not barred by the provisions of sections 13 and 43 of Act XIV of 1882 and of section 11 and order II, rule 2, of the [306] present Code. The learned counsel for appellant referred us to the case of *Rangasami Pillai* v. *Krishna Pillai* (1). That case has been overruled by the later Full Bench ruling of the same court in *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnen Nair* (2). This last ruling is clearly against the appellant and supports the view of our learned colleague. We dismiss the appeal with costs.

Appeal dismissed.

33 A. 306 (=9 I. C. 317).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banarji.

BISHAMBHAR NATH (*Defendant*) *v.* GADDAR (*Plaintiff*).*

[5th December, 1910.]

Execution of decree – Attachment—Property under wrongful attachment stolen by bailiff —Liability of attaching decree-holder – Small Cause Court—Act No. IX of 1887 (Provincial Small Cause Courts Act), schedule II, article 35 (j) – Jurisdiction.

Where crops of a third party had been wrongfully attached by a decree-holder as those of his judgment-debtor, and, while so attached, were stolen by the *shahna* (or bailiff) in whose custody they were, it was *held* that the decree-

* Appeal No. 72 of 1910 under section 10 of the Letters Patent.

(1) (1889) I. L. R. 26 Mad. 259.

(2) (1906) I. L. R. 29 Mad. 153.

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holder was responsible to the owner for their value; also that a suit by the owner against the decree-holder to recover the value of the crops and damages was not a suit cognizable by a Court of Small Causes. *Goma Mahad Patil* v. *Gokaldas Khimji* (1) followed. *Mussamat Subjan Bibi* v. *Sheikh Sariatulla* (2) not followed. *Kisori Mohun Roy* v. *Harsukh Dass* (3) referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgment of GRIFFIN, J. The facts of the case appear from the judgment under appeal, which was as follows : —

" The defendant, who is appellant in this Court, in execution of a decree held by him against one Tula Ram, attached, as the property of his judgment-debtor, the crops of the plaintiff Gaddar. The plaintiff filed an objection against the attachment. His objection was allowed and the attachment was removed. While the property was under attachment and in the custody of the *shahna* (or temporary bailiff) of the Court, most of the attached crops disappeared. The *shahna* was prosecuted and found guilty under section 406, I. P. C., and sentenced to imprisonment. The plaintiff has instituted the present suit to recover a sum of Rs. 457-8-0, which is made up of two items, namely, Rs. 417-8-0, the value of the crops which disappeared while under attachment and Rs. 40 as damages for the wrongful act of the defendant. The Court of first instance decreed the suit for Rs. 40, that is, for the damages claimed by the plaintiff, and dismissed [307] the suit for the value of the attached crops on the ground that the plaintiff had failed to prove that it was the defendant who removed them. On appeal by the plaintiffs the lower Appellate Court held that it was immaterial whether it was the defendant who had removed the crops or not. As he was a trespasser and had wrongfully attached the crops, he was responsible for the value, no matter who stole them. The learned District Judge found that the value of the crops was Rs. 92-8-0 and gave the plaintiff a decree for that amount in addition to Rs. 40, decreed by the Court of first instance. The defendant comes here in second appeal. A preliminary objection is raised that no appeal lies. It is contended on behalf of the plaintiff respondent that the suit was one of a nature cognizable by a Court of Small Causes, and, the value being below Rs. 500, no second appeal lies. I was referred to various rulings by the learned advocates of both the parties, but it appears to me on a reference to the plaint itself that the suit is not one cognizable by a Court of Small Causes. So far as it is a suit for damages, it is clearly excepted from the cognizance of a Court of Small Causes, *vide* schedule II of the Provincial Small Cause Courts Act, clause 35 (*j*). As to whether the defendant appellant can be held liable for the value of the crops or not, the ruling relied on by the Court below in the case of *Goma Mahad Patil* v. *Gokaldas Khimji* (1) is a direct authority for the view taken by the learned District Judge. The facts of that case are on all fours with those of the case before me. On behalf of the appellant I am referred to the Privy Council decision in the case of *Kissori Mohan Roy* v. *Harsukh Das* (3), in which it was held that where the plaintiff's property was wrongfully attached by the defendant, the plaintiff was entitled to recover from the defendant the difference in the market value of the goods at the time of the attachment and their price when they were sold. The concluding portion of the judgment is relied on in support of the contention advanced on behalf of the appellant that he can only be held liable for the natural and necessary consequence of his act. It may be conceded that the theft or disappearance of the plaintiff's crops while under attachment was not in any sense the consequence of the wrongful attachment by the defendant. The fact remains that the plaintiff has suffered a loss for which he is entitled to compensation. His crops were wrongfully attached by the defendant appellant. He is entitled to get back his crops or their value if the crops themselves are not available. The plaintiff had a complete cause of action at the date of the wrongful attachment, and his right to the relief he was entitled to was not impaired by subsequent occurrences for which he was not responsible. In the case *Kissori Mohan Roy* v. *Harsukh Das*, referred to above, their Lordships of the Privy Council held that the plaintiffs are entitled to recover the value of the property wrongfully attached as it stood at the date of the defendant's unlawful act. The principle to be deduced from that ruling is that the plaintiff is entitled to be restored to the *statu quo ante* the illegal act of the defendant. As to the ruling reported in 3 B. L. R, p. 16 quoted on behalf of the appellant, it appears that the learned Judges who decided it were largely influenced by the English law on the subject, as held in the case of *Walker* v. *Olding*. Their Lordships of the Privy Council held in *Kissori Mohan* v. *Harsukh* that the rule of law laid down

(1) (1878) I. L. R. 3 Bom. 74.
(2) (1869) 3 B. L. R. A. J. 413.
(3) (1889) I. L. R. 7 Cal. 486.

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in *Walker* v. *Olding* does not apply to India. This being the state of authority [308] on the question to be decided in this case, I prefer to follow the decision of the Bombay High Court in *Goma Mahad Patil* v. *Gokaldas Khimji* which is directly in point. I dismiss the appeal with costs."

The defendant appealed.

Dr. *Tej Bahadur Sapru*, for the appellant :—

Only such damages as flowed naturally from the wrongful act of the appellant could be assessed against him. That doctrine applied to cases of torts as well as of contracts; *Hadley* v. *Baxendale* (1). Reference was also made to *Mayne on Damages*, 7th ed. 49, 438, *Mussamat Subjan Bibi* v. *Sheikh Sariatullah* (2) and *Kissori Mohan Roy* v. *Harsukh Das* (3). It would not be in the contemplation of parties that the very man in whose custody they were would steal them.

Maulvi *Muhammad Ishaq*, for the respondent, was not called on.

STANLEY, C. J. and BANERJI. J.—We are of opinion that the view taken by our learned colleague is correct. It is based on the ruling in *Goma Mahad Patil* v. *Gokul Das Khimji* (4) with which ruling we agree. The cases which have been relied upon by the learned advocate for the appellant appear to us to be distinguishable. The correctness of the decision in the case of *Goma Mahad Patil* v. *Gokuldas Khimji* has never, so far as we are aware, been questioned. We dismiss the appeal with costs.

Appeal dismissed.

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33 A. 308 (=9 I. C. 275=8 A. L. J. 55).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

ZIA-UD-DIN AND ANOTHER (*Plaintiffs*) *v.* MUHAMMAD UMAR AND OTHERS (*Defendants.*)*

[12th December, 1910].

Landlord and tenant—Co-owners—Receipt for rent collusively given to tenant by one co-owner—Right of the others to sue tenant and remaining co-owner for rent.

W and others were co-owners of a shop which was let to *U*. The other co-owners, suspecting W's good faith, gave notice to *U* forbidding him to pay rent to *W*. They then commenced proceedings for partition of the shop. Subsequently *W* executed in favour of *U* a receipt for arrears of rent and for a further [309] sum alleged to represent rent paid in advance. *Held* that in the above circumstances the co-owners other than *W* were entitled to sue the tenant and *W* for their proportionate share of the rent, their allegation being that the receipt referred to above was fictitious and collusive. *Doorga Churn Surma* v. *Jampa Dasee* (5) referred to.

[Fol. 28 M. L. J. 197=28 I. C. 141 ;]

The plaintiffs in this case and one Wajih-ud-din were joint owners of a shop which was let to one Muhammad Umar. It was alleged that Wajih-ud-din used to collect the rent. On the 3rd April, 1905, the plaintiffs served the first defendant, Muhammad Umar, with a notice stating that they suspected the good faith of Wajih-ud-din and directing

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* Second Appeal No. 392 of 1910, from a decree of W. H. Webb, District Judge of Bareilly, dated the 26th of January 1910, reversing a decree of Girraj Kishore Datt, Subordinate Judge of Bareilly, dated the 29th of June, 1908.

(1) 9 Exch. 341.
(2) (1869) 3 B. L. R. 413.
(3) (1889) I. L. R. 17 Cal. 436.
(4) (1878) I. L. R. 3 Bom. 74.
(5) (1873) 12 B. L. R. 289.

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him not to pay the plaintiffs' share of the rent to Wajih-ud-din. Shortly after this notice, on the 24th of April, 1905, the plaintiffs brought a suit against Wajih-ud-din for partition and obtained a preliminary decree on the 29th of July, 1905. The final decree in the partition suit was made by the Court of first instance on the 20th of September, 1906. There was an appeal to this Court and the case was remanded for a fresh partition. This partition took place on the 9th of March, 1908. Under it the shop occupied by the defendant fell into the plaintiff's' share. It was after this partition that the suit out of which this appeal has arisen was brought on the 25th of March, 1908. After the preliminary decree for partition made by the Court of first instance, Muhammad Umar obtained from Wajih-ud-din, on the 31st of May, 1906, a receipt for Rs. 510, in full payment of the rent due up to that date and for an additional sum of Rs. 609-9-0 for rent in advance. The present suit relates to the period from the 1st of March, 1905, to the 29th of February, 1908. The claim was contested on the grounds that the plaintiffs were not competent to maintain the suit being part owners of the property, and further that payment to Wajih-ud-din was a full discharge for the rent due.

The Court of first instance (Subordinate Judge of Bareilly) held that no payment had actually been made, and that the receipt of the 31st May, 1906, was collusively given. Upon appeal the District Judge dismissed the suit altogether. The plaintiffs appealed to the High Court.

Mr. *A. H. C. Hamilton*, Mr. *B. E. O'Conor* and *Maulvi Shafi-uz-zaman*, for the appellants.

[310] Mr. *S. A. Haidar* and Babu *Lalit Mohan Banerji*, for the respondents.

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit brought by the plaintiffs appellants for recovery of arrears of rent against the first defendant who is the tenant of a house and shop belonging to the plaintiffs, and the defendant Wajih-ud-din. Wajih-ud-din owns a small share in the shop, but it is alleged that he used to collect the rent. On the 3rd of April, 1905, the plaintiffs served the first defendant, Muhammad Umar, with a notice stating that they suspected the good faith of Wajih-ud-din and directing him not to pay the plaintiffs' share of the rent to Wajih-ud-din. Shortly after this notice, on the 24th of April, 1905, the plaintiffs brought a suit against Wajih-ud-din for partition and obtained a preliminary decree on the 29th of July, 1905. The final decree in the partition suit was made by the Court of first instance on the 20th of September, 1906. There was an appeal to this Court and the case was remanded for a fresh partition. This partition took place on the 9th of March, 1908. Under it the shop occupied by the defendant fell into the plaintiffs' share. It was after this partition that the suit out of which this appeal has arisen was brought on the 25th of March, 1908. After the preliminary decree for partition made by the Court of first instance, Muhammad Umar obtained from Wajih-ud-din, on the 31st of May, 1906, a receipt for Rs 510, in full payment of the rent due up to that date and for an additional sum of Rs. 609-9-0 for rent in advance. The present suit relates to the period from the 1st of March, 1905, to the 29th of February, 1908. The claim was contested on the grounds that the plaintiffs were not competent to maintain the suit, being part owners of the property, and further that payment to Wajih-ud-din was a full discharge for the rent due.

The Court of first instance held that no payment had actually been made and the receipt of the 31st of May, 1906, was collusively given. Upon

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9 I. C. 275=
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appeal the learned District Judge without going into the various pleas raised by the appellant before him, held that the suit was "fundamentally bad" and that the plaintiffs as part owners of the property let to the defendant could not sue him for any portion of the [311] rent. In view of the circumstances of this case this opinion of the learned Judge is in our judgment erroneous. The plaintiffs served the defendant, Muhammad Umar, with a notice, forbidding him to pay their share of the rent to Wajih-ud-din. If in spite of this notice the defendant paid the rent to Wajih-ud-din, he did so at his own risk. It is manifest that if any payment of the plaintiffs' share of the rent was made to Wajih-ud-din after the issue of the notice referred to above, in spite of the plaintiffs' protest and at a time when partition proceedings were going on, such payment was made in collusion with Wajih-ud-din. This collusion is further manifest from the fact that payment is alleged to have been made not only for arrears of rent but also for rent in advance, a circumstance which is highly improbable. Under these circumstances the plaintiffs were entitled to maintain the suit after making Wajih-ud-din a defendant to it. This case is similar to the case of *Doorga Churn Surma* v. *Jampa Dassee* (1), decided by a Full Bench of the Calcutta High Court. The learned counsel for the respondent has cited a number of cases, which in our opinion are distinguishable, inasmuch as in those cases no notice was issued to the tenant directing him not to pay the rent to the plaintiff's co-sharer, nor was there any collusion in those cases between the tenant and such co-sharer.

We accordingly allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance. The appellant will have his costs in this Court and in the court below.

Appeal allowed.

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33 A. 312 (=9 I. C. 50=8 A. L. J. 57).

[312] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

GAJADHAR PANDE AND OTHERS (*Plaintiffs*) *v.* PARBATI (*Defendant*).*

[15th December, 1910.]

Act XV of 1877 (Indian Limitation Act), schedule II, article 141—Hindu law—Suit by reversioner for possession—Adverse possession by widow of predeceased son of last male owner—Limitation.

A separated Hindu died leaving him surviving two widows and a daughter-in-law the widow of his predeceased son. Upon the death of the survivor of the two widows the daughter-in-law took possession of the property and remained in possession thereof for more than twelve years, adversely to the reversioners. *Held* on suit by the reversioners to recover possession that their claim was time-barred, their cause of action having commenced from the death of the survivor of the two widows of the last owner. *Sham Koer* v. *Dab Koer* (2) referred to.

[Ref. 83 I. C. 41]

THIS was a suit for recovery of possession of shares in two villages and for mesne profits brought by the plaintiffs as reversionary heirs of one Mulai Pande. The property in suit belonged to one Ajudhia. He left

*First Appeal No. 279 of 1908 from a decree of Ram Chandra Chaudhri, Subordinate Judge of Azamgarh, dated the 31st of August, 1908.

(1) (1873) 12 B. L. R. 289.

(2) (1902) L. R. 29 I. A. 132.

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three sons, Pargash, Mulai and Har Dyal. Before his death he divided his property between his three sons. Mulai had a son, who predeceased him, leaving a widow Musammat Katwari Kunwar. He also left two widows, Musammats Hansrani and Sitla Kunwar. The second of these widows died in 1889, and after her death Katwari took possession of Mulai's estate and remained in possession for more than twelve years. The Court of first instance (Subordinate Judge of Azamgarh) dismissed the suit as barred by limitation, finding that more than twelve years had elapsed since the death of Katwari. The plaintiffs appealed to the High Court.

Mr. *A. F. Ryves*, Munshi *Govind Prasad* and Babu *Surendra Nath Sen*, for the appellants.

Mr. *B. E. O'Conor* and Maulvi *Muhammad Ishaq* for the respondent.

STANLEY, C. J. and BANERJI, J.—In the suit out of which this appeal has arisen the plaintiffs claimed possession of shares in two villages as reversionary heirs of one Mulai Pande. They also claimed mesne profits. The property in dispute with other property belonged to one Ajudhia deceased. He left three sons, **[313]** Pargash, Mulai and Har Dyal. Before his death he divided his property between these three sons, and it is a matter not now in controversy that the three sons were separated Hindus. Mulai, accordingly, at the time of his death was entitled as a separate Hindu to his share. He had a son, named Janki, who predeceased him, leaving a widow, Musammat Katwari Kunwar. He also left two widows, namely Musammat Hansrani and Musammat Sitla Kunwar. The last of these widows died in 1889. A plea of limitation was set up by the defendants, and this plea was decided in their favour by the learned Subordinate Judge upon the ground that twelve years had elapsed before the institution of the suit from the death of Musammat Katwari.

It appears to us that in the circumstances of this case the time of the death of Musammat Katwari is immaterial, inasmuch as her husband predeceased his father, and she therefore acquired no interest in the estate of Mulai. The learned Subordinate Judge failed to appreciate the true rule of limitation governing claims by reversioners to possession of immovable property on the death of a Hindu female. The rule is to be found in article 141 of schedule II to the Limitation Act of 1877. That article provides a period of twelve years' limitation in a suit by a Hindu or a Muhammadan entitled to possession of immovable property on the death of a Hindu or Muhammadan female from the time when the female dies. In this case, on the death of the survivor of Hansrani and Sitla, the widows of Mulai, the right of the reversioners to possession of the property of Mulai accrued. As we have said, Masammat Katwari was not entitled to the estate of Mulai; and consequently, however she enjoyed possession of his property, it was not by right of inheritance as a Hindu widow.

It appears that upon the death of the survivor of Hansrani and Sitla an application for mutation of names was made to the Revenue Court, and on that occasion Kali Charan and Debi, the fathers of the present plaintiffs, objected to the name of Katwari being retained upon the record. They were referred to the Civil Court, but failed to institute any proceeding in the Civil Court to establish their title. The name of Musammat Katwari accordingly remained upon the record as owner of the property **[314]** of Mulai. The learned counsel for the appellant has failed to point out any evidence whatever which would go to establish that Musammat Katwari was permitted to enjoy the possession of the property by the reversioners. So far from her possession being with their consent,

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it appears from the documents on the record that they objected to her possession and to the receipt of rent by her from the tenants. In the absence, therefore, of any such agreement between Musammat Katwari and the reversioners, it seems to us clear that her possession must be regarded as adverse to them. If that possession was adverse to them, then the accrual of the cause of action of the plaintiffs commenced from the death of the survivor of Musammat Hansrani and Sitla and not from the death of Musammat Katwari. It is unnecessary, therefore, for us to determine the precise date of the death of Musammat Katwari.

It appears to us that inasmuch as, admittedly, Musammat Hansrani and Musammat Sitla died prior to or in the year 1889, limitation began to run against the reversioners, the present plaintiffs, in that year, and consequently the present claim is barred by limitation.

The case of *Sham Koer* v. *Dab Koer* (1) is very similar to the case before us. In that case the owner of property, Babu Nath Singh, died in November, 1862, possessed of considerable property, leaving no issue at his death, but leaving a widow and a daughter-in-law, the widow of his only son who had died in his lifetime. Immediately before, or on his death, these two widows obtained possession of the property in dispute. Sabawan Koer, the widow of Babu Nath Singh, died in 1879, and after her death Dab Koer remained in sole possession. In a suit by the reversioner it was held that possession as of right by the widow and daughter-in-law of Babu Nath Singh for twelve years barred the heirs of the deceased unless they could show that the possession was permissive. In that case the learned counsel for the appellants relied very strongly on what he suggested were the probabilities of the case, namely, that there was some arrangement between the reversionary heirs and the widows that they should take a life-interest in some villages in lieu of [315] maintenance. Their Lordships of the Privy Council repelled this contention, observing as follows :—"The learned counsel for the appellants relied very strongly on what he suggested were the probabilities of the case. He said that it was probable that there was some arrangement between the reversionary heirs and the two widows that they should take a life-interest in these villages in lieu of maintenance. If one were at liberty to guess, one might adopt that view. But their Lordships cannot say that there is any proof of any such arrangement, and the fact that the reversionary heirs did not procure the execution of the *ekrarnama* (which was relied on by the appellants) by the two widows, throws a certain amount of suspicion upon it". Now here in the present case, so far from there being evidence of any arrangement between the reversionary heirs and Musammat Katwari, whereby she was allowed to remain in possession in lieu of maintenance, the evidence shows that the reversioners objected to her possession and resisted the receipt of rent by her of the property.

Under all the circumstances we think that the suit fails by reason of limitation, but, as we have said, the rule stated by the learned Subordinate Judge is erroneous, inasmuch as limitation in this case ran from the death of the survivor of the widows of Mulai and not from the date of the death of Katwari. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1902) L. R. 29 I. A. 132.

33 A. 315 (=9 I. C. 50=8 A. L. J. 66.)

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33 A. 315=
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APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Griffin.

RAM KUMAR SINGH (*Plaintiff*) *v.* JAGMOHAN SINGH (*Defendant*).*
[17th December, 1910.]

Act No I of 1877 (*Specific Relief Act*), *section* 21—*Arbitration—Reference to arbitration pleaded in bar of suit—Effect of reference having become unenforceable before suit.*

Held that an agreement to refer to arbitration which has not been acted upon and which has become from lapse of time unenforceable cannot be set up as a bar to a suit respecting matters which had been included in the agreement. *Atma* [316] *Rai* v. *Sheobaran Rai* (1), *Tahal* v. *Bisheshar* (2) and *Adhibai* v. *Cursandas Nathu* (3).

[Ref : 33 M. L. J. 48=41 I. C. 581.]

THE facts of this case were as follows :—

One Ram Autar Singh purchased a plot of land and built a house on the land. He died in 1892, leaving his son the appellant in this case a minor. The respondent, who was married to his daughter and was living with him, was appointed general attorney to his mother-in-law, the wife of the deceased, who in turn was appointed guardian of her son, the appellant in this case. The appellant came of age in 1902. Owing to some dispute a suit was then brought by Ram Kumar Singh against the respondent for accounts, and, on the 28th of November, 1902, by a registered deed the parties referred their disputes for decision to three named arbitrators. Among the matters so referred was the question of the ownership of the houses built by Ram Autar Singh. Sometime in 1903, the appellant gave notice to the arbitrators asking them not to make an award. The arbitrators took no further action after that, nor did the respondent. On the 19th of November, 1907, Jagmohan Singh brought a suit against Ram Kumar Singh under section 9 of the Specific Relief Act, on the ground that he had been transferred from Allahabad and Ram Kumar Singh had taken exclusive possession of the house in his absence. The Subordinate Judge gave him a decree for joint possession with Ram Kumar Singh on the 27th of March, 1908. Thereupon, on the 31st of March, 1908, Ram Kumar Singh brought this suit for a declaration that he was the proprietor and as such in exclusive possession of the house. The defendant, Jagmohan Singh, set up a title under an oral gift from his father-in-law, said to have been made in 1890, also adverse possession, and pleaded the last clause of section 21 of the Specific Relief Act in bar. The first Court found that the plaintiff was the owner of the house, and overruled the defendant's pleas to the contrary, but held that the suit was barred by the provisions of section 21 of the Specific Relief Act, inasmuch as the plaintiff had not shown that he revoked the submission to arbitration for good cause. It accordingly dismissed the suit.

The plaintiff appealed to the High Court (F. A. No. 250 of [317] 1908). This appeal was heard by RICHARDS and TUDBALL, JJ., who delivered the following judgments :—

RICHARDS, J :—"This appeal arises out of a suit brought by the plaintiff for a declaration of his title to a certain house or part of the house. The plaintiff is the son of Ram Autar Singh, deceased. The defendant married a daughter of the said

* Appeal No. 69 of 1910, under section 10 of the Letters Patent.

(1) Weekly Notes 1882, p. 58.
(2) (1885) I. L. R. 8 All. 57.
(3) (1886) I. L. R. 11 Bom. 199.

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Ram Autar and undoubtedly lived in the premises in dispute for a long time. The plaintiff claims that defendant lived in the house during the lifetime of Ram Autar Singh by the latter's permission and that on his father's death he (the plaintiff) was a minor. The defendant set up a title that the premises in dispute were a gift to himself and his first wife, the daughter of Ram Autar Singh. The Court below has decided on the merits of the case in favour of the plaintiff, but nevertheless dismissed the suit on the ground next hereinafter mentioned. The defendant pleaded that the parties by agreement, dated the 28th November, 1902, referred certain disputes (including the dispute as to the title of the house) to arbitration, that the plaintiff refused to perform his contract and that therefore the suit is barred by section 21 of the Specific Relief Act. There is no doubt that the contract was entered into and the agreement signed by the parties. The arbitrators were ready and willing to go on with the arbitration. Both parties at first attended before the arbitrators and produced their witnesses. The defendant says (at page 7 R) :—'The arbitrators gave Ram Kumar and myself a notice that on such and such a date there will be a meeting of the arbitraters and that we should attend. I attended the meeting regularly, but Ram Kumar did not attend I asked the arbitrators to make an award. They said that they would not make an award until both parties attended. Ram Kumar gave notice to the arbitrators not to make an award.' This evidence is not contradicted, and there can be no doubt that the award was not made because of the conduct of the plaintiff and the notice sent by him. The defendant suggests that the plaintiff sent the notice and refused to attend the proceedings because the arbitrators had intimated their opinion on one of the matters referred to them against the plaintiff. However this may be, the plaintiff has given no evidence of any kind that the arbitrators were guilty of misconduct.

"It is argued for the plaintiff that when he signed the agreement he had altogether performed the contract and that accordingly it cannot be said that he "refused to perform the contract" within the meaning of the section. It seems to me that such construction cannot be given to the section. In my opinion a contract to refer disputes to arbitration implies a contract to do all things necessary to making of a valid award so far as the parties are concerned If the contract was not rescinded, I would hold on the evidence that the plaintiff refused to perform his contract within the meaning of the section.

"It seems to me that it lay on the plaintiff to show that he had just cause for revoking the authority of the arbitrators. If the notice had any effect at all, it was to revoke the authority of the arbitrators and was itself a refusal to perform the contract. A contract once made can only be rescined by mutual agreement. Of course if after a contract to refer is entered into, nothing is done for a long time the Court might infer from the conduct of the parties that they had rescinded it by mutual consent. But this is not a necessary inference. In the present [318] case the defendant was clearly anxious to have the award. The only circumstances from which it could be implied that he agreed to rescind, was the fact that he never attempted to put in force the provisions of the Code of Civil Procedure to force on the proceedings, As against the drawing of this inference it must be remembered that defendant was in possession and might well be content to rely on the strength of this position. I find it impossible to hold on the evidence that the defendant ever intended to rescind or did rescind the contract. It is lastly said that the contract to refer was not in existence" when the suit was instituted within the meaning of the section. It seems to me that if the contract was never rescinded it must be still in existence, and the mere fact that there might have been difficulty in applying the sections of the Civil Procedure Code does not render the contract non-existent. It is said that this means that the plaintiff may now be unable to have the question decided either by the Court or by arbitration. The answer is that he had his remedy until he contracted to refer and he had his remedy by arbitration until he refused to go on with the artibitration. In other words, it is his own fault I would dismiss the appeal."

TUDBALL, J :— 'The sole question which has been argued before us is whether the plaintiff's suit is barred by the provisions of the last clause of section 21, Specific Relief Act. The lower Court on the merits has held in favour of the plaintiff appellant, but has held that the suit is barred by the existence of a binding and subsisting contract to refer the dispute to arbitration. The suit was brought to obtain a declaration of the plaintiff's title to and possession of a portion of a house. The defendant respondent is the husband of the plaintiff's sister and is what is known in this country as *Khana Damad*, *i.e.*, a son-in-law who resides in the house of his father-in-law. The plaintiff's father died when the plaintiff was a minor. When the latter had attained his majority a dispute arose between the par-

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ties under three different heads. In respect to one a civil suit was brought, and during the pendency thereof, the parties, on 28th November, 1902, executed an agreement in writing to refer the three matters to the arbitration of three persons. No period was fixed within which the arbitrators were to come to a decision. In regard to the matter then under litigation they passed a decision and the civil suit was decided in accordance with their award. It was in favour of the defendant. The plaintiff after that, i.e., 1903, sent a notice to the arbitrators revoking the submission to arbitration. Whether this was done with good cause has not been established in evidence, and for the purposes of this decision it may be assumed that the revocation was without good cause. The arbitrators then dropped the proceedings. It appears from the defendant's evidence that he attended the meetings of the arbitrators but they refused to go on unless the plaintiff also attended and then the latter wrote to say that he did not wish them to go to a decision. The defendant took no further action under the provisions of the Civil Procedure Code to enforce a decision of the two remaining questions in dispute, one of which was the question raised in this very suit, *i.e.*, the title to the house in dispute, which the plaintiff claims as being his ancestral property and which the defendant claims as having been gifted by the plaintiff's father to [319] his (defendant's) wife. The period of limitation for an application under section 523 (three years under article 178, Limitation Act) passed by, and neither party made any attempt to enforce a decision by the arbitrators. Then the plaintiff in the defendant's absence took possession of the house. Upon this the defendant brought a suit (November 1907), under section 9, Specific Relief Act, and obtained a decree on 27th March, 1908.

"On 31st March, 1903, the plaintiff brought the present suit. Three pleas have been raised on this appeal :—

1. That an actual submission to arbitration having been made by the parties, the plaintiff has fulfilled his contract to refer, and therefore there is no such contract in existence as would bar this suit under section 21, Specific Relief Act.

2. That the defendant not having proved that the revocation of the agreement was made without sufficient cause, the contract no longer exists.

3. That the contract to refer to arbitration has been broken up by the conduct of the parties and the bar of section 21 has ceased to be applicable.

"On the first plea, I agree with my learned brother that an agreement to refer to arbitration, implies an agreement to do everything necessary to enable the arbitrators to arrive at a decision on the question submitted to them. To hold the plaintiff had fulfilled his contract to refer merely by signing the documents of 20th November, 1902, is, I think, impossible. It is true that an agreement to refer may in this country be revoked for good cause, but until such revocation be made, it is the plaintiff's duty under this contract to do all that is necessary to enable the arbitrators to come to a decision. It cannot be said that he has fulfilled his contract to refer until he has, to the best of his power, placed before the arbitrator the material necessary for a decision.

"As to the second point, the burden of proving revocation for good cause was upon the plaintiff, and he has failed to put forward any evidence on the point. It was not for the defendant to prove the negative, i. e., the absence of good cause. On the third point, however, I think the plaintiff is entitled to a decision in his favour. In my opinion the conduct of the parties has broken up the contract to refer, and there was therefore no such contract in existence when the present suit was brought. When the plaintiff refused to go on with the arbitration, one of two courses was open to the defendant. It was open to him to take action within the period of limitation under the provisions of the law as contained in the Civil Procedure Code to enforce a decision by the arbitrators if the latter were still willing to act. If they were unwilling to act, then the arbitration was at an end, unless the Court were able to appoint other persons in their places. The other alternative open to the defendant was to drop his right to enforce a decision by the arbitrators and to leave the matter *in statu quo*, suing if he thought fit, for damages for breach of contract. The defendant has not elected to take the first of these two courses, nor has he sued for damages for breach of contract. As matters now stand neither party can enforce in a court of law the contract to refer. If, therefore, we hold that the jurisdiction of the ordinary court is barred by the last clause of section 21, Specific Relief Act, we shall hold that there is a cause of action which cannot be litigated between the parties either in the courts of justice or anywhere else [320] unless and until one of the arbitrators dies or is unable to act. The plaintiff has a cause of action ; he has suffered a wrong and is entitled to a remedy. In the circumstances, as they now are, he cannot, under the agreement of 20th November,

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1902, enforce a decision by the arbitrators, nor can the defendant do so either. Unless the parties make a fresh contract to refer, the plaintiff cannot possibly obtain in any forum the relief to which he is entitled, if section 21 in the present circumstances is a bar. That the arbitration proceedings came to nothing is partly due to the plaintiff's action, no doubt, but it is also partly due to the inaction of the defendant, who has not taken any steps to enforce his rights under the Code of Civil Procedure. A contract which could otherwise be specifically enforced, but which by reason of the lapse of time no longer be enforced in a court of law, cannot be said to be in existence in the eye of the law. If in the present case the contract to refer were in existence, the plaintiff would be entitled to enforce even now a decision by the arbitrators under the agreement of 20th November, 1902. This he clearly is not now entitled to do, nor is the defendant so entitled. The law cannot contemplate with equanimity a state of affairs in which a party cannot resort to any forum to recover, within limitation, the relief to which he is entitled. The meaning of the last clause of section 21, Specific Relief Act, I take it, is that the law says to a party 'you have selected a forum of your own which is fully empowered to decide the issue between you and your opponent, therefore as long as that forum exists and is capable and willing to act, and you can enforce a decision therein, the ordinary courts are closed to you.' But whereby the action of both parties that other forum is now closed to both of them the law surely does not mean that the parties are not entitled to enter the ordinary forum established by it. In my opinion it is the action of both parties in the present case which has placed it beyond the power of the arbitrators to decide the issue between them. There is, therefore, no longer is existence a contract to refer and the suit is not barred. I would, therefore, accede to the appellant's contention and hear the case on the merits, but, as my learned colleague's opinion must prevail, this is not necessary."

BY THE COURT.—"The order of Court will be that the appeal be dismissed, and, as the Court is not unanimous, each party will abide his own costs of the appeal."

Against the judgment of RICHARDS, J., the plaintiff preferred an appeal under section 10 of the Letters Patent, which was referred to a Bench of three Judges.

Dr. *Satish Chandra Banerji*, (with him Babu *Balram Chandra Mukerji*), for the appellant:—

Granting that the last clause of section 21, Specific Relief Act applies to the case of a submission to arbitration and the plaintiff did not revoke the submission for good cause, the plaintiff could not prevent the arbitrators from making an award. If the defendant did not acquiesce in the plaintiff's conduct, his [321] obvious remedy was to present an application to the court under section 523, Act No. XIV of 1882 (corresponding to paragraph 17, schedule II, Act No. V of 1908), and have an award made. This application should have been made within three years under Act No. XV of 1877, schedule II, article 178. If the plaintiff committed a breach of contract, the defendant should have sued him for damages. The evidence here shows that upon receiving a notice from the plaintiff, the arbitrators, who had held some meetings previously and examined witnesses, told the defendant that they had received such notice, and would not make an award until both parties attended. The defendant took no action, and the arbitrators made no award. More than six years have passed since. There is no subsisting and operative contract to refer to arbitration, it has been broken up by the conduct of all the parties concerned, it has lapsed by efflux of time. The plaintiff could not force the hands of the arbitrators, and, if there was a refusal on his part, the defendant has acquiesced in that refusal. Reference was made to *Adhibai* v. *Cursandas Nathu* (1), *Tahal* v. *Bisheshar* (2) and *Atma Ram* v. *Sheobaran Rai* (3).

The Hon'ble Pandit *Sundar Lal*, for the respondent:—

The provisions of section 21 of the Specific Relief Act, 1877, apply, for the plaintiff refused to perform his part of the contract, and revoked

(1) (1886) I. L. R. 11 Bom. 199 (210).
(2) (1885) I. L. R. 8 All. 57 (60-61).
(3) Weekly Notes, 1982 p. 58.

the submission to arbitration without cause. He had submitted the dispute to arbitration; he then sent the notice to the arbitrators and did not appear before them. He thus refused to perform his part of the agreement by not placing the arbitrators in a position to make the award. That the arbitrators were unwilling to go on with the proceedings, and in fact did nothing for seven years, was because the plaintiff wished them to do nothing. Paragraph 22, schedule II, of the present Code of Civil Procedure, had repealed the last clause of section 21 of the Specific Relief Act for certain purposes, and applies to the present case. In the case in 8 Allahabad both parties had dropped the reference. Not so here, because the defendant was all along quite willing to abide by the decision of the arbitrators.

Dr. *Satish Chandra Banerji* was not heard in reply.

[322] STANLEY, C. J.—In the suit out of which this appeal has arisen the plaintiff sought a declaration of his title to a house situate in Allahabad. It appears that the house in question was built by the father of the plaintiff. He died in 1892, leaving the plaintiff his heir, at that time a minor. The defendant is married to the plaintiff's sister and he lived in the house with the plaintiff. He also, it appears, was the general attorney of the plaintiff's guardian up to the year 1902, when the plaintiff came of age. A dispute arose between the parties and a suit for accounts was instituted by the plaintiff against the defendant, and on the 20th of November, 1902, an agreement was entered into between the parties for the settlement by arbitration of their disputes, including a dispute as to the title to the house in question. Three arbitrators were appointed, but the proceedings proved abortive, by reason, it is said, of the conduct of the plaintiff. He served a notice upon the arbitrators calling upon them to desist from passing an award. In November, 1907, the defendant instituted a suit against the plaintiff under section 9 of the Specific Relief Act and obtained a decree awarding to him joint possession of the house in dispute. The present suit was then instituted, namely, on the 31st of March, 1908.

The defendant pleaded that he was entitled to the house under an oral gift from his father-in-law. This gift is said to have been made in the year 1890. He also set up a plea that he was entitled to the property by adverse possession.

The court below overruled both these pleas, but dismissed the suit of the plaintiff on the ground that it was obnoxious to the provisions of the last clause of section 21 of the Specific Relief Act. This section prescribes that certain contracts enumerated in the section cannot be specifically enforced, and concludes with this provision "that save as provided by the Code of Civil Procedure . . . no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit." It appears that at the time of the settlement of issues the pleader for the [323] plaintiff intimated to the court that the plaintiff had issued a notice to the arbitrators asking them not to pass an award. As a matter of fact, the arbitrators did not pass any award, and it is contended that the notice to which I have referred was, within the meaning of section 21 of the Specific Relief Act, a refusal on the part of the plaintiff to perform the agreement to refer the disputes to arbitration.

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An appeal was preferred from the decision of the lower court to this Court, and the learned Judges before whom it was argued differed in opinion. Consequently this appeal under the Letters Patent was preferred, and it is for us to say whether the conduct of the plaintiff was such as precluded him from successfully prosecuting his present suit. It is admitted that upon the merits he is entitled to succeed ; if the section in question does not bar the suit, then the decree of this Court and also of the court below must be set aside and a decree passed in his favour.

In addition to the statement of the pleader of the plaintiff to the court on the settlement of issues, to which I have referred, we have some evidence shewing what actually occurred. One of the arbitrators, Annoda Prasad Banerji, was examined, and the version which he gives of the plaintiff's interference with the arbitration is as follows :—" Badri Prasad," he stated, " told me not to make an award, as Balram Chandar, Ram Kumar Singh's pleader, was telling him not to make an award. So far as I remember, Jagmohan Singh, (the defendant) did not prevent us from making an award." Then in cross-examination he stated :—" The plaintiff, or his pleader, did not write to me a letter preventing me. The plaintiff did not prevent me. So far as I remember, Badri Prasad showed me Balram Chandar's letter."

The defendant's version of what occurred appears in his deposition. He stated that the arbitrators gave Ram Kumar (the plaintiff) and himself a notice intimating that on such and such a date there would be a meeting of the arbitrators and they should attend. He says :—" A meeting was held by the arbitrators and witnesses were also produced by him (the plaintiff) and me. The aribitrators gave Ram Kumar and myself [324] a notice intimating that on such and such a date there will be a meeting of the arbitrators and we should attend. I attended the meeting regularly ; but Ram Kumar Singh did not attend, I asked the arbitrators to make an award. They said that they would not make an award until both parties attended. Ram Kumar Singh gave notice to the arbitrators not to make an award." It seems to me apparent from this evidence that the arbitrators declined to proceed with the arbitration. It was open to them, despite any notice which may have been given to them by the plaintiff, to proceed with the arbitration and to pass an award. But for some reason or other they did not adopt this course. Further, it was open to the defendant to file the agreement under section 523 of the Code of Civil Procedure of 1882, have an award made and a decree passed upon the award, but he did not choose to do so. Nothing was done for a number of years. The only inference that I am able to draw from the conduct of the parties is that the arbitration proceedings were abandoned. The defendant acquiesced in the inaction of the arbitrators and did not ask them to pass an award ; nor did he take the proceeding which was open to him under section 523. It appears to me that the arbitrators refused to proceed with the arbitration and with the acquiescence of the defendant, the proceedings were abandoned. In this view the judgment of my brother TUDBALL is correct.

In the case of *Atma Rai* v. *Sheobaran Rai* (1), in which an agreement had been entered into between the parties to a dispute over a piece of land to refer to arbitration, their differences on the 17th of April, 1877, and a suit was instituted on the 8th November, 1880, in regard to the land, nothing having been done under the agreement to refer

(1) Weekly Notes, 1882, p. 58.

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to arbitration, the lower appellate court held that the agreement was a bar to the suit under section 21 of the Specific Relief Act, but upon appeal this decision was reversed by STRAIGHT and BRODHURST, JJ. They based their judgment on the fact that the submission to arbitration had been executed so far back as the 17th of April, 1877, and that at the time of the institution of the suit not only had nothing been done under [325] it, but the arbitrators had never met. They held that section 21 of the Specific Relief Act did not apply, observing that "the agreement was no bar to the present suit, that it had lapsed not having been acted upon within a reasonable time." The delay in that case was only three years, whereas in the case before us seven years were allowed to elapse without any steps being taken.

In *Tahal* v. *Bisheshar* (1) a somewhat similar question to the one before us arose. One of the parties to a contract to refer a controversy to arbitration brought a suit for part of the subject-matter so referred. The defendants pleaded as a bar to the suit the provisions of section 21 of the Specific Relief Act, but did not allege in their answer to the plaint that the plaintiff refused to perform his contract. It was held that the mere act of filing the suit on the part of the plaintiff was not tantamount to a refusal to perform his contract in the sense of section 21 of the Specific Relief Act, and the contract, the existence of which would bar a suit under the circumstances contemplated by section 21, must be an operative contract and not a contract broken up by the conduct of all the parties to it. In the course of their judgment the learned Judges say:— "The Judge in appeal held that the mere act of filing this suit on the part of the plaintiff is tantamount to a refusal to perform his contract in the sense of section 21 of the Specific Relief Act. We cannot take this view, and we hold that the contract, the existence of which would bar a suit under the circumstances contemplated by this section, must be an operative contract and not a contract broken up by the conduct of all parties to it."

Again in the case of *Adhibai* v. *Cursandas Nathu* (2), upon the question whether the actual submission of a subject in dispute to named arbitrators, followed by the attempt of one of the parties to such submission to withdraw from or to prevent an award being made upon the submission, falls within the concluding paragraph of section 21 of the Specific Relief Act, FARRAN J., in his judgment observed:—"It is not shown whether the plaintiff's withdrawal was justified or [326] not, but it appears that the defendant took no steps under section 523 of the Code of Civil Procedure to have the agreement to refer filed in court, and thus render the plaintiff's attempt to withdraw from the arbitration nugatory, if it was in fact unjustifiable. This, under the ruling in *Pestonjee* v. *Manockji* (3), it appears, he might have done. There is nothing to show that they did not acquiesce in it, (*i.e.* the withdrawal), in which case the ruling in *Tahal* v. *Bisheshar* would apply."

It appears to me that in this case by mutual consent the contract to refer to arbitration was rescinded, and further, as I think, the arbitrators declined to proceed with the arbitration. Consequently the arbitration proceedings became abortive. Under the circumstances there is no bar to the plaintiff's suit and it ought to be decreed.

BANERJI, J.—I am of the same opinion. The plaintiff's suit would be barred by the provisions of section 21 of the Specific Relief Act, if

(1) (1885) I. L. R. 8 All. 57.
(2) (1886) I. L. R. 11 Bom. 199.
(3) (1868) 12 Moo. I. A. 112.

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at the date of the suit there was in existence a contract to refer the controversy between the parties to arbitration. The circumstances of this case clearly show that no such contract was in existence. As pointed out by the learned Chief Justice, the arbitrators refused to act and the defendant acquiesced in the reference becoming abortive. No action was taken for a number of years, and nothing was done to enforce the agreement. There was therefore no bar to the maintenance of the suit and the claim ought to have been decreed. I agree in the order proposed.

GRIFFIN, J.—In my opinion the inference to be drawn from the conduct of the parties and of the arbitrators, and more particularly from the lapse of time since the agreement to refer to arbitration, is that that agreement had ceased to be operative at the date of the institution of the suit. There was, therefore, no contract in existence which under the provisions of the last clause of section 21 of the Specific Relief Act would be a bar to the suit. I agree in the order proposed.

BY THE COURT.—The order of the Court is that the appeal [327] be allowed, the decree of this Court and also of the lower court be set aside, and the plaintiff's claim be decreed with costs in all courts.

Appeal decreed.

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33 A. 327 (=9 I. C. 127=8 A. L. J. 79).

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Before Mr. Justice Sir George Knox, Mr. Justice Karamat Husain and Mr. Justice Griffin.

GHAFUR KHAN (*Opposite Party*) *v.* KALANDARI BEGAM (*Applicant*).*

[23rd December, 1910.]

Act No. VII of 1889 (*Succession Certificate Act*), *sections* 2, 4—*Certificate not to be given for collection of part only of a debt—Debt in part irrecoverable—Muhammadan law—Dower.*

Held that no certificate could be granted to one of the heirs of a Muhammadan lady, who had died leaving her dower debt unrealized, for collection merely of a part of the dower debt of the deceased.

Muhammad Ali Khan v. *Fultun Bibi* (1) and *Bismillah Begam* v. *Tawassul Husain* (2) followed. *Shitab Dei* v. *Debi Prasad* (3) and *Akbar Khan* v. *Bilkisara Begam* (4) referred to.

[Dist. 16 C. W. N. 231=15 C. L. J. 384=12 I. C. 593. Ref. 18 C. W. N. 836=23 I. C. 556=42 Cal. 10; Ref. 42 All. 347=56 I. C. 380.]

THE facts of this case were as follows:—Musammat Kalandari Begam applied under section 11 of the Succession Certificate Act (VII of 1889) for a certificate to collect a debt valued at Rs. 9,387, being a part of the dower due to her deceased sister. The amount of the dower was Rs. 25,000 plus two gold *dinars*. The deceased lady left as her heirs her husband, her mother and her sister (the applicant). The applicant's share out of the dower amounted to Rs. 9,387. It was alleged in the application that the share of the mother, Musammat Sahibjan, was discharged by relinquishment or mutual agreement; the exact nature of the transaction was not set forth. This share was accordingly deducted from the

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* First Appeal No. 53 of 1910 from an order of Muhammad Ishaq Khan, District Judge of Farrukhabad, dated the 18th of February 1910.

(1) (1896) I. L. R. 19 All. 129.
(2) (1910) I. L. R. 32 All. 335.
(3) I. L. R. 16 All. 21.
(4) Weekly Notes, 1901, p. 125.

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amount of the dower, as was also the share which came by inheritance to the husband, against whom the dower was due ; and the application was made for the balance, namely, Rs. 9,387. Objections were taken that the whole of the dower debt was not included in the application and that duty had not been paid on the whole amount. The Judge found that the share of Musammat Sahibjan was irrecoverable, having become time-barred. He granted the application.

[328] Hence this appeal, which came up for hearing before KNOX and KARAMAT HUSAIN, JJ., who referred the matter to a Full Bench.

Mr. *Muhammad Ishaq Khan* (for The Hon'ble Nawab *Muhammad Abdul Majid*), for the appellant :—

The application is admittedly for a portion only of the dower debt. A certificate to collect a part of a debt cannot be granted. The object of the Succession Certificate Act is to safeguard the debtors of a deceased person. If certificates were granted for parts of debt piecemeal, the result would be to jeopardise the debtors and unnecessarily harass them by a multiplicity of suits. The Act therefore contemplates that only one certificate should be granted for the whole of a debt and the grantee of the certificate should become a trustee as it were for the co-creditors. There is an uniform course of decisions laying down that a certificate can be granted only for the whole of a debt. The first case is that of *Shitab Dei* v. *Debi Prasad* (1), the case of *In the matter of the petition of Indarman* (2) may appear to be somewhat against me; but the facts were different. Later cases are those of *Muhammad Ali Khan* v. *Puttan Bibi* (3) and *Bismilla Begam* v. *Tawassul Husain* (4). The last case is identical with the present one. If a portion of the debt is relinquished, it becomes irrecoverable, just as a portion which has become time-barred is irrecoverable ; there is no distinction of principle between the two cases.

Munshi *Gulzari Lal*, for the respondent.

The application covers the whole of that portion of the dower debt which is recoverable. No suit can be brought to recover the portion belonging to Musammat Sahibjan, which has become time-barred; nor the portion of the debt which has been inherited by the husband who himself is the debtor. The application specifically sets forth that the portion of the debt not included in it is irrecoverable for the reasons mentioned therein. The rulings of this Court do not lay down anything more than that the application should include the whole of the recoverable portion of the debt, and that the stamp duty should be paid on that amount. [329] In the case of *Muhammad Ali Khan* v. *Puttan Bibi* (5) it is clearly laid down that the duty is to be paid, not for the whole of the debt, but for that portion of it which at the date of the application is due and payable. In that case, the husband's share, "which he holds in his own hands," and a son's share, which was discharged, were directed to be deducted from the whole dower debt and duty to be paid on the balance. The duty being payable only on the recoverable balance, the amount to be entered in the application for the certificate would be that balance and not the whole of the original debt, for, under article 12, schedule I, of the Court Fees Act, the duty is payable on the amount entered in the application. The case of *Akbar Khan* v. *Bilkisara Begam* (6) is in my favour. In that case, too, the portion of the debt which had been remitted and

(1) (1893) I. L. R. 16 All. 21.
(2) (1895) I. L. R. 18 All. 45.
(3) (1896) I. L. R. 19 All. 129 at p. 130.
(4) (1910) I. L. R. 32 All. 335.
(5) (1896) I. L. R. 19 All. 129 at p. 131.
(6) Weekly Notes, 1901, p. 125.

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discharged was deducted and duty was directed to be paid on the balance only. In the case reported in I. L. R. 32 All. it was not held that the duty should be paid on the whole of Rs. 57,000. That was a case in which there was a voluntary relinquishment of a portion; in the present case a portion has become extinguished by operation of law. The reason for the rule that a certificate should not be granted for a part of a debt is the avoidance of a multiplicity of suits and of unnecessary harrassment of the debtor by a number of proceedings which would arise if the debt were allowed to be collected piecemeal. But in the present case, there can be no further proceedings as the balance of the debt is irrecoverable and extinguished.

Mr. *Muhammad Ishaq Khan* replied.

KARAMAT HUSAIN, J.—The facts are these.—Musammat Kalandari Begam, one of the heirs of Musammat Gujrati Begam, deceased, applied for a succession certificate for the collection of a portion of the dower debt of Gujrati Begam. Her husband, Ghafur Khan, objected that no certificate for the collection of a portion of a debt could be granted. The learned District Judge overruled the objection and granted the certificate. In his order, dated the 18th of February, 1910, he said:—"I think the applicant is entitled to the certificate applied for by her for the balance of the dower debt after deducting the share of the same **[330]** to which the objector is entitled and which is in his hands and the share of Musammat Sahib Jan, another heir, which has become time barred." The objector preferred an appeal to this Court and repeated the plea he had raised in the court below. The case owing to conflict of authorities was heard by a bench of three Judges. It was urged for the appellant that a succession certificate for a portion of a debt could not be granted. In support of the contention reliance was placed on the following cases:— *Muhammad Ali Khan* v. *Puttan Bibi* (1) and *Bismilla Begam* v. *Tawassul Husain* (2). The contention of the respondent was that a Bench of this Court in *Akbar Khan* v. *Bilkisara Begam* (3) granted a succession certificate for portion of a dower debt and that the remarks of EDGE, C. J., in *Muhammad Ali Khan* v. *Puttan Bibi* (1) favoured the grant of a certificate for the collection of a portion of a debt. They are as follows:—"It appears to us that the applicant must pay the duty for a certificate entitling him to collect the whole of the dower debt which at the date of the application was due and payable. In calculating what the amount of that debt was, the son's share by inheritance which has been discharged and the husband's share which he holds in his own hand in satisfaction of his own share in the inheritance, will be deducted, and the duty will be payable on the balance."

The decision of the case turns upon the construction to be put upon section 4 of the Succession Certificate Act with special reference to the meaning assigned to the phrase "his debt" in that section.

Before dealing with the section the following points are to be noted. The Succession Certificate Act, 1889, as the preamble shows, has been enacted to "afford protection to parties paying debts to the representatives of a deceased person." The proceedings under the said Act are of a summary nature, in which the court either decides the right of the applicant to the certificate or grants it to one who appears to have the best *prima facie* title thereto (section 7). In certain cases the court must and

(1) (1896) I. L. R. 19 All. 129.
(2) (1910) I. L. R 32 All. 335.
(3) Weekly Notes, 1901, p. 125.

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in others it may require, as a condition precedent to the granting of a [331] certificate, a bond for indemnity of persons who may be entitled to the whole or any part of the debt (section 9). It is thus evident that the proceedings are in no way intended to *determine* the *share* of the applicant in the debt or to adjudicate upon the relative rights of the applicant and others therein.

This is not all. One debt creates one single and indivisible liability which gives rise to one single cause of action. One of the heirs of the obligee of a money bond may not, therefore, sue for his share in the money due under the bond—see *Kandhiya Lal* v. *Chandar* (1). The dower debt of a Muhammadan wife, whether prompt or deferred, is a "debt" within the meaning of section 2 of the Succession Certificate Act, 1889; *Abdul Karim Khan* v. *Makbul-un-nissa* (2). A debtor, again, ought not to be harassed more than once for one debt and the multiplicity of suits in respect of one cause of action must not be allowed. Some of the above mentioned points, among others not mentioned, brought into being Act XXVII of 1860, under which the Calcutta High Court in *Waselun Huq* v. *Gowhuroonnissa Bibee* (3) and *Srimati Amir-un-nissa Barkat* v. *Srimati Afiatt-un-nissa* (4) held that a certificate cannot be granted to different heirs according to their shares in the inheritance. Act XXVII of 1860 was replaced by the Succession Certificate Act, 1889, section 4 of which is as follows :—(1) " No court shall (*a*) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof... except on the production by the person so claiming of : —(III) A certificate granted under this Act and having the debt specified therein." The plain meaning of the phrase "his debt" in what has been quoted is the whole of the debt due by the debtor to the deceased. It cannot mean a portion of that debt. Such a meaning, firstly, is against the canons of interpretation, for the natural meaning of the term "debt" is not a share of some one in that debt; secondly, it is opposed to the scheme of the Act which has been enacted to afford protection to debtors and has nothing to do with the convenience of the applicant or his right to or share in the debt ; [332] thirdly, it will cause the splitting of an indivisible liability; and fourthly, it will lead to the harassing of a debtor more than once on one cause of action and to multiplication of suits thereon.

This Court, in view of the above reasons, held in *Shitab Dei* v. *Debi Prasad* (5) that separate certificates to different persons for partial collection of debts could not be granted, and in *Muhammad Ali Khan* v. *Puttan Bibi* (6) it was ruled that a certificate for the collection of a portion of a debt could not be given. EDGE, C. J. said: —"He (the father of the deceased wife) had applied for a certificate entitling him to collect debts to the amount of Rs. 1,50,000. It was necessary under section 4 of Act No. VII of 1889 that he should have a certificate. The Judge declined to grant such certificate unless the applicant paid the 2 per cent. duty on the whole debt, *i. e.*, the debt of eleven lakhs odd, which was due to the Muhammadan lady. There has been a uniform series of decisions in this Court according to which a certificate cannot be granted to collect a part only of a debt. There is no decision of this Court or, so far as we know, of any other court which says that an applicant for a certificate either under

(1) (1884) I. L. R. 7 All. 313.
(2) (1908) I. L. R. 30 All. 315.
(3) (1868) 10 W. R. 105.
(4) (1869) 3 B. L. R. 404.
(5) (1893) I. L. R. 16 All., 21.
(6) (1896) I. L. R. 19 All. 129.

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this Act or under the former Acts, must apply for a certificate to collect all the debts due to the deceased. We think it would be against public policy that a certificate to collect part only of a debt should be granted, as it would tend to multiplication possibly of suits in respect of one liability and the harassment of debtors." The ruling in *Shitab Dei* v. *Debi Prasad* (1) was followed in *Bismilla Begam* v. *Tawassul Husain* (2). It is, however, argued that the remarks of EDGE, C. J., in *Muhammad Ali Khan* v. *Puttan Bibi* (3), which have been cited by the learned vakil for the respondent, favour the grant of certificate for the collection of a portion of a debt. There is no force in this. The point for decision in that case was whether a certificate for the collection of a portion of a debt could or could not be granted, and the decision thereon was that it could not. That being so, the remarks towards the end of the judgment are mere *obiter dicta*. [333] CHAMIER, J., in *Akbar Khan* v. *Bilkisara Begam* (4), doubts the correctness of the decision in *Muhammad Ali Khan* v. *Puttan Bibi*, and is of opinion that the word "debts" in section 6 (*f*) of the Succession Certificate Act, 1889, means debts due, *i. e.*, alleged to be due from debtors to the person applying for the certificate. With due respect to the learned Judge there is nothing in section (6) (*f*) to show that the term "debts" means a portion of the debt to which the applicant is entitled. Neither that section nor any other section of the Act aims at determining the share of the applicant in the debt. Reading that term in the light of the phrase "his debt" in section 4 of the Act, it becomes clear that "debt" in section 6 (*f*) means the debt which is due to the deceased, *i. e.*, the whole of the debt. An applicant for a probate or letters of administration, no doubt, is allowed to put a value on the amount of assets of the deceased. But he has to put a value on the assets as a whole and not on any portion thereof.

Article 12 of schedule I of the Court Fees Act does in no way support the view that a succession certificate for a portion of a debt can be granted. The note in that clause is in the following terms:—"The amount of a debt is its amount, including interest, on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained." The ascertainment of the amount of the debt, in my opinion, is the ascertainment of the amount of the whole debt and not of the share of the applicant therein. It is the ascertainment which an accountant would make. Juristic facts which may affect the debt or any portion of it, such as the absence of right to the debt in the applicant, fraud, limitation, the absence of cause of action or the like, cannot be taken into account in ascertaining its amount for the purpose of obtaining a succession certificate. The determination of such facts is the exclusive function of a court of justice in a regular suit and may often involve intricate and difficult questions of law and facts which are not to be decided in a summary proceeding.

The only plea which favours the grant of a succession certificate for the collection of a portion of a debt is based on sympathy with the applicant. It is urged that it will be a great hardship [334] to make an applicant, who is entitled to a fractional share of a debt only to pay duty upon the whole of that debt. This, however, is a matter of pure sentiment and, in the absence of an express rule of law to that effect, courts of justice can take no notice of the hardship and the more so when there

(1) (1893) I. L. R. 16 All. 21.
(2) (1910) I. L. R. 32 All. 335.
(3) (1896) I. L. R. 19 All. 129.
(4) Weekly Notes: 1901, p. 125.

are considerations which point the other way. A person entitled to one-tenth of a debt has to pay the full court fee payable on the whole of the debt and the hardship involved cannot save him from such payment. One of the mortgagors whose share in the property mortgaged is 1/30, cannot, on the ground of hardship, be allowed to sue for the redemption of 1/30 of the property on payment of 1/30 of the full court fee. A plaintiff who sues for Rs. 20,000 and obtains a decree for Rs. 1,000 only cannot, on the basis of the hardship, claim a refund of the court fee on Rs. 19,000.

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For the above reasons I would allow the appeal and dismiss the application for a succession certificate for collection of a portion of the dower debt with costs.

KNOX, J.—I fully agree with the above. It is matter for the Legislature to consider whether the hardship to which my learned brother has alluded should not be relieved by a change in the Statute.

GRIFFIN, J.—I agree.

BY THE COURT—The order of the Court is that the appeal be allowed, the order the lower court set aside and the application dismissed with costs.

Appeal allowed.

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33 A. 335 (=9 I. C. 217=8 A. L. J. 117.)

[335] APPELLATE CIVIL.

Before Justice Sir George Knox and Mr. Justice Karmat Husain.

CHHOTE LAL (*Plaintiff*) *v.* SHEOPAL SINGH AND OTHERS (*Defendants*).*

[23rd December, 1910.]

Land-holder and tenant—Occupancy tenant—Usufructury mortgage—Relinquishment of tenancy during the term of the mortgage.

Held that, an occupancy tenant who has made a usfructuary mortgage of his holding and put the mortgagee in possession cannot during the subsistence of such mortgage relinquish his holding to the prejudice of the mortgagee's rights. *Rannu Rai* v. *Rafi-ud-din* (1) followed.

[Ref. 66 I. C. 376=1921 M. W. N. 615=15 L. W. 218=42 M. L. J. 161=45 Mad. 47.]

THE facts of this case were as follows:—

In this case, an occupancy tenant mortgaged his holding with possession to one Chotte Lal, and afterwards relinquished his holding in favour of the zamindar, who instituted a suit in ejectment in the revenue Court against the plaintiff. The occupancy tenant was not a party to the suit. Chhote Lal in that suit raised a plea that the relinquishment by the mortgagor in favour of the zamindar was a collusive transaction and could not effect his rights. While that suit was pending, Chhote Lal instituted a suit in the Court of the Subordinate Judge for a declaration that the relinquishment, dated the 25th of September, 1909, was collusive and fraudulent and made for the purpose of causing loss to him and was void as against him. The Subordinate Judge, coming to the conclusion that the suit was barred by *res judicata*, dismissed the claim, and that decree was upheld by the lower appellate Court (Subordinate Judge of Agra) on the ground that

*Second Appeal No. 129 of 1910 from a decree of H. W. Lyle, District Judge of Agra, dated the 29th of November 1909, confirming a decree of Sheo Prasad, Subordinate Judge of Agra, dated the 6th August 1909.

(1) (1905) I. L. R 27 All. 82.

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the relief sought was a relief in the discretion of the Court to grant or refuse. The plaintiff appealed to the High Court.

Munshi *Haribans Sahai*, for the appellant.
Munshi *Benode Behari*, for the respondents.

KARAMAT HUSAIN, J.—In this case, an occupancy tenant mortgaged his holding with possession to one Chhote Lal, and afterwards relinquished his holding in favour of the zamindar, who instituted a suit in ejectment in the Revenue Court against the plaintiff. The occupancy tenant was not a party to the suit. Chhote Lal in that suit raised a plea that the relinquishment by **[336]** the mortgagor in favour of the zamindar was a collusive transaction and could not affect his rights. While that suit was pending, Chhote Lal instituted a suit in the Court of the Subordinate Judge for a declaration that the relinquishment, dated the 25th September, 1909, was collusive and fraudulent and made for the purpose of causing loss to him and was void as against him. The learned Subordinate Judge coming to the conclusion that the suit was barred by *res judicata* dismissed the claim and that decree was upheld by the lower appellate Court on the ground that the relief sought was a relief in the discretion of the Court to grant or refuse. The plaintiff comes here in second appeal. Following the ruling in *Rannu Rai* v. *Rafi-ud-din* (1) which I followed in *Ramdhari Rai* v. *Ramdhari Rai* (2) I hold that the occupancy tenant, after mortgaging his holding with possession to Chhote Lal, had no power to relinquish it in favour of the zamindar. I would, therefore, allow the appeal, set aside the decree of the Courts below, and under the provisions of order 41, rule 23, send the case back through the lower appellate Court to the Court of first instance for trial on the merits. Costs will abide the event.

KNOX, J.—The facts are set out in the judgment of my learned brother, and in view of the course of rulings to which he has referred, I prefer not to adhere to the opinion which I have entertained and would have put forward at greater length had the matter been *res integra*. I was one of the Judges who in *Khiali Ram* v. *Nathu* (3) was prepared to hold and did hold that an ex-proprietary tenant could sublet the whole or any part of his holding, but I have always hesitated, with due respect to the learned Judges who decided the cases, in following the further step taken in *Badri Prasad* v. *Sheodhan* (4) and *Rannu Rai* v. *Rafi-ud-din* (5). The question arises—what will the decree-holder do with the decree when he gets it, and whether the Revenue Courts will pay any attention to it? These conflicts between Revenue and Civil Courts are to be regretted. It would be well if they could be put an end to by the Legislature. In view, **[337]** however, of the series of rulings abovementioned, I accept the view taken by my learned brother, and agree in his order, which will also be the order of the Court.

Appeal allowed.

(1) (1905) I. L. R. 27 All. 82.
(2) (1910) 7 A. L. J. 305.
(3) (1893) I. L. R. 15 All. 219.
(4) (1896) I. L. R. 18 All. 354.
(5) (1905) I. L. R. 27 All. 82.

33 A. 337 (=9 I. C. 140).

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DEC. 23.

APPELLATE CIVIL.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Tudball.

33 A. 337=9 I. C. 140.

GHULAM NABI KHAN (*Plaintiff*) *v.* NIAZ-UN-NISSA (*Defendant*).*

[23rd December, 1910.]

Construction of document—Sale—Agreement to repurchase executed on same day—Mortgage by conditional sale.

When what purported to be an out-and-out sale was accompained by a contemporaneous agreement giving to the vendor a right of repurchase within five years at the same price, it was *held* that the transaction was what it purported to be, and could not be construed as a mortgage by conditional sale. *Bhagwan Sahai* v. *Bhagwan Din* (1) followed. *Vasudeo* v. *Bhau* (2) referred to.

[Ref. 33 All. 585 ; 19 A. L. J. 423=43 All. 493 ; 42 All. 437=18 A. L. J. 478.]

THE facts of this case were as follows :—

A sale-deed was executed in favour of the respondent on 12th August, 1894. On the same day another deed was executed between the parties which provided that if the purchase money, were paid within five years the transferee would reconvey the property to the vendor, and the sale would be deemed to be non-existent. This was a suit by the appellant vendor to redeem the property on payment of purchase money on the basis that the two deeds made the transaction a mortgage by way of a conditional sale. The Court of first instance (Subordinate Judge of Moradabad) dismissed the suit, and this decree was affirmed on appeal by the District Judge. The plaintiff appealed to the High Court.

The Hon'ble *Nawab Muhammad Abdul Mojid* (with him Mr. *B. E. O'Conor*), for the appellant, contended that the two documents must be read together as constituting a mortgage by conditional sale. In the case of *Bhagwan Sahai* v. *Bhagwan Din* (1) the vendees promised to reconvey as a matter of grace. Moreover that case was decided on principles of common law and did not apply. He cited *Ali Ahmad* v. *Rahmat-ut-lah*, (3) and referred to section 58, clause (*c*) of the Transfer of Property Act.

[338] Mr. *G. P. Boys* (with him Maulvi *Ghulam Mujtaba*) for the respondent, relied on *Bhagwan Sahai* v. *Bhagwan Din* (4) and submitted that the case was exactly like the present. The parties intended to create a transfer out-and-out. He further relied on *Vasudeo* v. *Bhau* (2).

STANLEY, C. J, and TUDBALL, J.—This appeal arises out of a suit for redemption of an alleged mortgage of the 12th of August, 1894. On that date a sale-deed was executed and a contemporaneous agreement whereby the vendee undertook to reconvey the property comprised in the sale-deed on repayment of the amount of the purchase money within a period of five years. The period of five years has long since elapsed, and consequently the agreement to reconvey is not capable of being enforced unless the transaction is regarded as in the nature of a mortgage by way of conditional sale.

Both the lower Courts dismissed the plaintiff's suit on the ground that the sale-deed represented an out-and-out sale, and that the agreement

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* Second Appeal No. 723 of 1910 from a decree of A. W. R. Cole, District Judge of Moradabad, dated the 3rd May 1910, confirming a decree of Nihal Chandra, Subordinate Judge of Moradabad, dated the 11th of August 1909.

(1) (1890) I. L. R. 12 All. 387.
(2) (1896) I. L. R. 21 Bom. 528.
(3) (1892) I. L. R. 14 All. 195.
(4) (1890) I. L. R. 12 All. 387, 391.

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33 A. 337=9 I. C. 140.

whereby the vendee undertook to reconvey the property on payment of the purchase money within a limited time did not convert the sale into a mortgage by way of conditional sale.

This second appeal has been preferred and reliance has been placed upon the language of section 58 of the Transfer of Property Act. It is to be observed in this case that there are two documents to be interpreted and that the decision of it depends upon the true construction to be placed on those documents. If we come to the conclusion that the sale-deed represented, and was intended to be, an out-and-out sale, then it appears to us that, there being nothing illegal in the agreement of the parties, we should hold it to be an out-and-out sale, and that inasmuch as the purchase money was not paid within the time agreed upon, the plaintiff is not entitled to recover the property. It appears to us that the case is concluded by the decision of their Lordships of the Privy Council in *Bhagwan Sahai* v. *Bhagwan Din* (1). In that case a document purporting to be one of sale was accompanied by a contract whereby a right was reserved to the vendor of [339] repurchasing the property sold on repayment of the purchase money within a certain time, and it was held that the transaction was not to be regarded as a mortgage by conditional sale. Their Lordships in their judgment quote a statement of the law pronounced by LORD CHANCELLOR CRANWORTH in the case of *Alderson* v. *White* (2) when dealing with the question whether or not what purported to be a deed of sale on its face was really a mortgage, and read the following passage:—"In every such case the question is, what upon a fair construction is the meaning of the instruments? Here the first instrument was on the face of it an absolute conveyance; the second gave a right to repurchase on payment, not of what should be due, but of the full amount of the purchase money of £ 4,739, exactly corresponding to the terms of the two documents in the present case, whereby the vendee gave the right to the vendors to take back the property if within the period of ten years they should pay the same amount, namely, Rs. 4,000. Was that, if taken according to its terms, a lawful contract? Clearly so. What then is there to show that it was intended to be a mere mortgage? I think that the Court after a lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be, and I see but little evidence to that effect here." It seems to us that this language of the LORD CHANCELLOR is closely applicable to the facts of the present case. We find in the document which is described as a deed of sale, a recital that "the sale had become absolute and final, and that the contracting parties had no right to cancel the sale and to demand restitution of the consideration money, and that the vendor has no right to any share in the property sold." In view of this language can we say that what purports to be a sale is in reality a mortgage? A stipulation for repurchase will not of itself convert a case of sale into one of mortgage. To make a mortgage there must be a debt—*Vasudeo* v. *Bhau* (3). If there be a right to redeem property from a debt, there must also be the correlative right to enforce payment of the debt. Here there is clearly no debt. Whether a transaction is a *bona fide* sale with an agreement for repurchase or a [340] mere mortgage in the form of a sale must depend on the intention of the parties to be gathered from the language in which the transaction is carried out, supplemented, it may be,

(1) (1890) I. L. R. 12 All. 387, 391; 44 R. R. 924 (928).
(2) (1858) 2 De. Gex, and J. 97 (105);
(3) (1896) I. L. R. 21 Bom. 528.

by oral evidence. If we attach their true meaning to the recitals which we have referred to above, it must, we think, be held that the transaction was intended by the parties to be an out and out sale with an agreement for repurchase. In view of the language used we are of opinion that the courts below rightly held that the plaintiff had no right to redeem the property. If he intended to rely upon the agreement for repurchase, he ought to have paid his money within the time limited by the document. Having failed to do so, he must abide the consequences. We dismiss the appeal with costs.

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Appeal dismissed.

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33 A. 340 [=15 C. W. N. 521=3 A. L. J. 373=13 C. L. J. 510=13 Bom. L. R. 391=10 M. L. T. 23=(1911) 2 M. W. N. 370=21 M. L. J. 1126=11 I. C. 398 =38 I. A. 85]

PRIVY COUNCIL.

HANIF-UN-NISSA AND ANOTHER (*Defendants*) *v.* FAIZ-UN-NISSA AND ANOTHER (*Plaintiffs.*)*

[*On appeal from the High Court of Judicature at Allahabad.*]

[14th February, 1911.]

Act No. I of 1872 (*Indian Evidence Act*), *section* 92—*Admissibility of evidence to show that a document purporting to be a sale-deed is in reality a deed of gift.*

In the appeal their Lordships were of opinion that the decree of the High Court in *Faiz-un-nissa* v. *Hanif-un-nissa* (1) could not be supported and remitted the case to the High Court to be dealt with on the evidence.

[Ref : 14 I. C. 65=1912 M. W. N. 164 ; Fol : 36 All. 537 ; Ref. (1916) 1 M. W. N. 474 =31 M. L. J. 96=35 I. C. 301 ; 1919 M. W. N. 87=49 I. C. 699=10 L. W. 1= 26 M. L. T. 291 ; 70 I. C. 203=49 Cal. 161 ; 75 I. C. 557=37 C. L. J, 552=27 C. W N. 496]

APPEAL from a judgment and decree (17th April, 1905) of the High Court at Allahabad, which reversed a decree (5th November, 1902) of the Additional Subordinate Judge of Aligarh.

The main questions for determination on this appeal were, (*a*) whether a deed of sale, dated the 27th of September, 1889, executed by the plaintiff (respondent) in favour of the appellants and another, embodied a genuine transaction, or was merely a fictitious deed ; and (*b*) whether or not the appellants should be allowed to give parole evidence for the purpose of showing that the executant of the aforesaid deed, which purported **[341]** to be, and was, a deed of sale on the face of it, did not intend to take the purchase money therein specified from the vendee.

The Subordinate Judge held that natural love and affection was the real consideration for the deed of sale, and that it was therefore, not fictitious, but "a real conveyance by which ownership with possession was transferred." He also held that the plaintiff was estopped from claiming any relief against the transferees. He accordingly made a decree dismissing the suit with costs. On appeal the High Court (SIR JOHN STANLEY C. J. and SIR W. BURKITT, J.) were of opinion that the defendants were precluded by the provisions of section 92 of the Evidence Act (I of 1872) from giving oral evidence to show that the deed of sale was in reality intended by the executant to be a deed of gift : and they held that the

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Present :—Lord MACNAGHTEN, Lord ROBSON, Sir ARTHUR WILSON and Mr. AMEER ALI.

(1) (1905) I. L. R. 27 All. 612.

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FEB. 14.

PRIVY COUNCIL.

33 A. 340=15 C. W. N. 521=8 A. L. J. 373=13 C. L. J. 510=13 Bom. L. R. 391=10 M. L. T. 23=(1911) 2 M. W. N. 370=21 M. L. J. 1126=11 I. C. 398=38 I. A. 85.

question was concluded by the decision of the Privy Council in the case of *Balkishen Das* v. *Legge* (1). They therefore reversed the decree of the Subordinate Judge. They did not, however, give the plaintiff a decree for possession of the property; but they gave her a decree for Rs. 60,000 with interest from the date of the decree, and declared her entitled to a charge for the decretal amount on the property in the hands of the transferees (the three principal defendants). The facts of the case are fully stated in the report of the case in the High Court which will be found in I. L. R. 27 All. 612.

On this appeal :—

W. A. Raikes, for the appellants.

De Gruyther, *K. C.* and *B. Dube*, for the respondents.

1911, *February* 14*th* :—The judgment of their Lordships was delivered by Lord MACNAGHTEN :—

Their Lordships think the decree appealed from cannot be sustained. They are of opinion that the proper course will be to remit the case to the High Court to be dealt with on the evidence, and they will humbly advise His Majesty accordingly. The costs of the further hearing will be costs in the cause. As the appellants have been successful upon the point **[342]** of law, they will have their costs of the appeal incurred in England.

Appeal allowed and case remanded.

Solicitors for the appellants :—*T. C. Summerhays & Son.*

Solicitors for the respondents :—*Barrow, Rogers & Nevill.*

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33 A. 342 [=15 C. W. N. 466=13 C. L. J. 441=9 M. L. T. 465=8 A. L. J. 474=13 Bom. L. R. 384=21 M. L. J. 641=10 I. C. 274=(1911) 2 M. W. N. 445].

PRIVY COUNCIL.

BHAWANI KUNWAR (*Defendant*) *v.* HIMMAT BAHADUR AND ANOTHER (*Plaintiffs*).

[*On appeal from the High Court of Judicature at Allahabad.*]

[15th February, 1911.]

Hindu Law—Widow—Payment by wife of husband's debts during his lifetime—Voluntary payment—Absence of proof of obligation to repay—Onus of proof.

In this case, which was an appeal from the decision of the High Court in the case of *Himmat Bahadur* v. *Bhawani Kunwar* (2) the Judicial Committee merely affirmed that decision on the ground that the appellant on whom the onus lay had not proved that there was any obligation on the part of the husband or his estate to pay the moneys which were paid by his wife, and dismissed the appeal.

APPEAL from a judgment and decree (1st May, 1908) of the High Court at Allahabad, which reversed a decree (11th August, 1905) of the Subordinate Judge of Shahjahanpur.

The question for determination in this appeal was as to the right of the respondents (plaintiffs) to recover from the appellant (defendant) certain property in her possession which the plaintiffs alleged had originally belonged to their maternal grandmother, and which they alleged had

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Present :—Lord MACNAGHTEN, Lord ROBSON, Sir ARTHUR WILSON and Mr AMEER ALI,

(1) (1899) I. L. R. 22 All. 149; L. R. 27 I. A. 58.
(2) (1908) I. L. R. 30 All. 352.

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FEB. 15.

PRIVY COUNCIL.

33 A. 342=15 C. W. N. 466=13 C. L. J. 441=9 M. L. T. 465=8 A. L. J. 474=13 Bom. L. R. 384=21 M. L. J. 641=10 I. C. 275=(1911) 2 M. W. N. 445.

been sold by her without legal necessity to one Jiwan Sahai, the vendor to the appellant.

The Subordinate Judge dismissed the suit with costs. On appeal the High Court (SIR JOHN STANLEY, C. J. and KARAMAT HUSAIN, J.) reversed that decree and gave the plaintiff a decree for possession of the property on certain terms. The facts of the case will be found fully stated in the judgment of Mr. Justice KARAMAT HUSAIN reported in I. L. R. 30 All. 352.

On this appeal:

W. A. Raikes, for the appellant, contended that there was abundant evidence of the legal necessity; that the respondents being daughter's sons the question of legal necessity did not really **[343]** arise, and the respondents were bound by the acts and transfers made by their grandmother and mother; that the respondents were also bound by the acts of their great-grandfather who was the head of a joint Hindu family; and that the grandmother and mother of the respondents (who were the reversioners) had complete power to deal with and transfer the property. Reference was made to *Succaram Morarji Shetay* v. *Kalidas Kalianji* (1); *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole* (2); *Karim-ud-din* v. *Gobind Krishna Narain* (3), and *Raj Bullubh Sen* v. *Oomesh Chunder Rooz* (4).

DeGruyther, K. C., and *Ross*, for the respondents, contended that it was for the appellant to show legal necessity justifying the alienation of the property; and the power of a female manager of a joint family was very restricted.

Payment by a wife of her husband's debt in his lifetime was merely voluntary; such payment involved no obligation on the husband to repay it; nor, it was submitted, was there any assumption that there was a contract by him to repay it. Reference was made to Mayne's Hindu Law, 7th Edition, page 850, paragraph 653, and *Sham Sundar Lal* v. *Achhan Kunwar* (5). There was no sufficient evidence of legal necessity justifying the sale of the 30th of September, 1890; it was not binding on the respondents, and they were entitled to recover the poperty transferred by that deed on the conditions imposed by the High Court, whose decision should be upheld.

Raikes replied.

1911, *February* 15th:—The judgment of their Lordships was delivered by Lord MACNAGHTEN:—

The facts of this case are very complicated in detail, but it seems to their Lordships that judgment can be given in a single sentence.

The appellant has not proved that there was any obligation on the part of Nityanand or his estate to pay the moneys which were paid by his wife. The obligation lay upon the appellant to prove that there was such liability, and she has not satisfied it.

[344] Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed, and the appellant will pay the costs.

Appeal dismissed.

Solicitors for the appellant:—*T. C. Summerhays & Son.*

Solicitors for the respondents:—*Ranken Ford, Ford & Chester.*

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(1) (1894) I. L. R. 18 Bom. 631.
(2) (1886) I. L. R. 11 Bom. 320
(3) (1909) I. L. R. 31 All. 497: L. R. 36 I. A. 138.
(4) (1878) I. L. R. 5 Cal. 44.
(5) (1898) I. L. R. 21 All. 71.

1911
FEB. 15, 17
& 28.

PRIVY COUNCIL.

33 A. 344=
10 I. C. 285=
14 O. C. 133
=15 C. W. N.
497=8 A. L.
J. 465=13 C.
L. J. 519=9
M. L. T. 507
=13 Bom. L.
R. 404=21
M. L. J. 637
=38 I. A. 104
=(1911) 2 M.
W. N. 242.

33 A. 344 [=10 I. C. 285=14 O. C. 133=15 C. W. N. 497=8 A. L. J. 465=13 C. L. J. 519=9 M. L. T. 507=13 Bom. L. R. 404=21 M. L. J. 637=38 I. A. 104=(1911) 2 M. W. N. 242.]

PRIVY COUNCIL.

UMRAO SINGH AND ANOTHER (*Plaintiffs*) *v.* LACHMAN SINGH AND ANOTHER (*Defendants*).

[*On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow*].*

[15th, 17th and 28th February, 1911.]

Act No 1 *of* 1869 (*Oudh Estates Act*)—*Will of taluqdar—Sanad executed by Taluqdar through the mediation of family friends—Whether document was testamentary or non-testamentary—Registration of document—Act No. III of* 1877 (*Indian Registration Act*), *sections* 17 *and* 49—*Instrument affecting immovable property—Ground not specifically taken in argument in Courts below—Costs.*

A taluqdar in 1862, in compliance with the directions issued by the Government, made a declaration that, "I wish and file this application, that after my death Umrao Singh the eldest son (*sic*) my estate should continue in my family undivided in accordance with the custom of the *raj-gaddi*, and that the younger brothers shall be entitled to get maintenance from the *gaddi-nashin*."

Held (affirming the decision of the Courts in India) that it was a valid testamentary disposition by the taluqdar of his estate in favour of his eldest son.

The same taluqdar, having three sons, with one of whom he was on bad terms, executed in 1884 the following document, which he called a sanad:—"For Prithipal Singh, who is my son, I fix Rs. 300 annually, so that he may maintain himself. Besides this whatever I may give I will give equally to the three sons, except provisions, which they may take from my godown (*kothar*). The marriage and *gauna* expenses of the sons and daughters shall be borne by me. After me the three sons are to divide the property movable and immovable. This has been settled through the mediation of Thakur Jote Singh of Bihat, and Thakur Ratan Singh of Rojah."

Held (reversing the decision of the Judicial Commissioner's Court) that it was a non-testamentary instrument. It was a family arrangement arrived at by the mediation or arbitration of two gentlemen, friends of the family and interested in its honour, and it was plainly intended to be operative immediately and to be final and irrevocable.

Held also that it required to be registered under section 17 of the Registration Act (III of 1877) in order to make it effective as regards immoveable property, being unregistered, was, so far, void.

[345] On an objection that it was not open to the appellants to contend that the document was not a will the fact that they had, throughout the proceedings in the Courts below, taken conflicting views as to the nature of the document, was held not to preclude their Lordships from considering and determining the real question in the case, and that they were bound to give effect to the real character of the document. Neither party had pursued a consistent course in the matter. Their Lordships permitted the appellants, therefore, to raise that contention, but in allowing the appeal on that ground they did so without costs to the appellants on this appeal or in the Courts below.

[Ref. 83 I. C. 193=11 O. L. J. 574; 79 I. C. 429=(1924) A. I. R. (A) 396; 78 I. C. 878=11 O L. J. 213.]

APPEAL from a judgment and decree (19th August, 1907) of the Court of the Judicial Commissioner of Oudh, which reversed a judgment and decree (8th September, 1906) of the Subordinate Judge of Sitapur.

The principal question for determination on this appeal was the right of succession to the estates of Ramkote and Hadipur, the last owner of

* *Present*:—Lord MACNAGHTEN, Lord ROBSON, Sir ARTHUR WILSON, and Mr. AMEER ALI.

which was one Kalka Bakhsh Singh; and to determine that it was necessary to decide which of several documents put forward was his last will and testament regulating the succession.

The Ramkote estate was settled with Kalka Bakhsh Singh at the second summary settlement after the confiscation of all proprietary rights in Oudh, and a sanad was subsequently granted him by Government, who also conferred upon him two villages forming the Hadipur estate in recognition of loyal services. On the passing of the Oudh Estates Act (I of 1869) Kalka Bakhsh Singh's name was entered in lists 1, 4 and 6 prepared under section 8 of that Act, and he consequently became the absolute owner of the property in suit until his death.

Kalka Bakhsh Singh died on the 14th of October, 1893, leaving his eldest son Umrao Singh, his third son Baldeo Bakhsh Singh (the present appellants) and two grandsons, Lachman Singh and Bharat Singh now respondents, the sons of his second son Prithipal Singh, who died on the 10th of November, 1892.

On the 9th of January, 1862, Kalka Bakhsh Singh, in reply to a letter from the Deputy Commissioner of Oudh asking him to declare the custom of succession obtaining in his estate, and saying that if the custom of *gaddi-nashini* did not obtain in his family, "it is necessary that you should write a will and enter **[346]** therein the name of your heir and register it," executed the following document:—

"As the British Government has conferred upon me, generation after generation, the proprietary rights in Ramkote estate, therefore I wish and file this application that after my death Umrao Singh, the eldest son, (*sic*) my estate should continue in my family undivided in accordance with the custom of *raj-gaddi*, and that the younger brothers shall be entitled to get maintenance from the *gaddi-nashin*."

and presented it with a petition in which it was stated that his wish was that his eldest son Umrao Singh should succeed him.

Prithipal Singh was on very bad terms with his father, so much sc that in May, 1884, Kalka Bakhsh complained to the Deputy Commissioner of the conduct of Prithipal, and subsequently lodged a formal complaint against him in the Criminal Court under sections 352, 448 and 506 of the Penal Code. Matters however, were settled between them by two of Kalka Bakhsh Singh's friends, Jote Singh and Ratan Singh, who eventually drew up the following document, which they induced Kalka Bakhsh Singh to sign on the 23rd of May, 1854 :—

"This *sanad* is executed by me, Thakur Kalka Bakhsh, taluqdar of Ramkote. For Prithipal Singh, who is my son, I fix Rs 300 annually so that he may maintain himself. Besides this whatever I may give I will give equally to the three sons, except provisions, which they may take from my godown (*kothar*). He may take six annas in *Kharif* (crop) and ten annas in *Rabi* (crop) out of my treasury (*tahwil*). The marriage and *gauna* expenses of the sons and daughters shall be borne by me. After me the three sons are to divide the property, moveable and immovable. This has been settled through the mediation of Thakur Jote Singh of Bihat and Thakur Ratan Singh of Rojah."

Though Kalka Baksh Singh was induced to sign that document in order to settle the quarrel with his son, he did not act upon it; and on the 15th of February, 1886, Prithipal Singh instituted a suit in the court of the Subordinate Judge of Sitapur to recover arrears of maintenance, and a sum of money equal to the amount alleged to have been given by Kalka Bakhsh Singh to his youngest son Baldeo Bakhsh Singh. That suit was dismissed on the 25th August, 1886, on the ground that the document of the 23rd of May, 1884, which contained the agreement to pay maintenance had not been registered.

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33 A. 344=10 I. C. 285=14 O. C. 133=15 C. W. N. 497=8 A. L. J. 465=13 C. L. J. 519=9 M. L. T. 507=13 Bom. L. R. 404=21 M. L J. 637=38 I. A. 104=(1911) 2 M. W. N. 242.

1911
FEB. 15, 17, & 28.

PRIVY COUNCIL.

33 A. 344=10 I. C. 285=14 O. C. 133=15 C. W. N. 497=8 A. L. J. 465=13 C. L. J. 519=9 M. L. T. 507 13 Bom. L. R. 404=21 M. L. J. 637=33 I. A. 104=(1911) 2 M. W. N. 242.

On the 3rd of May, 1892, Kalka Bakhsh Singh brought a suit in the court of the Subordinate Judge of Sitapur for cancellation of the document of the 23rd of May, 1884; but Prithipal Singh died [347] before the first hearing of the suit, which was consequently withdrawn.

On the 4th of October, 1893, Kalka Bakhsh Singh executed a will by which he gave his estate to his two surviving sons, Umrao Singh and Baldeo Bakhsh Singh, and died ten days afterwards.

After his death there were disputes to obtain mutation of names in the Revenue Registers; and on the 14th of May, 1894, the Deputy Commissioner of Sitapur made an order directing the name of Umrao Singh to be entered for one-third of the estate, the name of Baldeo Bakhsh Singh for another third; and the names of Lachman Singh and Bharat Singh, the sons of Prithipal Singh, for the remaining third.

On the 20th of June, 1894, Umrao Singh transferred his interest in the estate to his brother Baldeo Bakhsh Singh.

On the 30th of September, 1905, Umrao Singh and Baldeo Bakhsh Singh brought the present suit against Lachman Singh and Bharat Singh to recover possession from them of the one-third share of the estate which they had obtained under the order of the 14th of May, 1894: basing their claim either on the will of the 9th of January, 1862, or on that executed by Kalka Bakhsh Singh on the 4th of October, 1893. The plaintiffs alleged that the will executed by their father on the 23rd of May, 1884, was obtained by coercion and undue influence; and that it had been, moreover, revoked by their father in his lifetime.

The defence was *inter alia* that the document, dated the 9th of January, 1862, was not a will, and even if it was a will it was cancelled by the document, dated the 23rd of May, 1884, which they called a *sanad* and which they alleged was not executed under undue influence; and that Kalka Bakhsh Singh never duly executed the alleged will of the 4th of October, 1893, as he was on that day not of sound disposing mind, and incapable of executing such a will.

On the issues raised in accordance with the pleadings the Subordinate Judge held that the document of the 9th of January, 1862, was a will in favour of the first plaintiff, Umrao Singh; that the document of the 23rd of May, 1884, was not proved to have been executed by Kalka Bakhsh Singh "with his free will and consent", and that Kalka Bakhsh Singh was not shown to have [348] been capable of making a will on the 4th of October, 1893. He made a decree, therefore, in favour of the plaintiff.

The defendants appealed to the Court of the Judicial Commissioner, and the appeal was heard by Mr. E. CHAMIER, Judicial Commissioner, and MR. J. SANDERS, Additional Judicial Commissioner, who agreed with the findings of the Subordinate Judge that the document of the 9th of January, 1862, was a will in favour of Umrao Singh; and that Kalka Bakhsh was not capable of making a will on the 4th of October, 1893; but they dissented from his finding as regarded the document of the 23rd of May, 1884. They were of opinion that its execution was not obtained by threats or undue influence; that it was testamentary in its nature; had not been revoked, and that it operated as a valid devise to Prithipal Singh, the benefit of which passed on his death to his sons, the defendants.

As to the nature and effect of the document of the 23rd of May, 1884, the following was the material portion of the judgment of the Court which was delivered by MR. CHAMIER:—

"The point was not taken in the arguments before us, but it occurred to me afterwards that there might be room for doubt, whether the signature of Kalka Bakhsh is

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33 A. 344=10 I C. 285=14 O. C 133=15 C. W. N. 497=8 A. L J. 465=13 C. L. J. 519=9 M. L. T. 507 =13 Bom. L. R. 404=21 M. L. J. 637 =38 I. A. 104=(1911) 2 M. W. N. 242.

so placed on the document as to make it appear that it was intended thereby to give effect to the document as a will (see section 50 of the Succession Act, which is applied to the wills of taluqdars by section 19 of Act I of 1869) and we decided to hear counsel further on the question. The writing is on a strip of paper 18 inches long and 5¼ inches wides and the lines are about 4½ inches long leaving a very narrow margin on each side. The signature of Kalka Bakhsh, which is very large, is in the blank space at the top and is written at right angles to the body of the document. The signatures of the witnesses are in the space at the bottom and are close to the date. In some parts of India it appears to be the custom to sign all documents at the top and old *sanads* (grants) in this province are invariably found to have been signed at the top. In the case of documents written on stamped paper it is customary for the executant and the witnesses to sign at the right hand side where a large margin is left for the purpose. It would not have been possible to leave such a margin on the paper used for the document in question. The executant must have signed either at the top or at the bottom. Petitions are signed at the bottom; but a *sanad*, such as this purports to be, could not possibly have been signed at the bottom. I think it is clear that the signature is so placed as to make it appear that Kalka Bakhsh intended to give effect to the document, and as there is no rule requiring the signature of the executant of a will to be at the foot or end of the document, I think it must be held that the signature was intended to give effect to the document as a will if and so far as it is of a testamentary character. [349] Counsel for the plaintiffs took advantage of the opportunity offered by a further hearing to argue that the document could not operate as a will at all, because the executant calls it a *sanad* and because, in part, at least it is not of a testamentary character. The first part of this argument is met by the case of *Thakur Ishri Singh* v. *Thakur Baldeo Singh* (1) where a document called a *tamliknama* was held to operate as a will. The second part is met by the decision in *Lali* v. *Murlidhar* (2) and other like cases, in which it has been held that a part of *wajib-ul-arz* may operate as a will. Both parties throughout this case until the further hearing in this Court admitted that so much of this document as is of a testamentary character should take effect as a will if the document is not invalid on the ground of undue influence.

"The next question is as to the construction of this document. The plaintiffs urged that Kalka Bakhsh intended thereby to leave his estate to his three sons as joint tenants, and that as Pirthipal died in the life-time of his father the whole estate passed to the plaintiffs, the surviving sons, under this document. But it appears to me to be quite clear that Kalka Bakhsh did not intend to make his sons joint tenants. Pirthipal was living apart from his father and his brothers, and nothing could have been farther from the intention of Kalka Bakhsh than that his three sons should be joint tenants. He evidently contemplated a division of the estate between them, for he said :—'After my death my three sons will (or let my three sons) divide (*taqsim*) my moveable and immoveable property.' In my opinion, the devise was to the three sons as tenants in common. Under section 96 of the Indian Succession Act, which is applied to the wills of taluqdars by section 19 of the Oudh Estates Act, the devise to Pirthipal takes effect in favour of his sons, the defendants. The word used in section 96 of the Succession Act is 'bequest,' but the words 'bequest,' 'bequeath,' &c., are used in the Oudh Estates Act, in the sense of devise and under the latter part of section 19 of the Oudh Estates Act, the word 'bequest' in section 19 of the Succession Act must be given the same meaning as is attached to it by the Oudh Estates Act.

"The next question is whether the will, as it may now be called, of May, 1884, was revoked by the testator's written statement in Pirthipal's suit of 1880 (Exhibit 4) or by his plaint in a suit of 1892 (Exhibit 5). According to section 57 of the Succession Act, which is applied to wills of taluqdars by section 19 of the Oudh Estates Act, no unprivileged will or codicil nor any part thereof can be revoked otherwise than by marriage or by any will or codicil or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is required by the Succession Act to be executed, or by burning, tearing, or otherwise destroying the same by the testatator or by some person in his presence and by his direction with the intention of revoking the same. It is admitted that if this section applies to the will of 1884, that will was not revoked either by the written statement of 1886, or the plaint of 1892, but it is contended by counsel for the defendants that section 57 of the Sucession Act applies only to wills made by taluqdars or grantees in favour of [350] persons who do not come within the second and third paragraphs of section 13 of the Oudh Estates Act. If this contention is correct then the sections of the Succession Act mentioned in section 19 of the Oudh Estates Act do not apply to the wills of

(1) (1884) I. L. R. 10 Cal., 792; L. R. 11 I. A. 140.

(2) (1906) I. L. R. 28 All. 488; L R. 33 I. A. 112.

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33 A. 344=10 I. C. 285=14 O. C. 133=15 C. W. N 497=8 A. L. J. 465=13 C. L. J. 519=9 M. L. T. 507=13 Bom. L. R. 404=21 M. L. J. 637=38 I. A. 104=(1911) 2 M. W. N. 242.

taluqdars generally, but only to wills made in favour of persons who do not come within the second and third paragraphs of section 13 of the Oudh Estates Act. It seems to me to be impossible to accept this contention. Section 19 of the Act says that certain sections of the Succession Act shall apply to *all* wills and codicils made by any taluqdar or grantee *under the provisions of the Act*. It appears to me to be impossible to hold that these words apply only to one class of Wills. In my opinion they apply to all wills made by taluqdars under the powers conferred upon them by section 11 of the Act. I hold therefore that the will of May, 1884, was not revoked either by the written statement of 1886 or by the plaint of 1892 (1)."

On this appeal—

DeGruyther, *K. C.*, and *S. A. Kyffin*, for the appellants, contended that the document of the 9th of January, 1862, was a valid will, and as such was an effective devise of the whole estate in favour of the first appellant Umrao Singh: that had been found by both Courts below [Sir *R. Finlay*, *K. C.* It is not disputed that that holding is a good decision in law]. It was then contended that the document, dated the 23rd of May, 1884, was not in fact or in law a testamentary disposition of the estate. It was not executed by Kalka Bakhsh Singh as a will, and was never intended by him to operate as a will. It was intended to, and did, come into operation immediately on its execution. Reference was made to *In the goods of Robinson* (2) where probate of such a document was refused and it was doubted whether the Court could treat as being a will a document which was only partly testamentary. [Sir *R. Finlay*, *K. C.* objected that it was not now open to the appellants to argue that the document was not a will. It had been all along treated as a will without any objection to that course being raised by the appellants]. There was always a question whether it was a will or not. Reference was made to the case of *Tagore* v. *Tagore* (3). The circumstances of the making of the document were discussed, and it was submitted that as it was shown that Prithipal Singh was at enmity with his father, and that the latter was obliged to bring charges against him in the Criminal Court, of assault or using criminal force, house trespass, and criminal **[351]** intimidation under sections 352, 448 and 506 respectively of the Penal Code (Act XLV of 1860) there were good grounds for saying that the document in question was obtained from Kalka Bakhsh Singh by Prithipal by undue influence, if not by actual threats: and *Hall* v. *Hall* (4) was referred to, it being contended that the document was invalid on that ground, as not having been executed by Kalka Bakhsh Singh with his free will and consent, as the Subordinate Judge had held. Moreover, Kalka Bakhsh Singh had never acted upon it. If viewed as a contract too it was invalid for want of consideration under section 25 of the Contract Act (IX of 1872): and it was ineffective as regarded immovable property by the fact that it was not registered; sections 17, 23 and 49 of the Registration Act (III of 1877) were referred to. Reference was also made to section 19 of Act I of 1869 and the Succession Act (X of 1865), section 96, which had been wrongly applied to the case by the Judicial Commissioner's Court.

Sir *R. Finlay*, *K. C.*, and *Ross*, for the respondents, contended that the document of the 23rd of May, 1884, was not the less operative as a will as to the testamentary portion merely because the rest of it might be of a non-testamentary character; and referred to *Thakuri Ishri Singh* v. *Thakur*

(1) This judgment is reported in 11 Oudh Cases, 102.
(2) (1861) L. R. 1 P. and D. 384.
(3) (1872) L. R. I. A. Sup. Vol. 47.
(4) (1868) L. R. 1 P. and D. 481.

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33 A. 344=10 I. C. 285=14 O. C. 133=15 C. W. N. 497=8 A. L. J. 465=13 C. L. J. 519=9 M. L. T. 507=13 Bom. L. R. 404=21 M. L. J. 637 38 I A. 104=(1911) 2 M. W. N. 242.

Baldeo Singh (1) and *Lali* v. *Murlidhar* (2) in which a *tamliknama* and a *wajib-ul-arz* were respectively considered to be effective as wills by the Privy Council. It was not, it was submitted, procured from Kalka Bakhsh Singh by undue influence or threats ; and was not void under section 25 of the Contract Act ; but was a valid will, under which the respondents were entitled to the one-third share of the property in respect of which mutation of names was effected in their favour after Kalka Bakhsh Singh's death. Registration of a will was optional under the Registration Act, section 18, and it was never legally revoked by Kalka Bakhsh Singh : section 57 of the Succession Act (X of 1865), made applicable to the wills of taluqdars by section 19 of the Oudh Estates Act (I of 1869), and the definition of a " will" in the latter Act were referred to ; **[352]** and the case of *Tagore* v. *Tagore* (3) cited for the appellants was distinguished.

To show that the fact of the document being a will was not disputed in the pleadings and in the lower Courts it was pointed out that the appellants called it a will in their plaint, paragraph 11, and in paragraphs 33 and 34 of their replication, in which they said (paragraph 33): — "The arrangement on foot during the life-time of Kalka Baksh Singh may be called by any name, but whatever was written to take effect after his death is nothing but a will" and paragraph 34 :—" At all events Kalka Baksh Singh could and did render ineffectual the testamentary portion merely by an expression and course of conduct." No ground was taken that it was not a will either in the petition of objections on the appeal by the respondents to the Judicial Commissioner, nor in the grounds of appeal to the Privy Council ; and the document was dealt with as a will througout the judgments of both the lower Courts. The point that it was not a will, not having been raised before, could not be raised now. The judgment of the Judicial Commissioner upholding that document as a will should be affirmed. The due execution of the alleged will of 1893 was negatived by the concurrent judgments of the lower Courts on the facts.

De Gruyther, K. C. in reply referred to the pleadings to show that there had been a contest between the parties as to whether the document of the 23rd of May, 1884, was a will or not. In the plaint it was called both a " will " and a " deed ": and in the respondents' written statement, paragraphs 8 and 31 to 34, it was called a " deed " and a "*sanad.*" It was called a " deed " and a "will" indiscriminately in the judgment of both the Courts below, and in fact throughout the proceedings in India. Had the ground been definitely taken, there would have been no evidence necessary ; it was a matter of law. The point, it was submitted was now open. Reference was made to the fact that in the suit by Prithipal against his father the document was rejected as evidence because it was not registered and section 17 and clause (*d*) of section 18 and section 49 of the Registration Act were referred to.

[353] 1911, *February* 28th: —The judgment of their Lordships was delivered by Lord MACNAGHTEN :—

This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh reversing the decision of the Subordinate Judge of Sitapur.

The dispute between the parties relates to the right of succession to one-third of the estate of Ramkote, of which a Hindu gentleman named Kalka Bakhsh Singh was the last owner.

(1) (1884) I. L. R. 10 Cal. 792 (802) L. R. 11 I. A. 135 (140).
(2) (1906) I. L. R. 28 All. 488 ; L. R. 33 I. A. 97.
(3) (1872) L. R. I. A. Sup. Vol. 477.

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33 A. 344=10 I. C. 285=14 O. C. 133=15 C. W. N. 497=8 A. L. J. 455=13 C. L. J. 569=9 M. L. T 507=13 Bom. L. R. 404=21 M. L. J. 637=33 I. A. 104=(1911) 2 M. W. N. 242.

In the course of the discussion before this Board the controversy was reduced to two questions, and two questions only—

(1) Was a certain document executed by Kalka Bakhsh on the 23rd of May, 1884, a testamentary or a non-testamentary instrument?

(2) Is that question now open having regard to the course of the proceedings in the Courts below?

After the confiscation of Oudh the second Summary Settlement of the Ramkote estates was made with Kalka Bakhsh. He obtained a *sanad* from the Government. His name was entered in lists 1, 4, and 6, prepared under the provisions of section 8 of Act I of 1869. And he remained absolute owner of the property until his death.

Kalka Bakhsh died on the 14th of October, 1893. He had three sons, Umrao Singh, Pirthipal Singh, and Baldeo Bakhsh. Pirthipal Singh died in his father's life-time, leaving two sons, who were defendants in the suit and are the respondents to this appeal.

On the 9th of January, 1862, Kalka Bakhsh in compliance with the directions issued by the Government, declared that his wish was that after his death his estate should continue in his family undivided, in accordance with the custom of *raj-gaddi*, and that the younger brothers should be entitled to maintenance.

It is not disputed that this declaration was a valid testamentary disposition by Kalka Bakhsh of his estate in favour of his eldest son.

Kalka Bakhsh and his second son Pirthipal Singh were on bad terms, so much so, that Pirthipal Singh threatened personal violence to his father, and Kalka Bakhsh commenced criminal proceedings against his son. The quarrel, however, was for the **[354]** time composed by the intervention of two friends of the family, Jote Singh of Bihat and Ratan Singh of Rojah. At their instance the following document was drawn up and signed by Kalka Bakhsh in their presence on the 23rd of May, 1884:—

"This *sanad* is executed by me, Thakur Kalka Baksh, talukdar of Ramkote. For Pirthipal Singh, who is my son, I fix Rs. 300 annually, so that he may maintain himself. Besides this, whatever I may give I will give equally to the three sons except provisions, which they may take from my godown (*kothar*). He may take 6 annas in kharif (crop) and 10 annas in rabi (crop) out of my treasury (*tehwil*). The marriage and *gauna* expenses of the sons and daughters shall be borne by me. After me the three sons are to divide the property, moveable and immoveable. This has been settled through the mediation of Thakur Jote Singh of Bihat and Thakur Ratan Singh of Rojah."

Kalka Bakhsh, though he executed the document without demur, did not comply with its terms, if, indeed, he ever meant to do so. In February, 1886, Pirthipal Singh, who apparently was then in destitution, brought a suit to recover arrears of maintenance and a sum of money equal to an amount alleged to have been given by Kalka Bakhsh to his youngest son Baldeo Bakhsh. The suit, which was founded on the instrument of May, 1884, was dismissed by the Subordinate Judge, and the dismissal was affirmed on appeal, except as regards arrears of maintenance then due, amounting to Rs. 412-8-0.

In May, 1892, Kalka Bakhsh brough a suit for cancellation of the instrument of May, 1884, Pirthipal, however, died in November, 1892, before the suit could be heard, and it was consequently withdrawn.

After Kalka Bakhsh's death there was the usual quarrel as to registration in the Revenue records. On the 14th of May, 1894, the Deputy Commissioner of Sitapur, without pronouncing any opinion on the ques-

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tions in dispute, made an order directing the entry of one-third of the estate in the name of Umrao Singh, one-third in the names of Baldeo Bakhsh, and the remaining third in the names of Pirthipal's two sons.

Umrao Singh then transferred his interest in the estate to his brother Baldeo Bakhsh, and they brought this suit as co-plaintiffs to recover the one-third of the estate entered in the names of the sons of Pirthipal Singh. They relied mainly on a will alleged to have been executed on the 4th of October, 1893, up to which date, as they contended, the testamentary instrument of the 9th of [355] January, 1862, was in force. They asserted too that the instrument of the 23rd of May, 1884, was obtained from Kalka Bakhsh by undue influence, and was wholly inoperative.

The Subordinate Judge gave effect to the plaintiffs' claim except so far as it was found on the alleged will of October, 1893. He decided against them on the issue as to the validity of that document, stating that the execution thereof "was not very clear to his mind." The decree was made without costs.

On appeal the Judicial Commissioners affirmed the findings of the Subordinate Judge in regard to the will of 1862 and the alleged will of 1893. But as regards the instrument of 1884 they held that its execution was not procured by undue influence, and that it operated as a valid devise to Pirthipal Singh, the benefit of which passed on his death to his two sons. In the result they reversed the decree of the Subordinate Judge and dismissed the suit with costs.

Their Lordships agree with the Court of the Judicial Commissioner in thinking that the instrument of 1884 was not procured by undue influence. Indeed, there seems to be no ground whatever for such a suggestion On the other hand, it seems clear that that document is a non-testamentary instrument. It was a family arrangement arrived at by the mediation or arbitration of two gentlemen, who were old friends of the family, and interested in maintaining its honour. It was plainly intended to be operative immediately, and to be final and irrevocable. It fails of effect simply because it was not registered, as required by the Registration Act, III of 1877, section 17. It is therefore void as regards immovable property.

As regards the second question their Lordships must hold that they are not precluded by what took place in the Courts below from considering and determining the real question in the case. In the Courts below neither party pursued a consistent course. As long as the question of the validity of the alleged will of the 4th of October, 1893, was undetermined, the appellants contended that the instrument of May, 1884, was testamentary, while the defendants contended that it was a settlement and not a will. As soon as the alleged will of 1893 was successfully impeached, the defendants maintained that the instrument of 1884 was a will [356] and not a settlement, and the appellants changed their attitude. Their Lordships think that, notwithstanding the conflicting views presented by the appellants in the Courts below, they are bound to give effect to the real character of the instrument. At the same time they consider that the appellants, though successful in the result, ought not to be allowed costs on this appeal or any costs in the Courts below.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed and the decree of the Subordinate Judge restored, and that any costs paid under the order of the Court of the

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33 A. 344=10 I. C. 285=14 O. C. 183=15 C. W. N. 497=8 A. L. J. 465=13 C. L. J. 519=9 M. L. T. 507=13 Bom L. R. 404=21 M. L. J. 637=38 I. A. 04=(1911) 2 M. W. N. 242.

Judicial Commissioner must be returned. There will be no costs of the appeal.

Appeal allowed.

Solicitors for the appellants :—*T. L. Wilson and Co.*
Solicitors for the respondent :—*Young, Jackson, Beard and King.*

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33 A. 356 [=15 C. W. N. 545=8 A. L. J. 552=13 C. L. J. 575=13 Bom. L. R. 427=10 M. L T. 25=(1911) 1 M. W N. 432=21 M. L. J. 645=38 I. A 87 =10 I. C. 477].

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KHUNNI LAL (*Defendant*) *v.* GOBIND KRISHNA NARAIN AND ANOTHER (*Plaintiffs*) AND TWO OTHER APPEALS CONSOLIDATED.

[14th, and 15th February and 23rd March, 1911].

[*On appeal from the High Court of Judicature at Allahabad.*]

Hindu Law—Change of religion—Converts—Effect of conversion of member of Joint Hindu family to Muhammadanism—Regulation VII of 1832, *section* 9—*Act XXI of* 1850—*Compromise—Effect of compromise entered into by members of family in settlement of disputes as to right to property—Act No. XIV of* 1859 (*Limitation Act*), *section I, clause* 12—*Act No. IX of* 1871 (*Limitation Act*), *schedule II, article* 142—*Act XV of* 1877, (*Indian Limitation Act*), *schedule II, article* 141—*Suit by reversioner.*

By Bengal Regulation VII of 1832, section 9, and Act XXI of 1850 the Legislature virtually set aside the provisions of the Hindu Law which penalize the renunciation of religion, or exclusion from caste.

Where, therefore, in a joint Hindu family consisting of a father and son, the father was converted to Mubammadanism in 1845, *Held* (reversing the decision of the High Court) that by the father's abandonment of Hinduism the son did not acquire any enforceable right to his father's share in the joint family property which he could either assert himself, or transmit to his heirs for enforcement, in a British Court of justice.

Semble whatever right the son acquired under the Hindu law to the share of his father came into existence on the conversion of the latter in 1845 ; and no suit could have been brought (even if Regulation VII of 1832 and Act XXI of 1850 had permitted it) to enforce that right after the lapse of 12 years from the [357] time the cause of action arose (section 1, clause 12 of Act XIV of 1859) and nothing in article 142 of Act IX of 1871, or in article 141 of Act XV of 1877 could revive a right which had already become barred.

Hari Nath Chatterjee v. *Mothurmohun Goswami* (1) referred to.

After the death of the father (who survived the son) and their widows, a compromise was in 1860 effected between the two daughters of the son on the one side and the grandson of the father on the other, under which an 8½ anna share was allotted to the daughters and a 7½ anna share to the grandson. The 8½ anna share eventually, on the death of the survivor of the two daughters in 1899, devolved upon the respondents, her sons. In a suit by them in 1904 for possession of the 7½ anna share alloted to the grandson, against the appellants who were his successors in title as transferees from him or his heirs, *Held* (reversing the decision of the High Court) that the compromise of 1860 was a family arrangement by the members then claiming title to the property in settlement of their disputes, "each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognising the right of the others as they had previously asserted it to the portion allotted to them respectively." [See *Lalla Oudh Beharee Lall* v. *Ranee Mewa Koonwer* (2)]. The compromise was therefore, binding on the Respondents.

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* *Present* :—Lord MACNAGHTEN, Lord ROBSON, Sir ARTHUR WILSON, and Mr. AMEER ALI.

(1) (1893) I. L. R. 21 Cal. 8; L. R. 20 I. A. 188.

(2) (1868) 3 Agra H. C. 82 (84).

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The true test to apply to a transaction which is challenged by reversioners as an alienation is whether the alienee derives title from the holder of the limited interest or life-tenant, which in this case the predecessor in title of the appellants did not do: for the compromise here was "based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is" [See *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (1)].

[Fol 35 All. 466; 64 I. C. 514; **Ref.** 15 I. C. 297=10 A. L. J. 101; 25 I. C. 278; 53 I. C. 164=21 Bom. L. R. 837=43 Bom. 869; 53 I. C. 171=26 M. L. T. 180; 53 I. C. 555=1919 M. W. N. 658=26 M. L T. 354; 58 I. C. 732; 64 I. C. 676=41 M. L. J. 243=1921 M W. N. 591=14 L. W. 257=44 Mad. 891 (F. B.); 69 I C. 71=3 P L. T 749=1 Pat. 741=16 L. W. 956=21 A. L. J. 18=27 C. W. N. 269 =37 C. L. J. 356=44 M. L. J. 751 (P. C.); 78 I. C. 749=1924 Pat. 85=5 P. L. T. 203; **Fol**: 1915 M. W. N. 810=30 I. C. 927: 18 C. W. N. 929=27 M.L.J. 149; 30 I.C. 927=1915 M. W. N. 810; 22 C. L. J. 452=20 C. W. N. 210=32 I. C. 468; 38 All. 679; 31 M L. J. 87; **Dist.** 12 A. L. J. 998=27 I. C. 97; 33 I. C. 521; 17 A. L. J. 522=21 Bom. L. R. 496=1919 M. W. N. 313=24 C. W. N. 57; **Ref.** 11 A. L J. 157=18 I. C. 766; 30 M. L. J. 338=34 I. C. 475; 2 Pat. L. J. 370; 62 I. C. 752=13 L. W. 533; 62 I. C. 933; **Fol.** 65 I. C. 27=25 C. W. N. 496=33 C; L. J. 467=48 Cal. 536; 67 I. C 556=25 O. C. 21; 69 I. C. 545; 69 I. C. 730 **Rel**: 72 I. C. 488=44 M. L. J. 303=1923 M. W. N. 195=18 L. W. 35; **Dist.** 72 I. C. 456=17 L. W. 588=45 M. L. J 100=73 I. C. 284=18 L. W. 491; 73 I. C. 196=25 Bom. L. R. 293=47 Bom. 597; 75 I. C. 593; 78 I. C. 878; 80 I. C. 383: =10 O L. J. 657; **Fol.** 22 C. L. J 452=20 C. W. N. 210=32 I. C. 468; **Ref.** 10 A. L. J. 101=15 I. C. 297; 35 All. 240; **Dist.** 2 Pat L J. 578; **Ref.** 84 I. C. 208=5 P. L. T. 375=67 I. C. 210=34 C. L. J. 323; 67 I. C. 47=15 L. W. 395=42 M. L. J. 392=1922 M. W. N. 207=45 Mad. 504 (F. B.); 68 I. C. 577= 34 C. L. J. 529=26 C. W. N. 177; 73 I. C. 120; 1924 M. W. N. 322=80 I. C. 554=19 L. W. 564.].

33 A. 356=15 C. W. N. 545=8 A. L. J. 552=13 C. L. J. 575=13 Bom. L. R. 427=10 M. L. T. 25=(1911) 1 M. W. N. 432=21 M. L. J. 645=33 I. A. 87=10 I. C. 477.

THREE consolidated appeals, 9, 10 and 11 of 1910, from judgments and decrees (23rd April, 1907) of the High Court at Allahabad which reversed judgments and decrees (20th May, 1905) of the Court of the Subordinate Judge of Bareilly which had dismissed the respondents' suits.

The three suits out of which these appeals respectively arose were instituted on the 15th September, 1904, by the present respondents Gobind Krishna Narain and Kashi Krishna Narain against the respective appellants Khunni Lal (Appeal No 9), Kanhaiya Lal and others (Appeal No. 10) and Sarnam Singh and others (Appeal No. 11) and the object of the suits was to recover from the defendants three mauzas called Mahlpur (in Appeal No. 9), Khai Khera (in appeal No. 10) and Chandana (in Appeal No. 11), the title on which each of the properties sued for was claimed **[358]** being the same, namely, that the plaintiffs were the reversionary heirs to one Daulat Singh, their maternal grandfather.

The defendants derived their title through one Khairati Lal, the daughter's son of one Ratan Singh, who was Daulat Singh's father, and who had in 1845 become a Muhammadan. The property in dispute had been the joint property of Ratan Singh and Daulat Singh, and on the death of the latter in January, 1851, had remained in the sole possession of Ratan Singh until his death in September. 1851, when it was recorded in the name of his widow Raj Kunwar. Disputes as to the right to the property arose between her and the heirs of Daulat Singh (his widow Sen Kunwar, and his two daughters Chattar Kunwar and Mewa Kunwar,) in consequence of which the property was taken charge of by the Court of Wards in 1852. Sen Kunwar died in 1857 and Raj Kunwar in 1858, and on their deaths the title to the property was contested by the daughters of Daulat Singh on the one side and Khairati Lal on the other, the contest eventually resulting in a compromise made between the parties on

(1) (1874) L. R. 1 I. A. 157 (166).

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PRIVY COUNCIL.

33 A. 356=
15 C. W. N.
545=8 A. L.
J. 552=13 C.
L. J. 575=13
Bom. L. R.
427=10 M.
L. T. 25=
(1911) 1 M.
W. N. 432=
21 M. L. J.
645=38 I. A.
87=10 I. C.
477.

the 21st of July, 1860, under which the property was divided, 7½ annas being allotted to Khairati Lal, and 8½ annas to Chattar Kunwar and Mewa Kunwar.

The mauzas the subject of the three suits out of which the present appeals arose were included in the 7½ anna share allotted to Khairati Lal, of whom (or of his heirs) the present appellants were vendees.

The principal question for determination on these appeals was as to the validity and effect of the compromise of July, 1860, the appellants contending that it was a family arrangement which the daughters of Daulat Singh had power to make, and which was consequently binding on the respondents as the reversionary heirs; and the respondents asserting that it was in the nature of an alienation which could not be made by the daughters without legal necessity, and which was therefore not valid beyond the lifetime of the survivor, and came to an end on the death of Mewa Kunwar in 1899.

The appellants also contended that Ratan Singh did not forfeit his interest in the property by reason of his conversion to Muhammadanism; and that even if any right to it had devolved [359] upon Daulat Singh in 1845 when Ratan became a Muhammadan, such right had become extinguished, because Ratan Singh had been in sole possession of the property after Daulat Singh's death up to his own death a few months later in 1851, and the heirs of Daulat Singh had not obtained possession of any part of it until the compromise of 1860, and the suits were therefore barred by limitation. They also set up sections 41 and 51 of the Transfer of Property Act (IV of 1882) as supporting their title as *bona fide* purchasers in possession.

The Subordinate Judge found in favour of the defendants and dismissed the suits.

On appeal a Divisional Bench of the High Court (Sir JOHN STANLEY, C. J. and Sir WILLIAM BURKITT, J.) reversed those decisions and gave each plaintiff a decree.

The facts are sufficiently stated in the report of the cases before the High Court which will be found in I. L. R. 29 All. 487.

On these appeals :—

Cowell, for the appellants, contended that Ratan Singh did not, by becoming a Muhammadan, forfeit his right to the half share to which he was entitled in the property held by him and his son Daulat Singh, the effect of Bengal Regulation VII of 1832, section 9, and Act XXI of 1850 being to prevent any such forfeiture as would have occurred under the Hindu law by making it not enforceable by law. Reference was made to *Bhagwant Singh* v. *Kallu* (1). As to the compromise of 1860 it was contended that it was not an alienation by way of gift to Khairati Lal, but a family arrangement in settlement of doubtful claims, and that under it the daughters of Daulat Singh became possessed for the first time of property to which their father's title accrued in 1845, but had never been enforced; and any imperfection in that title was cured by the compromise. *Karimuddin* v. *Gobind Krishna Narain* (2) and *Lalla Oudh Beharee Lall* v. *Ranee Mewa Koonwer* (3) were referred to. It was also submitted that the daughters of Daulat Singh had full power with the concurrence [360] of Khairati Lal, then the only reversioner, to make such an arrangement. As to the power of compromise of a person in possession of property for

(1) (1888) I. L. R. 11 All. 100 (102).
(2) (1909) I. L. R. 31 All. 497; L. R. 36 I. A. 188.
(3) (1863) 3 Agra H. C. 82 (84).

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33 A. 356=15 C. W. N. 545=8 A. L. J. 552=13 C. L. J. 575=18 Bom. L. R. 427=10 M. L. T. 25=(1911) 1 M. W. N. 432=21 M. L. J 645=38 I. A. 87=10 I. C. 477.

the limited estate of a Hindu female, reference was made to *Katama Natchiar* v. *The Rajah of Shivagunga* (1); Mayne's Hindu law, 7th edition, section 346, page 455; section 347, page 457, section 624, page 840; section 634, page 852; and section 636, page 854; and as to the same power in managers of joint families or guardians, to *Hanooman Persaud Panday* v. *Munraj Koonweree* (2); and it was contended that under the circumstances in which the compromise of 1860 was made it was binding on the reversioners the respondents. The cases of *Imrit Konwur* v. *Roop Narain Singh* (3) and *Sheo Narain Singh* v. *Khurgo Koerry* (4), relied upon by the High Court as cases where compromises by a widow had been set aside, were decided on a different state of facts, and were distinguished from and therefore inapplicable to the present case; and *Baboo Lekraj Roy* v. *Baboo Mahtab Chand* (5) was referred to.

The possession obtained of the property now in suit by Khairati Lal was in full proprietary right, and he and his successors in title held adversely to Daulat Singh's daughters, and to the respondents, whose suits were therefore barred by limitation. Reference was made to *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (6); Limitation Act XIV of 1859, section 1, clause 12, and section 11; Act XI of 1861, section 2; Limitation Act IX of 1871, schedule II, article 142; Limitation Act XV of 1877, section 2, and schedule II, article 141. No right of suit which had been extinguished under the Act of 1859 could be revived by Act IX of 1871 or Act XV of 1877: *Hari Nath Chatterjee* v. *Mothurmohun Goswami* (7). The respondents had not shown any title, therefore, to the properties in suit.

De Gruyther K. C. and *B. Dube*, for the respondents, contended that on Ratan Singh's conversion to Muhammadanism he forfeited his share in the property jointly held by him and Daulat Singh, and the latter therefore became entitled in 1845 to the whole of the property of his father. Neither Bengal Regulation VII of [361] 1832, section 9, nor Act XXI of 1850 was applicable to the present case; they did not affect the substantive Hindu Law, but only rendered it unenforceable in the Civil Courts. Regulation VII of 1832 treated of procedure only and repealed (by section 8) so much of Regulation VIII of 1795 as provided that "in causes in which the plaintiff was of a different religious persuasion from the defendant the decision was to be regulated by the religion of the latter" substituting for specified localities the rules contained in the 1st clause of section 16 of Regulation III of 1803, which do not apply here. Moreover, Act XXI of 1850 was not retrospective; a statute did not affect vested rights without express words. Mayne's Hindu Law, 7th edition, page 805, section 593, and page 866, section 643; *Nanjammah* v. *Karebbasappah* (8); and Maxwell on the Interpretation of Statutes, 3rd edition, pages 298, 299 and 322 were referred to.

As to the compromise of 1860 it was not binding on the respondents. The daughters of Daulat Singh had, at the time it was made, the limited estate of a Hindu female and were therefore in the same position as a Hindu widow, whose powers of compromise were not more extensive than her powers of alienation, which, on the principle laid down in *Katama Natchiar* v. *The Rajah of Shivagunga* (9), would only bind the reversioners

(1) (1863) 9 Moo. I. A. 543 (604).
(2) (1856) 6 Moo. I. A. 393.
(3) (1880) 6 C. L. R. 76 (81).
(4) (1882) 10 C. L. R. 337 (342).
(5) (1871) 14 Moo. I. A. 393.
(6) (1874) L. R. 1 I. A. 157 (164, 166).
(7) (1893) L. R. 21 Cal. 83 L. R. 20 I. A. 183.
(8) (1858) S. D. A. Mad. 250.
(9) (1863) 9 Moo. I. A. 543.

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when in the form of a decree against the widow fairly obtained in a contested and *bona fide* litigation: *Sant Kumar* v. *Deo Saran* (1); *Imrit Konwar* v. *Roop Narain Singh* (2); *Sheo Narain Singh* v. *Khurgo Koerry* (3) and *Mussamut Indro Kooer* v. *Shaikh Abool Burkat* (4). This principle would not include the compromise in the present case. As to the nature of the compromise and how it came to be made, see *Gobind Krishna Narain* v. *Abdul Qayyum* (5). Unless the compromise of 1860 was binding the respondents were entitled to succeed.

The suits were not barred by limitation. The possession of the Court of Wards was not adverse; *Karan Singh* v. *Bakar Ali Khan* (6) and *Secretary of State for India* v. *Krishnamoni* [362] *Gupta* (7). Moreover, the respondents did not claim through the daughters of Daulat Singh, but through Daulat Singh himself and their claim was not barred by article 141 of the Limitation Act (XV of 1877), nor by section 28 of that Act. *Runchordas Vandravandas* v. *Parvatibai* (8). The period of limitation was 12 years from the date of the death of Mewa Kunwar in 1899.

Cowell in reply referred to *Lalla Oudh Baharee Lall* v. *Ranee Mewa Koonwar* (9) and *Bholamotee* v. *Abdullah Khan* (10).

March 28th, 1911:—The judgment of their Lordships was delivered by Mr. AMEER ALI:—

These appeals, which have been consolidated by an order, dated the 1st of November, 1910, arise out of three actions in ejectment, brought by the plaintiff in the Court of the Subordinate Judge of Bareilly, who dismissed the suits by one judgment on the 20th of May, 1905. His decision, however, was reversed on appeal by the High Court of Allahabad, which decreed the plaintiffs' claims, on the 23rd of April, 1908. The defendants have appealed to His Majesty in Council, and the point for determination is the same in each case.

The plaintiffs claim as next reversioners to their grandfather (mother's father) Raja Davlat Singh to recover possession of certain properties held by the defendants, on the allegation that the deed of compromise under which the latter purport to derive title is not binding on them. The defendants, on the other hand, are transferees from one Raja Khairati Lal, a grandson by a daughter of Raja Ratan Singh, the father of Daulat Singh, and a party to the compromise in question.

The history of Ratan Singh's family and the circumstances which led to the compromise have been twice before this Board, in *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (11); and *Karimuddin* v. *Gobind Krishna Narain* (12) and will be found summarised in the earlier of the two cases. It is unnecessary, therefore, to enter into them at any length. For the purposes of the present [363] appeals it is sufficient to state that Raja Ratan Singh, who appears to have held a high position in the Court of the then King of Oudh, owned considerable property within British territories, part of which is in suit, and that he and his son Daulat were members of a joint Hindu family and thus entitled in joint tenancy each to a moiety of the properties.

(1) (1886) I. L. R. 8 All. 365 (370).
(2) (1880) 6 C. L. R. 76 (81).
(3) (1882) 10 C. L. R. 337.
(4) (1870) 14 W. R. 146.
(5) (1903) I. L. R. 25 All. 546 (558).
(6) (1882) I. L. R. 5 All. 1; L. R. 9 I. A. 99.
(7) (1902) I. L. R. 29 Cal. 518; L. R. 29 I. A. 101.
(8) (1899) I. L. R. 23 Bom. 725; L. R. 26 I. A. 71.
(9) (1868) 3 Agra H. C. 82 (84).
(10) (1852) 5 D. A. Beng, 1103.
(11) (1874) L. R. 1 I. A. 157.
(12) (1909) I. L. R. 31 All. 497; L. R. 36 I. A. 138.

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33 A. 356=15 C. W. N. 545=8 A. L. J. 552=13 C. L. J. 575=13 Bom. L. R. 427=10 M. L. T. 26=(1911) 1 M. W. N. 432=21 M. L. J. 645=33 I. A. 87=10 I. C. 477.

It may be taken now as established beyond dispute that in 1845 Ratan Singh abandoned Hinduism and adopted the Muhammadan faith. But although his renunciation of the Hindu religion involved, under the Hindu law, the forfeiture of civil rights to the extent of depriving him of his share in the joint estate, Daulat advanced no claim based on such forfeiture, and father and son remained joint until the latter's death in January, 1851.

Daulat left him surviving a widow named Sen Kunwar, and two daughters, Chhattar Kunwar and Mewa Kunwar. On the death of Ratan Singh some months later (September, 1851) the entire property, which had stood all along in his name in the Collector's Register, was recorded in the name of his widow, Rani Raj Kunwar.

Disputes then arose between the heirs of Daulat on the one side and Raj Kunwar on the other. Eventually, and in consequence of these disputes, the Court of Wards took over, in 1852, possession of the entire estate, making Raj Kunwar, who is stated to have been a person of weak intellect, an allowance of Rs. 500 a month. The rights of Daulat's heirs do not appear to have been admitted to any part of the property, as no allowance was made to them, and, in fact, it is alleged, they were referred to the Civil Courts for the establishment of their rights. Matters remained in this condition for several years. Sen Kunwar died in 1857 and Raj Kunwar, Ratan's widow, the following year. In 1860, under the advice of Mr. John Inglis, a well-known District Officer, then Collector of Bareilly, the daughters of Daulat and the grandson of Ratan, Khairati Lal, entered into the compromise which the plaintiffs now seek to set aside so far as it affects them.

By this compromise Daulat Singh's daughters, Chhattar Kunwar and Mewa Kunwar, obtained between them an 8½ anna share [364] taking the entire estate as 16 annas; whilst Khairati Lal received a 7½ anna share. Partition was effected in terms of the compromise, and the parties obtained possession of the respective shares allotted to them. Chhattar Kunwar died in 1866. There was litigation between Chhattar's husband and Mewa Kunwar as to the right to Chhattar's share, which was ultimately decided in Mewa Kunwar's favour, who thus obtained possession of the entire 8½ anna share received by the two sisters in 1860. Mewa Kunwar died in 1899 and the share held by her has devolved on the plaintiffs, her sons.

Their case is that, on the abandonment of Hinduism by Ratan Singh he forfeited his half share in the joint property, which vested in Daulat Singh, that they as his heirs are entitled to the entire 16 annas; and that they are not bound by the compromise of 1860, as Chhattar Kunwar and Mewa Kunwar, being mere life-tenants, had no authority, in the absence of legal necessity, to alienate the 7½ anna share in favour of Khairati Lal.

The defendants, who are transferees either from Khairati Lal or his heirs, contend *inter alia* that the compromise entered into by the two ladies was not an alienation; that it was a family arrangement for the settlement of disputes, under which they obtained more than they were legally entitled to; that in view of the British legislation (to which the defendants refer) the forfeiture on which the plaintiffs rely could not be enforced, and that, therefore, there was no divestment of the right of Ratan in respect of his half share, and that, even if any such right, as the plaintiffs allege, devolved on Daulat in consequence of Ratan's conversion in 1845, it became "extinguished" on the lapse of 12 years from the date of such devolution,

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The Subordinate Judge in a well-considered judgmnt upheld the defendants' pleas and dismissed the suits. The learned Judges of the High Court, on appeal by the plaintiffs, arrived at a different conclusion. They were of opinion that on the conversion of Ratan Singh, Daulat became " sole and absolute owner of the whole estate," inasmuch as Regulation VII of 1832 did not abrogate the Hindu Law as to " the consequences of apostasy," and Act XXI of 1850 was not enacted until some five years after his adoption of the Muhammadan faith. With [365] regard to the compromise of 1860, although they considered it to be 'just and wise" and "perhaps the best arrangement that could be made," they felt pressed by authority to hold in effect that it amounted to an alienation which the ladies, in the absence of legal necessity, were not competent to make, and that consequently it was not binding on the plaintiffs. In this view of the question they reversed, as already stated, the decision of the Subordinate Judge, and decreed the plaintiffs' claims in all three suits. The learned Judges did not deal with the question of limitation raised by the defendants.

Their Lordships regret they are unable to concur in the judgment of the High Court.

In 1845, when Ratan Singh abandoned Hinduism and adopted the Muhammadan faith, the rule laid down in section 9, Regulation VII of 1832, for decision in civil suits where the parties ranged against each other belonged to different persuasions, was in force in the Bengal Presidency. It declared in express terms that in such cases.—

" When one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or other of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled."

Act XXI of 1850 extended the principle of section 9, Regulation VII of 1832, of the Bengal Code, throughout the territories subject to the Government of the East India Company. After reciting the provisions of section 9, and stating that it would be beneficial to extend its principle to the rest of British India, it enacted that—

"So much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as Law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories."

The intention in both enactments is perfectly clear ; by declaring that the Hindu or Muhammadan law shall not be permitted to deprive any party not belonging to either of those persuasions of a right to property or that any law or usage which [366] inflicts forfeiture of rights or property by reason of any person renouncing his or her religion, shall not be enforced, the Legislature virtually set aside the provisions of Hindu law which penalizes renunciation of religion or exclusion from caste.

The effect of the legislation of 1832 and 1850 was that on Ratan Singh's abandonment of Hinduism, Daulat Singh did not acquire any enforcible right to his father's share in the joint family property which he could either assert himself or transmit to his heirs for enforcement in a British Court of Justice.

In the view their Lordships take of this branch of the case it is not necessary to discuss the question of limitation raised by the defendants.

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33 A. 376=15 C. W. N. 545=8 A. L. J. 552=13 C. L. J. 575=13 Bom. L. R. 427=10 M. L. T 25=(1911) 1 M. W. W. N. 432=21 M. L. J. 645=38 I. A. 81=10 I. C. 477.

But it may be observed that whatever right Daulat acquired under the Hindu law to the share of his father came into existence in 1845 on the conversion of the latter to the Muhammadan religion. No suit could be brought, even if the enactments referred to above had permitted it, to enforce the right after the lapse of 12 years "from the time the cause of action arose" (Section 1, clause 12, Act XIV of 1859). Nothing in article 142 of Act IX of 1871 or in article 141 of Act XV of 1877 could lead to the revival of a right that had already become barred. In this connection their Lordships would refer to the judgment of this Committee in the case of *Hari Nath Chatterjee* v. *Mothurmohun Goswami* (1) where it was pointed out that "the intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right."

Such were the relative positions of the parties in 1860, when the compromise was entered into. The heirs of Daulat had no existing enforcible right to the share of Ratan Singh, and the entire property was recorded in the name of his widow. Under these circumstances the parties, under the advice of the District Officer, instead of engaging in a long litigation, arrived at a mutual settlement of their claims. The real nature of the compromise is well expressed in a judgment of the High Court of the North-West Provinces in 1868 in the suit of Mewa Kunwar against her sister Chhattar Kunwar's husband—*Lalla Oudh* [367] *Beharee Lall* v. *Ranee Mewa Koonwer* (2). The learned Judges say as follows :—

"The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognising the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement."

Their Lordships have no hesitation in adopting that view. The true test to apply to a transaction which is challenged by the reversioners as an alienation not binding on them is, whether the alienee derives title from the holder of the limited interest or life-tenant. In the present case Khairati Lal acquired no right from the daughters of Daulat, for "the compromise," to use their Lordships' language in *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (3) "is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is."

In their Lordships' judgment the decisions on the authority of which the learned Judges of the High Court have held the compromise not to bind the plaintiffs, are not applicable to the present case.

On the whole, their Lordships are of opinion that the judgment and decrees of the High Court at Allahabad should be reversed and those of the Subordinate Judge restored, and they will humbly advise His Majesty accordingly.

The respondents will pay the costs of this appeal and of the appeal in the High Court.

Appeals allowed.

Solicitors for the appellants : —*Pyke Parrott & Co.*
Solicitors for the respondents : —*T. T. Wilson & Co.*

(1) (1893) I. L. R. 21 Cal. 8 : L. R. 20 I. A. 18.
(2) (1868) 3 Agra H. C. Rep. 82 (84).
(3) (1874) L. R. 1 I. A. 157 (166).

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APPELLATE CIVIL.

33 A. 368=8 A. L. J. 112 =9 I. C. 205.

33 A. 368 (=8 A. L. J. 112=9 I. C. 205).

[368] APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Tudball.

RAHIM-UN-NISSA (*Defendant*) *v.* BADRI DAS (*Plaintiff*).*

[3rd January, 1911.]

Mortgage—Prior and subsequent mortgagees—Decree obtained on a prior mortgage satisfied by execution of a fresh mortgage in favour of decree-holder—Priority over an intermediate mortgagee.

A decree for sale upon a mortgage of 1895 was obtained in 1901. In 1903 the decree-holder accepted in satisfaction of the decree a sale-deed of a certain portion of the mortgaged property, but this adjustment was never certified to the Court. Subsequently the decree was put into execution and a sale was ordered, but before it was carried out the parties came to terms, and the judgment-debtor executed a fresh mortgage to secure the decretal amount. This was in May, 1904. Meanwhile, in April, 1904, another mortgage had been executed by the judgment-debtor. *Held* that the mortgage of May, 1904, being in satisfaction of the earlier mortgage of 1895 had priority over that of April, 1904. *Kanhaiya Lal* v. *Chedda Singh* (1) and *Shyam Lal* v. *Bashiruddin* (2) followed.

[Ref. 47 Cal. 446=30 C. L. J. 496=55 I. C. 189; 43 All. 204=61 I. C. 942=18 A. L. J. 1105.]

THIS was a suit brought to enforce a mortgage of date the 17th of May, 1904, executed under the following circumstances. The plaintiff mortgagee held a mortgage from the same mortgagor of the 6th of February, 1895. This mortgage was put into suit and a decree obtained on it, and eventually matters were arranged between the plaintiff and the defendant in this way that the plaintiff took a fresh mortgage for the decretal amount and the decree was entered up as satisfied. When the present suit was brought one of the defendants resisted it on the ground that she held a prior mortgage of the 25th of April, 1904. The Court of first instance, however, held that this was of no avail against plaintiff's mortgage, inasmuch as he was entitled to claim priority in virtue of the original mortgage of 1895. The defendant mortgagee of April, 1904, appealed to the High Court.

Mr. *A. H. C. Hamilton*, for the appellant.

Dr. *Satish Chandra Banerji*, for the respondent.

RICHARDS and TUDBALL, JJ.:—This appeal arises out of a suit on foot of a mortgage dated the 17th of May, 1904. The plaintiffs stated in the plaint that the mortgage was made to satisfy a certain decree obtained on the 25th of February, 1901, [869] on foot of a mortgage, dated the 6th of February, 1895. They therefore claimed that their mortgage had priority over the defendant's mortgage. The defendant claimed under a mortgage, dated the 25th of April, 1904, made by the last male owner of the property in favour of his wife, who is the present appellant. It appears that when the decree, dated the 25th of February, 1901, had been obtained, the decree-holder accepted from the judgment-debtor a sale deed of a certain part of the mortgaged property in full discharge of the decree. Possession, however, it is said, was never given, and it is admitted that the adjustment of the decree was never certified to the Court. Subsequently, the decree-holder put the decree into execution. The judgment-debtor objected, pleading the adjustment. The Court refused to recognize the adjustment, because it had not

* First Appeal No. 353 of 1909 from a decree of Kanhaiya Lal, Second Additional Judge of Meerut, dated the 23rd of June, 1909.

(1) (1907) 7 A. L. J. 984.

(2) (1906) I. L. R. 28 All. 778.

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33 A. 368=8 A. L. J. 112 =9 I. C. 205.

been certified according to law, and directed the property to be sold. Before the property was sold, however, the judgment-debtor asked for sanction to prosecute the decree-holder for fraudulently executing the decree which had been satisfied. The result of all this was the mortgage of May, 1904, on foot of which the present suit has been instituted. The amount of the mortgage was the amount of the decree of February, 1901. The Court below has decreed the plaintiff's claim giving the plaintiff the priority which was claimed. In appeal here it is contended that the decree of the 25th of February, 1901, was fully discharged by the sale-deed of 1903, and that the plaintiff's mortgage is only entitled to the priority of its actual date. Reliance has been placed upon the case of *Nakta Ram* v. *Moti Ram* (1). In that case, no doubt, it was decided that where the decree-holder took a usufructuary mortgage in discharge of a mortgage decree, he could not fall back upon the original mortgage on foot of which he had obtained his decree. This decision was considered in the case of *Kanhaiya Lal* v. *Chedda Singh* (2), and a Bench of two Judges expressed their dissent. In the case of *Shyam Lal* v. *Bashir-ud-din* (3), it was held that where a third person advanced money for the purposes of satisfying a mortgage decree for sale of the property and took a mortgage for the amount so advanced, he was [370] entitled to the benefit of the prior incumbrance, as against the incumbrances which had been created between the original mortgage and the new security. The same view seems to have been taken by both the High Courts of Calcutta and Madras. Mr. *Hamilton*, on behalf of the appellant, contends that the decree was actually satisfied by the sale-deed, and that the subsequent mortgage was a new arrangement altogether in which not only the old mortgage debt was satisfied but also a criminal charge compromised. We cannot take this view. It is clear that owing to the fact that the adjustment of the decree was not certified the property could be sold in execution of the decree, notwithstanding any adjustment. If the sale had taken place and the property had been sold to a third party, the latter would have got a perfect title and the sale would have been considered to be free of all incumbrances. We feel that we must regard the position of the parties without considering the complication of the sale of 1903, that is to say, we must deal with the case on the basis that prior to the actual sale of the property on foot of the mortgage decree the decree-holder took from the judgment-debtor a fresh mortgage for the amount due on foot of the decree. In our opinion, under these circumstances and on the authorities, the mortgagee is entitled to the benefit of the prior mortgage at least to the extent of all moneys secured by that mortgage. We dismiss the appeal with costs.

Appeal dismissed.

(1) Weekly Notes, 1906, p. 191.
(2) (1910) 7 A. L. J. 984.
(3) (1906) I. L. R. 28 All. 773.

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JAN. 4.

APPELLATE CIVIL.

38 A. 370=8 A. L. J. 155 =9 I. C. 670.

33 A. 370 (=8 A. L. J. 155=9 I. C. 670).

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Tudball.

PHULMANI CHAUDHRAIN (*Defendant*) v. NAGESHAR PRASAD AND OTHERS (*Plaintiffs*).*

[4th January, 1911.]

Mortgage—Prior and subsequent mortgagees—Sale of mortgaged property in execution of prior mortgagee's decree— Subsequent mortgagee no party thereto—Price to be paid by subsequent mortgagee on seeking to redeem.

A subsequent mortgagee is not entitled to redeem the prior mortgage by simply paying the price for which the mortgaged property may have been purchased at an auction sale held in execution of a decree obtained by a prior mortgagee without joining the subsequent mortgagee as a party; but such subsequent mortgagee must, if he wishes to redeem, pay to the prior mortgagee the full amount due on the prior mortgage *Dip Narain Singh* v. *Hira Singh*(1) applied.

[Ref. 36 All. 129.]

[371] THE facts out of which this appeal arose are fully stated in the judgment of the Court.

Maulvi *Muhammad Ishaq*, for the appellant.

Dr. *Tej Bahadur Sapru* and Munshi *Iswar Saran*, for the respondents.

RICHARDS and TUDBALL, JJ.:—The facts of the case out of which this appeal has arisen are as follows:—One Agar Singh was the owner of certain shares in seven villages, namely, Mania, Ramnapur, Kakrahu, Benipur, Belghata, Parsu, and Mahadani. His share in mauza Kakrahu was 14 annas. On the 9th of July, 1880, he mortgaged an 8 anna share in mauza Kakrahu and a share in mauza Mahadani to Sheo Charan Misra the predecessors in title of the present plaintiffs respondents for a sum of Rs. 555. On the 1st of December, 1883, he mortgaged an 8 anna share of mauza Kakrahu together with shares in mauza Mania, Ramnapur, Benipur and Belghata, to one Jiwan Das, for the sum of Rs. 11,500. On the 16th of June, 1885, he gave a second mortgage to Sheo Charan Misra of the whole 14 anna share in mauza Kakrahu and a share in mauza Parsu for the sum of Rs. 2,000. This Rs. 2,000 consisted of Rs. 1,500, due on the bond of 9th July, 1880, and Rs. 500, cash. Jiwan Das brought a suit on his bond of 1883 without making Sheo Charan Misra a party, and obtained a decree on the 15th of March, 1887. In execution of that decree, on the 20th of June, 1893, an 8 anna share in mauza Kakrahu, together with the shares in mauza Ramnapur and Belghata, was sold at auction and purchased by Musammat Karamraji Kunwari, the wife of Agar Singh, for the sum of Rs. 700. On the 10th of June, 1895, Karamraji Kunwari sold an 8 anna share in mauza Kakrahu to the appellant defendant for the sum of Rs. 4,100. The heirs of Sheo Charan Misra have now sued on the bond of 16th June, 1885, and have made the appellant defendant a party to the suit and seek to bring to sale the whole 14 anna share of mauza Kakrahu and the share in mauza Parsu. The actual amount due on their bond was over 3 lakhs of rupees. The amount due in respect of the sum of Rs. 1,500 (which was the debt due on the old bond of 1880) would come to over two lakhs of rupees. The plaintiffs, however, sued only to recover Rs. 30,000 and the lower Court has held that [372] this is a part

* First Appeal No. 303 of 1909 from a decree of Gokul Prasad, Subordinate Judge of Gorakhpur, dated the 13th of August, 1909.

(1) (1897) I. L. R. 19 All. 527.

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33 A. 370=3 A. L. J. 155 =9 I. C. 670.

of the debt due in respect of the old mortgage of 1880. The appellant defendant pleaded that the bond of 1883 was prior to that of 1885, and that therefore, the plaintiff could not bring to sale an 8 anna share of mauza Kakrahu unless they paid the whole amount due on the mortgage of 1883 or at least Rs. 4,100, the price which she had paid to Karamraji Kunwari, for this 8 anna share. The lower Court held that out of this 8 anna share mortgaged in 1883, 6 annas were not mortgaged in the bond of 1880, but that the remaining 2 annas formed a part of that 8 anna share which was mortgaged under that bond; decreed the plaintiff's claim, and made the sale of this six anna share in mauza Kakrahu conditional upon the plaintiffs paying the sum of Rs. 700, to the defendant appellant. The defendant appellant appeals and urges that she is entitled to receive the sum of Rs. 4,100 before her six anna share can be put to sale. In our opinion the lower Court's order in regard to the payment of Rs. 700 is clearly wrong. In the first place Rs. 700 is not the price which was actually paid at the auction sale for this six annas, but the price paid for 8 anna share in this village and shares in two other villages. In the second place the price paid at that auction sale is not a true measure, in our opinion, of what the plaintiffs respondents ought to pay in order to redeem the prior mortgage on the six anna share. The fact that Sheo Charan Misra was no party to the former suit which terminated in the decree of 15th March, 1887, left in Sheo Charan Misra the right to redeem the prior mortgage of the property. The right of the present defendant appellant is the right to have the mortgage redeemed. We fail to see on what principle she is entitled to receive merely the sum which was paid at the auction sale whether that was a high price or a low price. This was the view taken by a Bench of this Court in *Dip Narain Singh* v. *Hira Singh* (1), wherein it was held that a subsequent mortgagee is not entitled to redeem a prior mortgage by simply paying the price for which the prior mortgagee may have purchased the property at an auction sale held in execution of a decree obtained by him without joining the subsequent mortgagee as party; but such subsequent mortgagee must, if he wishes to redeem pay to the prior mortgagee the full amount [373] due on his mortgage. The only difficulty in applying this principle to the present case is due to the fact that the prior mortgagee Jiwan Das and all those persons who may have purchased the mortgaged property in execution of his decree have not been made parties to this suit. There is nothing on the record to show whether or not the decree of the 15th of March, 1887, has been satisfied or in what manner it has been satisfied, if at all. There is nothing to show whether the other properties mortgaged were sold or not, and if sold, to whom and for what amounts. No objection was taken by the defendant appellant in the lower Court as to the non-joinder of parties, and in this appeal she merely claims that she is entitled to receive the price which she paid to Karamraji Kunwari (not for the 6 anna share) but for the 8 anna share. In these circumstances it seems to us that the only equitable method of doing justice between the parties is to allow the plaintiffs respondents to bring this six anna share in mauza Kakrahu to sale conditional on their paying to the appellant that portion of the mortgage debt due on the bond of 1883, which can properly be attributed to the 6 anna share in dispute. In order to enable us to do this we must have findings by the lower Court upon the following points which we refer as issues under order 41, rule 25, of the Code of Civil

(1) (1897) I. L. R. 19 All. 527.

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33 A. 370=8 A. L. J. 155 =9 I. C. 670.

Procedure :—(1). What was the total amount of the debt due on the bond of 1883 at the date of the sale, namely, the 20th of June, 1893? (2), What was the value of the property mortgaged in the bond of 1883 other than the six anna share of mauza Kakrahu on the date of the sale? And what was the value of the six anna share in mauza Kakrahu? (3) What was the proportionate part of the mortgage debt which could properly be attributed to the six anna share now in dispute? Fresh evidence may be taken, and the case will be put up on return of findings. Ten days will be allowed for objections.

Issues remitted.

33 A. 374 (=8 A. L. J. 109=9 I. C. 422).

[374] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

THE BANK OF BENGAL, CAWNPORE (*Defendant*), *v.* KALKA DAS AND ANOTHER (*Plaintiffs*).*

[5th January, 1911.]

Rules of Court of the 4th April, 1894 rule, (1) proviso—Pleader's fees—Fee certificate not filed at or before the hearing—Fee not paid before hearing—Discretion of Court.

Held on a construction of rule 80 (1) of the rules of Court of the 4th April, 1894, that the *proviso* to rule 80 only gives a Court a discretion to accept a certificate for fees filed after the commencement of the hearing, but, whatever might have been intended, leaves no discretion as to the allowance, on taxation, of a fee which in fact was not paid on or before the first hearing.

[Ref. 61 I. C. 804.]

THIS was a suit for a declaration of the plaintiffs' title to certain moneys in the custody of the Bank of Bengal. The only question raised by the appeal was as to the disallowance by the Court of the fees of the pleader appearing for the Bank, which the Court considered itself unable to allow, having in view the proviso to rule 80 (1) of the rules of Court of the 4th April, 1894, by reason of the said fees not having in fact been paid at or before the first hearing, although it permitted a fee certificate to be filed after the first hearing. The facts of the case are fully stated in the judgment of the Court.

Mr. *B. E. O'Conor*, for the appellants.

Mr. *M. L. Agarwala*, for the respondents.

STANLEY, C. J. and BANERJI, J. :—The only question in this appeal is concerned with the pleader's fee. The suit was brought by the plaintiffs to have a declaration of their title to certain moneys held by the Bank. The Bank was prepared to hand over the moneys to the persons entitled, whoever they might be, and only required to be satisfied that the plaintiffs were the parties so entitled. The case was taken up late on the afternoon of the 3rd of September, and on a representation by the pleader for the Bank that the agent of the Bank was not present and the certificate required by the rules of the Court as to the payment of fees could not be verified, the Court intimated that the certificate would be accepted afterwards. On the following day the case appeared on the list, and, after some formal matters were disposed of, was adjourned to the 17th of September. On the 16th of September the pleader's fee was [375] paid and a certificate

* First Appeal No. 2 of 1910 from a decree of Mohan Lal Hukku, Subordinate Judge of Cawnpore, dated the 22nd of September, 1909.

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33 A. 374=8 A. L. J. 109 =9 I. C. 422.

filed, and the case was adjourned to the 21st of September when the arguments wer heared. Judgment was delivered on the 22nd of September. The result of the suit was that the claim was decreed but costs were awarded to the Bank. Only Rs. 2-8-0 were allowed in respect of costs; the pleader's fee not being allowed on the ground that it was not paid before the commencement of the hearing of the suit. This appeal has been preferred in respect of the pleader's fee, and it has been contended before us by the learned counsel for the Bank that inasmuch as the Court intimated that the certificate would be accepted after the first hearing that the fee ought to have been allowed. The Court below in its order in reference to the fee stated that in intimating that "the defendant would be justified in producing the required affidavit and certificate on the next following date" it did not undertake to condone the defendant's failure to file this document up to the 16th of September, 1909. The learned Suborninate Judge referred to the rules of the High Court on the subject and decided that he could not allow the pleader's fee to be included in the costs in the decree. Rule 80 (1) of the rules of the 4th of April, 1894, as amended, provides that "In drawing up a decree or order no fee to any legal practitioner, not appearing for the Crown * * * shall be allowed on taxation between party and party * * * unless the Munsarim, or, on application to the Judge, the Judge is satisfied that the fee was paid to such legal practitioner at or before the commencement of the hearing of the suit or application * * * and unless at or before such time there shall have been delivered by the Munsarim a certificate signed by the legal practitioner certifying the amount of the fee or fees actually paid to him * * * together with an affidavit made by such client or his authorized agent". This rule, we may observe, prescribes that the Court shall be satisfied that the fee is paid to the pleader at or before the commencement of the hearing of a suit, as also as to the delivery to the Munsarim of a certificate signed by the legal practitioner certifying the amount of the fee or fees actually paid to him. In this case the fee was not paid until the 16th of September, that nearly a fortnight after the commencement of the hearing [376] of the suit. Consequently the Court was justified in the course which it took in refusing to allow the appellant's pleader's fees. But it is said that the *proviso* to the rule in question meets this case. That *proviso* runs as follows:—"Provided that in any case the presiding officer may, for valid reasons to be recorded by him, accept a certificate for fees filed after the time mentioned above." It will be observed that this *proviso* only enables a presiding officer to exercise a discretion as to whether or not he will accept a certificate for fees filed after the commencement of the hearing. It gives him no discretion in regard to the allowance of a fee which was not paid at or before the commencement of the suit. It may be, when these rules were drawn up, that it was intended to give the presiding officer a general discretion in the matter of a fee tardily paid: but if this was intended, it is certainly not expressed in the *proviso* as it at present stands. In view of this rule we think that the Court below rightly refused to allow the pleader's fee in this case. We dismiss the appeal, but under the circumstances without costs.

Appeal dismissed.

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33 A. 376=8 A. L. J. 115 =9 I. C. 423.

33 All. 376 (=3 A. L. J. 115=9 I. C. 423.)

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Tudball.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Opposite party*)
v. BISHAN DAT (*Applicant*).*
[5th January 1911.]

Act No. 1 *of* 1894 (*Land Acquisition Act*), *sections* 9, 25—*Omission to attend in answer to notice—Owner not entitled to claim more than was awarded by the acquisition officer.*

It is intended by section 9, clause (2) of the Land Acquisition Act that the owner of property about to be acquired should appear and state his claim in the manner provided by the clause so as to enable the acquisition officer to make a fair, reasonable and proper award based upon a proper inquiry after the proper means have been placed before him for holding such inquiry. Section 25, clause (2), makes the refusal or omission to comply with the provisions of section 9 (2) without sufficient cause an absolute bar to the obtaining of a greater sum than that awarded by the Collector.

THIS was an appeal arising out of a reference under the Land Acquisition Act, 1894. The acquistion officer awarded Rs. 3,450 as the price of the land to be acquired. The owner [377] made no claim in compliance with section 9, clause (2), of the Act, but he applied for a reference to the District Judge claiming Rs. 12,830. The District Judge awarded him the sum of Rs. 6,668, including the 15 per cent. for compulsory acquisition. The Secretary of State appealed, mainly upon the ground that having regard to the provisions of section 9, clause (2), and section 25 of the Land Acquisition Act, the owner was not entitled to more than was awarded to him by the acquisition officer.

Mr. *A. E. Ryves*, for the appellant.

Dr. *Tej Bahadur Sapru*, for the respondent.

RICHARDS and TUDBALL, JJ. :—This appeal arises out of a reference under the Land Acquisition Act. The property is situated in Allahabad. The acquisition officer awarded Rs. 3,450 for it. The owner made no claim in compliance with section 9, clause (2), of the Land Acquisition Act of 1894. He, however, applied for a reference to the District Judge, claiming Rs. 12,830. He examined one witness, Mr. Acton, the Municipal Engineer, and no other. The learned District Judge awarded the sum of Rs. 6,668. The sum so awarded included the 15 per cent. for compulsory acquisition. The Secretary of State has appealed. The first ground of appeal is that having regard to the provisions of section 9, clause (2), and section 25 of the Land Acquisition Act, the ower can have no greater sum awarded to him than the amount awarded by the Collector, or in the present case the Land Acquisition Officer. The respondent contends that the notification of dissatisfaction with the award is a sufficient compliance with the provisions of the Act. We are not prepared to take this view. In our opinion it was intended by clause (2) of section 9 that the owner of property about to be acquired should appear and state his claim in the manner provided by the clause so as to enable the acquisition officer to make a fair, proper, and reasonable award based upon a proper inquiry after the proper means have been placed before him for holding such inquiry. Section 25, clause (2), makes the refusal or omission to comply with the provisions of section 9, clause (2), without sufficient

* First Appeal No. 296 of 1909 from a decree of Prag Das, Officiating District Judge of Allahabad, dated the 3rd of July, 1909.

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33 A. 376=8 A. L. J. 115 =9 I. C. 423.

cause an absolute bar to the applicant in the reference obtaining a greater sum than that awarded by the [378] Collector. There is, however no reference in the judgment of the learned District Judge to this point having been raised before him. It is suggested that the point was waived. Even on the merits, we think that the order of the District Judge cannot be sustained. For the reasons given in our judgment in F. A. No. 294 of 1909, decided yesterday, we cannot approve of the conclusion of the learned District Judge in respect to so much of the property as was let to tenants. Furthermore, the evidence given by the Collector applies to this case as well as to the others, while the evidence given in the present case by the owner is confined to the evidence of Mr. Acton. With regard to the house No. 194-C, part of the property acquired, which is in the occupation of the owner himself, we find that the acquisition officer allowed the sum of Rs. 920. Mr. Aston, the sole witness examined by the owner, valued this property as a whole at Rs. 798. It thus appears, that the acquisition officer allowed the owner a larger sum than his sole witness valued it at. The learned Judge in arriving at his conclusion has, contrary to the evidence produced by the owner himself and contrary to the evidence of the Collector, awarded a still greater sum. In our opinion the appeal must prevail. We accordingly allow the appeal, set aside the order of the Court below and award the applicant the sum of Rs. 3,450, namely, the amount awarded by the acquisition officer. The Secretary of State will have costs in both Courts to be paid by Bishan Dat.

Appeal allowed.

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33 A. 379 (=8 A. L. J 175=9 I. C. 265.)

[379] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

DURGA PRASAD AND ANOTHER (*Defendants*) *v.* JAI NARAIN AND OTHERS (*Plaintiffs*).*

[7th January, 1911.]

Civil Procedure Code (1908) *section* 100, *order XLV*, *rule* 27—*Refusal to admit additional evidence in appeal—Discretion of Court—Appeal.*

A refusal in the exercise of discretion to admit additional evidence under order XLI, rule 27, of the Code of Civil Procedure, will not afford a ground for second appeal. *Ram Piari* v. *Kallu* (1) followed.

[Ref. 37 M. L. J. 125=1919 M. W. N. 525=42 Mad. 737; Rel. 70 I. C 830=1923 A. I. R. (L) 30].

THE plaintiffs in this case sued the defendants for the price of goods sold. Two of the defendants, who contested the suit, denied having purchased any goods from the plaintiff. The Subordinate Judge decreed the suit. Against this decree there was an appeal filed, on the 7th of January 1910, to the District Judge. In their last ground of appeal to the District Judge the defendants prayed that they might be allowed to adduce additional evidence, but they did not disclose the nature of the evidence they wanted a produce. On the 28th of June, the defendants put in an application asking the Court to take additional evidence. This additional evidence, according to the application, consisted of certain account books

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* Second Appeal No. 803 of 1910 from a decree of H. Dupernex, District Judge of Mainpuri, dated the 7th of July, 1910, confirming a decree of Nihal Chandra, Subordinate Judge of Mainpuri, dated the 9th of December, 1909.

(1) (1900) I. L. R. 23 All. 121.

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33 A. 379=8 A. L. J. 175 =9 I. C. 265.

and some railway receipts showing that it was not true that the plaintiffs had sold their entire stock-in-trade to the defendants, but that they had sent some goods to Cawnpore after the date of the alleged sale. No definite order was passed on the application, but in his judgment the learned District Judge referred to the defendants' prayer for additional evidence and in the end decided the appeal on the evidence as it stood on the record and affirmed the decree of the Subordinate Judge. The defendant appealed to the High Court.

Munshi *Gokul Prasad*, for the appellant, contended that the Judge had not passed any order on the application of the 28th of June. He was bound to pass some order. There was therefore no proper trial.

Dr. *Tej Bahadur Sapru*, for the respondent :—

The grounds of appeal contained a prayer for additional evidence, but it was not suggested what the nature of it was. **[380]** The Judge had exercised his discretion and refused to take additional evidence and his action could not be impugned ; *Ram Piari* v. *Kallu* (1). The defendants could have withdrawn the appeal and applied for review to the Court of first instance. The lower Appellate Court could not take additional evidence, order XLI, rule 27 ; *Kessowji Issur* v. *G. I. P. Ry. Co.* (2), *Krishnama* v. *Narasimha* (3), *Ramappa bin Dareppa* v. *Dharma bin Rama* (4).

Munshi *Gokul Prasad*, in reply :—

The defendants could not apply for review, as the appeal was pending before the District Judge ; *Navivahu* v. *Turner* (5). The learned Judge did not dispose of the application praying for additionol evidence to be taken. The nature of the evidence was disclosed in the application.

STANLEY, C. J., and BANERJI, J.—The sole ground of appeal in this case is that the lower Appellate Court erred in deciding the appeal without taking additional evidence and that this irregularity prejudiced the appellant's case. The suit was for the price of stock-in-trade alleged to have been sold by the plaintiffs to the defendants. Some of the defendants did not dispute the claim, but the appellants, Durga Prasad and Sital Prasad, filed written statements in which they alleged that no cloth was received in the defendants' shop, nor had the plaintiffs any shop for the sale of cloth at any time. The Court of first instance decreed the plaintiffs' claim, and an appeal was thereupon preferred by the defendants appellants. During the pendency of the appeal an application was made to the lower Appellate Court to have certain documents, including railway receipts and certain account books, sent for. This application was ordered to be put up with the record, no order having been made at the time upon the application. The learned District Judge, however, considered the application as is clear from the language of the judgment. In his judgment he says :— " Appellants take up a peculiar position. First, they say that they could put up a better defence than was actually made if they were now allowed to import fresh evidence into the case. Secondly, they take exception to the **[381]** character of the account books produced, apparently on account of their size." He did not allow the defendants to produce any further evidence, clearly believing that the defence was not a genuine and *bona fide* defence. He dismissed the appeal and confirmed the decree of the Court below.

(1) (1900) I. L. R. 23 All. 121.
(2) (1907) I. L. R. 31 Bom. 381.
(3) (1908) I. L. R. 31 Mad. 114.
(4) (1906) I. L. R. 30 Bom. 625.
(5) (1889) I. L. R. 13 Bom. 520 ; L. R. 16 I. A. 157.

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33 A. 379=8 A. L. J. 175 =9 I. C. 265.

This second appeal has been preferred, the sole ground of appeal being the alleged irregularity which we have already stated. The order under which an appellate court is empowered to allow a party to produce additional evidence is to be found in order XLI, rule 27. That order expressly forbids the court to allow additional evidence to be produced, except in a case in which the Court below has refused to admit evidence which ought to have been admitted, or the appellate court itself requires any document to be produced, or any witness to be examined, to enable it to pronounce judgment or for any other substantial cause. The learned District Judge in this case did not consider that any grounds had been shown sufficient to justify him in allowing the further evidence referred to in the application of the defendants to be adduced. He exercised his discretion in the matter, and, as it appears to us, impliedly, if not expressly, refused the application. This being so, the question arises whether or not the action of the court below is such as would justify us in allowing a second appeal. We think not. A similar question was considered in the case of *Ram Piari* v. *Kallu* (1). In that case one of us was a party to the judgment. It was there held that a refusal in the exercise of the discretion given to the court by section 568 of the Code of Civil Procedure, 1882, which corresponds with order XLI, rule 27, to admit additional evidence was not an error or defect coming within section 584 of that Code. In the judgment in that case one of us remarked as follows:—"Under section 568 of the Code a party to an appeal is not entitled to produce additional evidence in the appeal as of right, but the court may in its discretion admit additional evidence. Where the court has exercised its discretion, and in the exercise of its discretion has refused to admit additional evidence, it cannot be said [382] that a substantial error or defect in procedure has taken place, which affords a ground of second appeal under section 584." This decision, which we are bound to follow, is conclusive against this appeal. The lower appellate court did, we think, exercise its discretion, and having exercised its discretion no second appeal will lie. For these reasons we dismiss the appeal with costs.

Appeal dismissed.

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33 A. 382 (=9 I. C. 298=8 A. L. J. 184).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

SARJU PRASAD AND OTHERS (*Plaintiffs*) *v.* BINDESHRI BAKHSH PAL SINGH AND OTHERS (*Defendants*).*

[18th January, 1911.]

Civil Procedure Code (1882), *section* 317—*Prior and subsequent mortgagees—Purchase of part of mortgaged property in execution of decree on prior mortgage—Suit on second mortgage—Auction purchaser alleged to be benamidar of mortgagor—Act No. IV of* 1882 (*Transfer of Property Act*), *section* 43.

A portion of certain mortgaged property was purchased by a third party at auction sale in execution of a decree on a prior mortgage.

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* First Appeal No 1 of 1909 from a decree of Banke Behari Lal, Additional Subordinate Judge of Gorakhpur, dated the 24th of September, 1908.

(1) (1900) I. L. R. 23 All. 131.

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33 A. 382=9
I. C. 298=8
A. L. J. 184.

Held on suit for sale by the subsequent mortgagee that it was not open to the subsequent mortgagee to bring this portion again to sale upon the ground that the auction purchaser was merely a *benamidar* for the mortgagor. *Ram Narain* v. *Mohanian* (1) followed.

[Ref: 49 I. C. 907.]

THIS was a suit brought by the representatives of the original mortgagee to enforce a mortgage executed by one Bindeshri Bakhsh Pal Singh on the 20th August 1895, and comprising shares in several villages. So far as the share in one village—Rusia —was concerned, the suit was resisted upon the ground that it had been purchased at an auction sale in execution of a prior mortgage decree by Musammat Jairaj Kunwari, the wife of Bindeshri Bakhsh Pal Singh. The plaintiffs alleged that this purchase was made merely as the *benamidar* of Bindeshri Bakhsh Pal Singh. Musammat Jairaj Kunwari's defence was that this contention was not open to the plaintiffs in view of the provisions of section 317 of the Code of Civil Procedure, 1882. The court of first instance (Additional Subordinate Judge of Gorakhpur) dismissed the suit except as regards a very small portion of the mortgaged property. The plaintiffs appealed to the High Court.

[383] Babu *Jogindro Nath Chaudhri* (with him Babu *Satya Chandra Mukerji* and Babu *Binoy Kumar Mukerji*), for the appellants.

Mr. *M. L. Agarwala*, Munshi *Gobind Prasad* and Munshi *Iswar Saran*, for the respondents.

STANLEY, C. J., and BANERJI, J.—The suit out of which this appeal arises was brought by the plaintiffs appellants, to enforce a mortgage of the 20th of August, 1895, made by the defendant, Bindeshri Bakhsh Pal Singh for himself and as general attorney of his brother's widow, Musammat Lakhpat Kunwari, in favour of Hari Singh, the predecessor in title of the plaintiffs. The property comprised in the mortgage consisted of a 6 anna 8 pie share in Rusia, and 2 anna 8 pie share in the village Tejpur and a 2 anna 8 pie share in a third village Nakahi Nagahi. There is no controversy in this appeal as regards the share in Tejpur. The court below has made a decree for the sale of that share and also of a $10\frac{1}{3}$ pie share in mauza Nakahi Nagahi. As regards the share in mauza Rusia, it has dismissed the claim. That share was purchased at auction in execution of a decree obtained on an earlier mortgage by Musammat Jairaj Kunwar, the wife of the first defendant. The share in Nakahi Nagahi was sold by the mortgagors to the respondent, Ram Kumar Naik, on the 5th of August, 1905. What we have to consider in this appeal is whether the plaintiffs appellants are entitled to a decree for sale of the share in mauza Rusia and of the whole of the 2 anna 8 pie share in mauza Nakahi Nagahi mortgaged under the mortgage deed executed in favour of Hari Singh. As regards the share in mauza Rusia, which was purchased at auction by Musammat Jairaj Kunwari, the allegation of the plaintiffs is that this purchase was in reality by Bindeshri Bakhsh Pal Singh and that Musammat Jairaj Kunwari was only his *benamidar*. They say that, as the real purchaser was Bindeshri Bakhsh Pal Singh, and he mortgaged it to them, they are entitled to a decree for sale of the share in the aforesaid village. On behalf of the respondent, Musammat Jairaj Kunwari, it is urged that the claim against her is barred by the provisions of section 317 of Act No. XIV of 1882, which was the Act applicable at the date of the institution of the present suit.

(1) (1903) I. L. R. 26 All. 82.

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JAN 18.

APPELLATE CIVIL.

33 A. 382=9 I. C. 928=8 A. L. J. 184.

[384] We think that, in view of the ruling of the Full Bench in *Ram Narain* v. *Mohanian* (1), this contention must prevail. In that case it was held that a mortgagee who derived his title from his mortgagor is precluded by the provisions of the aforesaid section from bringing a suit for a declaration that the auction purchaser of the mortgaged property was the *benamidar* of the mortgagor and was not the beneficial owner. This is what the plaintiffs seek to do in the present suit. They seek to have it declared that Musammat Jairaj Kunwari is the *benamidar* of their mortgagor, Bindeshri Bakhsh Pal Singh, from whom they derive title as mortgagees. In view of that ruling the claim as against Mussammat Jairaj Kunwari is not maintainable, and this part of the decree of the Court below must be upheld, though not on the ground on which that Court has made it.

As regards the share in Nakahi Nagahi, it was mortgaged jointly by Bindeshri Bakhsh Pal and Musammat Lakhpat Kunwari. If the mortgage was made by both of them, Ram Kumar Naik purchased the share mortgaged subject to the mortgage, but assuming that the mortgage was not a valid mortgage on behalf of Lakhpat Kunwari, the plaintiffs are in our judgment still entitled to a decree for sale of the 2 anna 8 pie share mortgaged to them. The ground on which we think the plaintiffs are entitled to such a decree is that Bindeshri Bakhsh Pal purported to mortgage the 2 anna 8 pie share on the representation that he was authorised to mortgage that share. If Musammat Lakhpat Kunwari owned part of that share, her interests were admittedly those of a Hindu widow, who succeeded to her husband, and therefore amounted only to a life interest. She is dead and therefore the life interest has determined. Ram Kumar Naik, as purchaser from her, has no longer any right to the property acquired by him under his purchase from her. That property has passed to Bindeshri Bakhsh Pal as the next reversioner. As Bindeshri Bakhsh purported to mortgage the whole of the 2 anna 8 pie share on a representation that he was authorized to make the mortgage, and as he is at present the sole owner of the 2 anna 8 pie share, the mortgage will operate on the 2 anna 8 pie share under the provisions of section 43 of the Transfer of [385] Property Act. In this view the plaintiffs are entitled to a decree for sale of a 2 anna 8 pie share in Nakahi Nagahi and the decree of the Court below must be varied as regards the share in that villge comprised in the mortgage.

We accordingly vary the decree of the Court below so far that we make a decree for sale of 2 anna 8 pie share of the village Nakahi Nagahi. instead of $10\frac{3}{4}$ pie as decreed by the Court below. The appellants will get their costs of this appeal and also in the Court below from Ram Kumar Naik, defendant. Musammat Jairaj Kunwari will get her costs of this appeal from the plaintiffs appellants. We extend the time for payment of the mortgage money for a period of six months from this date. In other respects we affirm the decree of the Court below. The objections preferred by Ram Kumar Naik necessarily fail and are dismissed with costs.

Decree varied.

(1) (1903) I. L. R. 26 All. 82.

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APPELLATE CRIMINAL.

33 A. 385=9 I. C. 278=8 A. L. J. 182=12 Cr. L. J. 46.

33 A. 385 (=9 I. C. 278=8 A. L. J. 182=12 Cr. L. J. 46).

APPELLATE CRIMINAL.

Before Mr. Justice Karamat Husain.

EMPEROR *v.* BRADSHAW.*

[19th January 1911.]

Criminal Procedure Code, sections 462 (3), 537—*European British subject—Jury—Jury not chosen by lot—Illegality.*

Held that the provisions of section 460 (3) of the Code of Criminal Procedure are imperative and if there is no choosing of the jury by lot, as provided for by the section, the result is that the whole trial is vitiated—*Brojendra Lal* v. *King-Emperor* (1) referred to.

[Diss. 1917 M. W. N. 1=36 I. C. 847=18 Cr. L. J. 15.]

IN this case one T. Bradshaw was committed to the Court of the Sessions Judge of Lucknow on charges under sections 474 and 417 of the Indian Penal Code. The date fixed for the trial was the 7th October, 1910. For that date ten European jurors were summoned to attend the Judge's Court at 10 o'clock, but up to 10-35 A. M., only three out of those summoned had appeared, and these were all empanelled without being chosen by lot. The accused was convicted, and appealed to the High Court, urging that the jury which tried him had not been constituted in the manner provided for by the Code of Criminal Procedure.

Mr. *C. Dillon* (with him Mr. *R. F. Bahadurji*), for the accused.

[386] The Government Advocate (Mr. *A. E. Ryves*) for the Crown.

KARAMAT HUSAIN, J.—In this case one Bradshaw, a European British subject, was committed to the Court of Sessions of Lucknow, for trial, for offences under sections 474 and 417, Indian Penal Code. He was convicted on both counts and sentenced to an aggregate term of one year's rigorous imprisonment. He appeals to this Court and one of the points taken is that there was no selection of jurors by lot as required by section 276 of the Code of Criminal Procedure, and that, therefore, the proceedings resulting in his conviction are illegal.

He, as it appears from the record of the case, claimed to be tried as an European British subject and with a jury composed of Europeans or Americans (section (450). The last date fixed for the trial by the Court of Sessions was 7th of October, 1910, and the record of the case shows that for that date 10 European jurors were summoned to attend, and the remarks of the learned Sessions Judge, in his order, dated the 7th of October, 1910, are to the same effect. He, towards the end of that order, says:—"I further note that, including the two above gentlemen, only three European jurors have up to this moment (10-35 A.M.) appeared, out of 10 summoned to be present at 10 A.M."

According to Notification No. $\frac{1693}{VI-545-A-10}$ in trials by Jury before the Courts of Sessions in the North-Western Provinces and Oudh, the jury shall consist of five persons.

Section 462, clause (3) of the Code of Criminal Procedure, provides that from the whole number of persons returned, the jurors who are to constitute the jury shall be chosen by lot in manner prescribed in section 276, until a jury containing the proper number of Europeans or Americans

* Criminal Appeal No. 826 of 1910 from an order of H. Warburton, Sessions Judge of Lucknow, dated the 10th of October, 1910.

(1) (1901) 7 C. W. N. 188.

or a number approaching thereto as nearly as practicable has been obtained.

Section 276 of the Code of Criminal Procedure provides that the jurors shall be chosen by lot from the persons summoned to act as such, in such manner as the High Court may, from time to time, direct.

Rule 102 of the rules and orders for Criminal Courts subordinate to the Court of Judicial Commissioner of Oudh, [387] gives the manner in which the jurors are to be chosen by lot. As the number of European jurors who appeared on the 7th of October, 1910, was only three and as all of them were empanelled, it is evident that the imperative procedure prescribed for choosing jurors was not followed. Jurors are the judges of facts, and in the absence of a properly constituted jury, the violation of the imperative procedure prescribed by the Code of Criminal Procedure is of such a serious nature as cannot be cured by the provisions of section 537 of that Code. See *Brojendra Lal Sircar* v. *King Emperor* (1).

For the above reasons I allow the appeal, set aside the sentence and conviction, and direct that the appellant be retried by a properly constituted jury. As the appellant is in the Naini Jail, I, on the application of his learned counsel, allow him to be admitted to bail to the satisfaction of the District Magistrate of Allahabad.*

Appeal allowed.

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APPELLATE CRIMINAL.

33 A. 385=9 I. C. 278=8 A. L. J. 182=12 Cr. L. J. 46.

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33 A. 387 (=8 A. L J. 195=9 I. C. 933).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

GHULAM HAZRAT AND ANOTHER (*Plaintiffs*) *v.* GOBARDHAN DAS AND OTHERS (*Defendants*).†

[19th January, 1911.]

Act No. IV of 1882 (*Transfer of Property Act*), *section* 82—*Mortgage—Contribution—Principle upon which contribution is to be assessed.*

Where of two properties belonging to the same owner one is mortgaged to secure one debt and then both are mortgaged to secure another debt, for the purpose of apportioning the liability of the respective properties in regard to the subsequent mortgage, the value of the two properties must be taken into account, and credit given for the amount due upon the earlier mortgage out of the value of the property comprised in the subsequent mortgage. Where the amount due upon the earlier mortgage exceeds the value of the property comprised in that mortgage the necessary result is that the whole of the amount of the second mortgage is recoverable from the other property comprised in the later mortgage.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Jogindro Nath Chaudhri* (with him Mr. *Nihal Chand*), for the appellant.

[388] Mr. *B. E. O'Conor* (with him Babu *Lalit Mohan Banerji*), for the respondents.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for contribution brought by the plaintiffs appellants under the following circumstances:—Muhammad Amin, the seventh defendant, mortgaged on the 28th of October, 1895, the northern mahal of the village Daranagar

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* See also *Emperor* v. *George Booth* (I. L. R. 26 All. 211).

†First Appeal No. 308 of 1909 from a decree of Girraj Kishore Dutt, Subordinate Judge of Bareilly, dated the 26th of May, 1909.

(1) (1901) 7 C. W. N. 188.

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33 A. 387=8 A. L. J. 195 =9 I. C. 933

without any reservation to one Gulzari Lal. On the 27th of April, 1896, he mortgaged to the same mortgagee all his rights and interests in the northern Mahal and a 2½ biswas share in the southern mahal together with its appurtenances. Gulzari Lal brought a suit for sale on both mortgages and obtained a decree on the 17th of April, 1905. The total amount decreed to him was Rs. 3,732-14-0. He assigned the decree to one Kamla Dat, who took out execution of it and caused the mortgaged property to be advertised for sale. On the 11th of September, 1907, Muhammad Amin made a usufructuary mortgage of his share in the northern mahal excluding the miscellaneous property appurtenant to that mahal in favour of the plaintiffs. The amount of the mortgage was Rs. 4,000, and it was agreed that this sum should be applied to part satisfaction of the decree of the 17th of April, 1905. The amount was paid, but as a further sum still remained due under the decree, the plaintiffs paid into Court Rs. 6,760-14-0, on the 18th of September, 1907, and thus averted the auction sale which had been fixed for the 21st of that month. The defendants Nos. 1—6 are purchasers of the southern mahal in execution of a money decree. The sale in their favour took place in 1902. The plaintiffs claimed contribution from them in respect of the southern mahal purchased by them and from the mortgagor Muhammad Amin in respect of the miscellaneous property which was not mortgaged to the plaintiffs.

The Court below has excluded from consideration the sum of Rs. 4,000 which was the amount for which the mortgage in plaintiff's favour was made. In so doing we think it was right. That amount was payable to the mortgagor and the payment of it must be deemed to be payment by the mortgagor himself. As to the remainder of the amount paid by the plaintiffs we fail to understand the method pursued by that Court in ordering [389] contribution. The decree which was passed in favour of Gulzari Lal was no doubt a decree for recovery of Rs. 8,730-14-0 from the mortgaged property, but it is urged on behalf of the appellants that the decree must be deemed to be a decree for sale of the property mortgaged under the first mortgage for realization of the amount due under that mortgage and of the remainder of the property for realization of the amount of the second mortgage. On the other hand Mr. *O'Conor*, for the respondents, contends that the decree directed the realization of the total amount decreed from all the property comprised in the two mortgages. We are unable to agree with Mr. *O'Conor's* contention. In the prayer in the plaint of Gulzari Lal what he asked for was that the 6¼ biswas share in the northern mahal should be first sold by auction and out of the sale proceeds the amounts of the first mortgage should be satified and that the remainder of the mortgaged property, namely, the southern mahal, should then be sold for the realization of the amount due under the second mortgage of 1896. It is this prayer of the plaint which was granted by the Court. There is nothing to show that the Court intended to award to the then plaintiff anything more than what he had asked for. In the decree it is provided that upon payment not being made on or before the date fixed, the mortgaged property or a sufficient part thereof will be sold and in the specification of the mortgaged property reference is made to the relief asked for in the plaint. This reference clearly indicates that the Court awarded to the plaintiff what he had prayed for and no more, that is to say, it directed that the property comprised in the first mortgage should be sold for the realization of the amount due upon that mortgage and the

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property mentioned in the second mortgage should be sold for the realization of the amount payable under that mortgage. The decree contains a specification of the amounts severally due under the two mortgages. We think that in this respect the contention put forward on behalf of the appellants is correct.

This being so, it is urged that the Court below ought to have declared the amounts for which the respective properties were liable after taking into consideration the value of the property comprised in the first mortgage and the amounts due under that [390] mortgage. Reliance is placed on section 82 of the Transfer of Property Act. The second paragraph of this section provides that " where of two properties belonging to the same owner one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is in the absence of a contract to the contrary. liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid." The value of the northern mahal including miscellaneous property appertaining thereto has been found by the Court below to be Rs. 3,636. The amount due under the decree of Gulzari Lal on account of the first mortgage of 1895 was Rs. 3,844-8-0. Therefore, when for the purpose of apportioning the liability of the respective properties in regard to the subsequent mortgage the value of the two properties is taken into account, credit must be given for the amount due upon the earlier mortgage out of the value of the property comprised in the subsequent mortgage. In this case the amount due upon the earlier mortgage exceeded the value of the property comprised in that mortgage. The necessary result is that the whole of the amount of the second mortgage was recoverable from the other property comprised in the mortgage, *viz.*, the $2\frac{1}{2}$ biswas of the southern mahal and its appurtenances. The defendants respondents who are now the owners of the southern mahal, are therefore liable to the plaintiff for the amount which the plaintiff paid for saving that mahal from sale in execution of the decree obtained by Gulzari Lal, and the plaintiffs are entitled to recover the amount paid by them, *viz.*, Rs. 5,760-14-0 with interest thereon from the defendants and their property.

We accordingly vary the decree of the Court below and make a decree in the plaintiff's favour for the recovery of Rs. 5,760-14-0, with interest thereon, at 6 per cent. per annum, from the date of suit up to the date of realization, to be recovered from the property in the hands of the defendants, namely, $2\frac{1}{2}$ biswas of the southern mahal together with its appurtenances. The parties will pay and receive costs in both Courts in proportion to failure and success. We fix the 1st of July, 1911, for payment [391] of the amount decreed and direct that the decree be drawn up in the terms of order XXXIV, rule 4, of the Code of Civil Procedure.

Decree varied.

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APPELLATE CIVIL.

33 A. 391=8 I. C. 932=8 A. L. J. 192.

33 A. 391 (=9 I. C. 932=8 A. L. J. 192).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

AHMED HUSAIN AND OTHERS (*Applicants*), *v.* GOBIND KRISHNA NARAIN AND OTHERS (*Opposite parties*).*

[20th January, 1911.

Civil Procedure Code (1908), *sections* 105, 108, 109; *order XLI, rule* 23—*Remand—Appeal—Privy Council.*

Held, that an order remanding a case to the lower Appellate Court passed by the High Court under order XLI, rule 23, of the Code of Civil Procedure, 1908, is not appealable to His Majesty in Council. *Forbes* v. *Ameer-oon-nissa Begum* (1), *Mahant Ishvargar Budhgar* v. *Coudasama Amarsang* (2), *Saiyid Muzhar Hossein* v. *Mussammat Bodha Bibi*, and *Radha Kishen* v. *The Collector of Jaunpur* 4) referred to.

[Ref. 21 I. C. 912=26 M. L. J. 96=1914 M. W. N. 64=38 Mad 509; 42 All. 174=18 A. L. J. 83=54 I. C. 804; 80 I. C. 366=5 Lah. 329; Dist. 79 I. C. 87=21 A. L. J. 686=45 All. 741.]

IN a suit for the recovery of possession of certain property the Court of first instance held that the suit was barred by the provisions of section 43 of the Code of Civil Procedure, 1882, and dismissed it. There was then an appeal to the High Court. The High Court held that section 43 of the Code was not a bar to the suit, and accordingly remanded the case to the lower Court for a decision on the merits. The present application was made for leave to appeal to the Privy Council against this order of remand.

Dr. *Tej Bahadur Sapru*, for the applicants.

The opposite parties were not represented.

STANLEY, C. J. and BANERJI J.:—This is an application for leave to appeal to His Majesty in Council. The suit out of which the case has arisen was brought by the plaintiffs for recovery of possession of certain property. It was held by the Court of first instance that the suit was barred by the provisions of section 43 of the Code of Civil Procedure of 1882. But upon appeal to this Court the decree of the Court below was set aside and the case was remanded to the Court below on the ground that the suit was not concluded by section 43 of the former Code, and [392] as the questions of fact had not been determined, the court below ought to re-admit the suit and decide it on the merits. From this order of remand the present application for leave to appeal to His Majesty in Council is made. We are of opinion that the application for leave to appeal is premature. The order of remand is not in our judgment a decree or final order within the meaning of section 109, of the present Code of Civil Procedure. In the case of *Forbes* v. *Amir-oon-nissa Begum* (1), their Lordships of the Privy Council treated an order of remand as an interlocutory order and held that no appeal lay on the ground that it did not purport to dispose of the cause. Again, in the case of *Mahant Ishavargar Budhgar* v. *Caudasama Amarsang* (2) the Bombay High Court also held that no appeal lay as a matter of right from an order of remand. Again, in the case of *Saiyid Muzhar Hossein* v. *Mussammat Bodha Bibi* (3), their Lordships of the Privy Council in their judgment, in regard to the question whether or not it was the practice of this Court to treat orders of remand as not final orders, observe that probably the practice referred

* Application for leave to appeal to the Privy Council, No. 35 of 1910.

(1) (1865) 10 Moo. I. A. 545.
(2) (1884) I. L. R. 8 Bom. 548.
(3) (1894) I. L. R. 17 All. 112.
(4) (1900) I. L. R. 23 All. 220.

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to is quite correct. Again in the case of *Radha Kishan* v. *The Collector of Jaunpur* (1), in which this High Court passed an order under section 562 and remanded the case for disposal on the merits, on appeal their Lordships of the Privy Council observe of this order of remand that it is a purely interlocutory order directing procedure. In view of these decisions and of the language of section 109 of the Code of Civil Procedure, which refer to a decree or final order, we do not think that the present application is maintainable. The order which has been passed is an interlocutory order, and, as such, cannot be regarded as a decree or final order within the meaning of the section. It is contended on behalf of the proposed appellants by their learned advocate that section 105 of the Code gives the right of appeal in a case such as the present where an order of remand has been passed. That section, after providing for appeals in certain cases, prescribes in sub-section 2 that where any party aggrieved by an order of remand made after the commencement of the Code from which an appeal lies does not appeal thereform, he shall thereafter [393] be precluded from disputing its correctness. This section would no doubt justify the application which has been made if it were applicable to Privy Council appeals, but in our judgment it is not applicable to Privy Council appeals. Such appeals are dealt with in section 109 and following sections. It is further, we think, manifest from the language of section 108 that section 105 does not apply to Privy Council appeals.

For these reasons we reject the application, but without costs as the respondents are not represented.

Application rejected.

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33 A. 393 =(8 A. L. J. 158=9 I. C. 319).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

GANGARAI AND OTHERS (*Defendants*) v. KIRTARATH RAI AND OTHERS (*Plaintiffs.*)*

[20th January, 1911.]

Mortgage—Redemption—Right to reedeem one of two properties separately mortgaged.

Two persons mortgaged certain property in 1879. In 1883 one of the mortgagors executed a mortgage comprising in part property subject to the mortgage of 1879 and in part other property in favour of the same mortgagees. This latter mortgage contained a stipulation that the mortgagor would redeem it before redeeming the mortgage of 1879. Certain property comprised in the first mortgage, but not in the second, was sold, and the purchasers sued for redemption of that mortgage alone. *Held* that in the circumstances they were not precluded by the covenant in the second mortgage from redeeming the first.

[Ref. 61 I. C. 612=44 Mad. 301=40 M. L. J. 236; 55 I C 509=1 Lah. 105.]

On the 6th of May, 1879, two persons, Ram Lakhan and Ram Baran, executed a mortgage of certain property in favour of Bharose Rai, Ganga Rai and Mahpat Rai. This mortgage contained the usual covenant allowing the mortgagors to redeem on payment in the month of Jeth in any year. A portion of the property comprised in this mortgage was afterwards sold to Kirtarath Rai and others. In the year 1883 Ram

*Second Appeal No. 797 of 1910, from a decree of Sri Lal, District Judge of Ghazipur dated the 30th of June, 1911, reversing a decree of Baij Nath Das, Subordinate Judge of Ghazipur, dated the 16th of December, 1909.

(1) (1900) I. L. R. 23 All. 220.

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33 A. 393 =8 A. L J. 158 =9 I. C. 319.

Lakhan alone mortgaged certain property—partly property other than that comprised in the mortgage of 1879—to the same mortgagees. That mortgage contained the following covenant: —" First I (the mortgagor) shall pay this money, and then the money borrowed on the security of fields (i. e. the amount of the former mortgage)." The purchasers above referred to sued for redemption of [394] the mortgage of 1879, but were resisted upon the ground that it was incumbent on them first to redeem the mortgage of 1883. The court of first instance (Subordinate Judge of Ghazipur) acceded to this contention and dismissed the plaintiff's suit. On appeal, however, the District Judge reversed this decree. The defendants mortgagees appealed to the High Court.

Mr. *M. L. Agarwala* and Munshi *Parmeshar Dayal*, for the appellants

Babu *Sital Prasad Ghosh* and Babu *Balram Chandra Mukerji*, for the respondents.

STANLEY, C. J. and BANERJI, J.:—This appeal arises under the following circumstances. The suit is one for the redemption of mortgage of the 6th of May, 1879. This mortgage was executed by two persons—Ram Lakhan and Ram Baran—in favour of Bharose Rai, Ganga Rai and Mahput Rai. It contained the following provision, namely, that " when in the month of Jeth in any year the mortgagees paid the principal with Government revenue paid by the mortgagees, the property will be redeemed." Portion of the property in this mortgage was subsequently sold to the plaintiffs by Ram Lakhan and by the heirs of Ram Baran who was then deceased. Having so purchased portion of the property, it is clear that the plaintiffs would, under ordinary circumstances, be entitled to redeem the mortgage. Their claim, however, to redeem, was resisted by the appellants on the ground that a subsequent mortgage of the 24th of October 1883, was executed, whereby the mortgagor undertook, as it is alleged, not to redeem the first mortgage, until the mortgagor had first redeemed the second mortgage. This second mortgage was executed by Ram Lakhan Rai alone and not by Ram Baran or his heirs. It also comprised different property from the property comprised in the mortgage of the 6th May, 1879 On turning to this mortgage we find the following provision upon which reliance has been placed by the learned counsel for the appellants, namely "First, I (the mortgagor) shall pay this money and then the money borrowed on the security of fields" (the fields representing the property comprised in the first mortgage). The contention is that, in view of the provisions of section 61 of the Transfer of Property Act, the plaintiffs, who are purchasers of a portion of [395] the property comprised in the first mortgage, which was not included in the second mortgage, are not entitled to redeeem the mortgage of the 6th of May, 1879, until they first redeem the later mortgage—a mortgage with which they have no concern. The court of first instance acceded to this contention and dismissed the plaintiff's suit.

On appeal the learned District Judge reversed the decision of the court below, holding that upon a true construction of the agreement in the later mortgage, it did not amount to a consolidation of the two mortgages, but simply fixed the time when Ram Lakhan would pay the amount of the second mortgage.

We entirely agree with the lower anpellate court upon the view so adopted. By the second mortgage no charge whatever was created upon the property comprised in the first mortgage. This second mortgage was executed by Ram Lakhan alone and by the undertaking which Ram

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Lakhan gave, he could not in any way prejudice the rights of Ram Baran or his heirs. Moreover, the agreement is not an agreement whereby the mortgagor deprived himself or purported to deprive himself of the right to redeem the first mortgage. It is simply an agreement on his part to pay the money secured by the second mortgage first, and then the money secured by the first mortgage. This is nothing more than a provision fixing the time for payment. There is no agreement in the second mortgage on the part of the mortgagor that he would not be entitled to redeem the first mortgage, without paying the money due under the second mortgage. Mr. *Agarwala* strenuously relies upon the language of section 61 of the Transfer of Property Act, but we think that he puts a forced construction upon that section. If we turn to the illustration to the section, we get a clue as to the true meaning of it. The illustration is as follows :—

A, the owner of farms *Z* and *Y*, mortgages *Z* to *B* for Rs. 1,000. *A* afterwards mortgages *Y* to *B* for Rs. 1,000, making no stipulation as to any additional charge on *Z*. *A* may institute a suit for the redemption of the mortgage to *Z* alone.

Here, Ram Lakhan and Ram Baran executed a mortgage of one property, and subsequently one of the mortgagors, Ram Lakhan alone, mortgaged separate property, making no stipulation as **[396]** to any additional charge of the first property. This illustration discloses the intention of the Legislature in enacting section 61 and exactly meets the present case. Therefore this ground of appeal is without force.

It is further contended that under the first mortgage the mortgagors agreed upon redemption to pay the principal amount of the mortgage debt, together with any Government revenue which might have been paid by the mortgagees, and that the sum deposited in court under the provisions of the Transfer of Property Act fell short of the amount due uuder the mortgage by a sum of Rs. 25; which, it has been found, the mortgagees paid on account of revenue. It is contended that in view of this fact the mortgagors have a right to be deprived of the costs of the litigation. We are unable to accede to this contention. The sum is a very small sum and the mortgagors had no knowledge that the mortgagees had paid this amount. In fact, in their statement of claim they alleged that no revenue was paid by the mortgagees. On the other hand the mortgagees asserted that they had paid a sum of Rs. 246 in respect of revenue, whereas, as a matter of fact, they only paid Rs. 25. In view of this we do not think that the order passed by the Court below in the matter of cost, was unreasonable. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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33 A. 396 (=9 I. C. 497=12 Cr. L. J. 98=8 A. L. J. 240.).

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

EMPEROR *v.* KAMTA PRASAD.*

[26th January, 1911.]

Criminal Procedure Code, section 476—"Brought under the notice of the Court,"—"Judicial proceeding"—Decree on an award—Jurisdiction.

Held, that the words "brought under its notice" in section 476 of the Criminal Procedure Code, are wide enough to cover an offence which may have been committed in another *forum* and on some previous occasion.

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* Civil Revision No. 43 of 1910.

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REVISIONAL CRIMINAL.

33 A. 396=9 I. C. 497==12 Cr. L. J. 93=8 A. L. J. 20.

Held also that a proceeding in which a court is asked to pass a decree in accordance with an award made with reference to a pending suit cannot be said to be other than a "Judicial proceeding" within the meaning of the [397] same section. *Girwar Prasad* v. *King-Emperor* (1) *Umrao Singh* v. *Hardeo* (2) and *Banke Bihari Lal* v. *Pokhe Ram* (3) referred to.

[Ref: 1 Pat. L. J. 298=37 I. C. 487.]

THE facts of this case were as follows :—

THE applicant got an *ex parte* decree against two persons in the court of Small Causes at Calcutta, on the 5th of May, 1909, got the decree transferred to the Munsif's Court at Phaphund and applied for execution. The judgment-debtors objected that the decree was obtained by fraud. The Munsif overruled the objection on the ground that he, as the court executing the decree, could not go behind it. The judgment-debtors thereupon brought a suit in this same Munsif's court praying that the decree may be declared null and void and that the property attached in execution should be released. This suit was referred to arbitration and the arbitrator gave his award that the decree was fraudulently obtained and judgment was passed by the Munsif in accordance with the award on the 9th of September, 1909. On the 18th of October, 1909, the Munsif acting under section 476 of the Criminal Procedure Code, issued an order calling upon the decree-holder to show cause why he should not be tried by a criminal court on a charge falling under section 210, Penal Code, and on the 15th of March the Munsif ordered the prosecution of the decree-holder. The decree-holder applied to the High Court in revision.

Babu *Satya Chandra Mukerji*, for the applicant, contended that the Munsif had no jurisdiction to take proceedings under section 476 of the Criminal Procedure Code, inasmuch as there were absolutely no judicial proceedings before him. His passing a decree in accordance with the award was not sufficient to make the proceedings "judicial." The offence was not brought to his notice in a judicial proceeding as the suit as brought was not within his jurisdiction. He relied on *Umrao Singh* v. *Hardeo* (2). If the matter had been brought to his notice in execution proceedings, *Girwar Prasad* v. *King-Emperor* (1) might have been applicable. Moreover, the delay in taking proceedings against the applicant was not satisfactorily accounted for.

[398] The Government Advocate (Mr. *A. E. Ryves*) for the Crown, submitted that the case first came before the Munsif in execution proceedings. Such proceedings are "judicial" as held by the Calcutta High Court in *Barindra Kumar Ghose* v. *Emperor* (4). The Munsif distictly found that a fraud had been committed, and under the circumstances he had jurisdiction in the matter. He relied on *Banke Bihari* v. *Pokhe Ram* (3) which laid down that where there was any further relief asked for in addition to getting a decree passed by another court declarad null and void, the court would have jurisdiction to entertain the suit.

Babu *Satya Chandra Mukerji*, in reply:—

In the case in I. L. R. 25 All. 48, the prayer was one for an injunction, that made the suit cognizable. In the present case the prayer was quite different.

KNOX and KARAMAT HUSAIN, JJ.—On the 11th of February 1910, the Munsif of Phaphund, acting under section 476 of the Code of Criminal Procedure, issued an order directing that one Kamta Prasad be tried by a

(1) (1909) 6 A. L. J. 392.
(2) (1907) I. L. R. 29 All. 418.
(3) (1902) I. L. R. 25 All. 48.
(4) (1909) I. L. R. 37 Cal. 469.

criminal court on a charge falling under section 210 of the Indian Penal Code. We are asked to reverse this order on two grounds ; *first*, that the Munsif had no jurisdiction to pass the order, and *secondly*, that if he had jurisdiction, the Munsif had improperly exercised this jurisdiction.

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The decree out of which all these proceedings have arisen was a decree passed by a Court in Calcutta. Execution proceedings were taken out and the decree was transferred to the Court of the Munsif of Phaphund. Upon the Munsif of Phaphund taking action, the judgment-debtors appeared before him and stated that the decree had been obtained by fraud. The learned Munsif held the view that, as a court executing a decree, he had no alternative but to proceed with the decree, as it stood. He overruled the objection of the judgment-debtors. The judgment-debtors then instituted a suit in the court of the Munsif of Phaphund, praying that the decree in question might be declared null and void and that an injunction might be issued staying further proceedings in execution. It appears that this suit was referred to arbitration. When the arbitrator returned the **[399]** case, judgment was passed by the Munsif in accordance with the award on the 9th of September, 1909. This was followed by proceedings under section 476 of the Code of Criminal Procedure. Kamta Prasad was called on to show cause why he should not be prosecuted, and on the 15th of March, 1910, the order now under revision was passed.

It will be seen from the above statement of facts that the first plea taken in revision is hardly correct. The Munsif took action upon what had been brought under his notice in his own court, viz., the suit filed by the judgment-debtor ending in the decree of the 9th of September, 1909. An attempt has been made to contend that in passing judgment in accordance with the award the Munsif had not before him a judicial proceeding. He had merely to give judgment in accordance with the award and had nothing before him on which to exercise his judicial mind. We do not think that this is so. The proceedings before the Munsif were judicial proceedings, and the alleged offence was brought to the notice of the Munsif in the course of judicial proceedings. This Court has already held, in *Girwar Prasad* v. *King Empreor* (1), that the words contained in section 476 " brought under its notice " are wide enough to cover an offence which may have been committed in another *forum* and on some previous occasion. We do not find that in the exercise of his jurisdiction the learned Munsif has acted either illegally or with material irregularity. The contention relating to this plea was based on what this Court held in *Umrao Singh* v. *Hardeo* (2), but, as pointed out in *Banke Bihari Lal* v. *Pokhe Ram* (3), where a plaintiff asks that a compromise be declared null and void and an injunction issues restraining execution of a decree, the Court has jurisdiction to try the suit. The learned judges in that case drew a distinction between the case before them and the case of *Banke Bihari Lal* v. *Pokhe Ram*, where the plaintiff asked only a declaration that the decree has been obtained by fraud and not for any further relief.

We find no reason to interfere and dismiss the application with costs.

Application rejected.

(1) (1909) 6 A. L. J. 392.
(2) (1907) I. L. R. 29 All. 418.
(3) (1902) I. L R. 25 All. 48.

33 A. 400 (=9 I. C. 753=8 A. L. J. 162).

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APPELLATE CIVIL.

33 A. 400=9 I. C. 753=8 A. L. J. 162.

[400] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

MAZHAR HUSAIN KHAN (*Defendant*) *v.* ABDUL HADI KHAN (*Plaintiff*).*

[17th January, 1911.]

Muhammadan law—Waqf—Charitable object—Expenses of fatiha of executant—Burning lamps in mosque—Salary of Hafiz.

Held by BANERJI, J., (STANLEY, C. J., *dubitante*), that a waqf by which a substantial portion of the income of the endowed property was appropriated for (1) expenses of the annual *fatiha* of the waqif, of her husband and members of her family; (2) the annual expenses of burning lamps in a mosque, and (3) the salary of Hafiz and readers of the Quran, was a valid waqf, and that there was a substantial dedication of the property to religious or charitable purposes. *Mahomed Ahsanulla Chowdhri* v. *Amarchand Kundu* (1), *Luchmipat* v. *Amir Alum* (2), *Phul Chand* v. *Akbar Yar Khan* (3), *Biba Jan* v. *Kalo Husain* (4) referred to. *Kaleeoola Sahib* v. *Nuseerudeen* (5) and *Fakhr-ud-din Shah* v. *Kifayat-ullah* (6) doubted.

Per STANLEY, C. J. The general dedication of villages in the name of God is not sufficient to render the waqf valid, in respect of so much of the property as has been dedicated expressly for specific objects which are not proper objects of waqf; *fatiha* ceremonies and the reading of the Quran in private do not seem to be such objects.

[Ref. 84 I. C. 759=24 Bom. L. R. 1060.]

THIS was a suit to recover certain immoveable property by right of inheritance to one Muhammad Altaf Ali Khan, who had died in 1875. Since Altaf Ali Khan's death the property in suit had been in the possession of his widow Barkat-un-nissa, who had made a waqf of it. The plaintiff, on the 21st June, 1898, impeached the deed of waqf, alleging that Musammat Barkat-un-nissa had no power to make the endowment, and that it was fictitious and colourable and was executed under undue influence. It was contended on behalf of the plaintiff that Barkat-un-nissa entered into possession of her husband's property for the purpose of satisfying her dower thereout and that she was therefore incompetent to make a waqf of it.

The court below held that Barkat-un-nissa had been during her life in proprietary possession of one-fourth of her husband's **[401]** properties by right of inheritance and that in respect of this one-fourth share she was competent to make a waqf. As to the remaining three-fourths it held that her possession was in lieu of dower, and that she had no right to dispose of her interest in this share of the property. It held that the waqf was valid as to one-fourth of the properties and gave a decree to the plaintiff for mesne profits.

The defendant appealed, and the main contention advanced on his behalf was that Barkat-un-nissa's possession of the entire estate of her husband was proprietary and not to any extent in lieu of dower, and that the waqfnama was valid and effectual as regards all the property comprised in it.

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* First Appeal No. 256 of 1909, from a decree of Muhammad Mubarak Husain, Subordinate Judge of Shahjahanpur, dated the 19th of June 1909.

(1) (1889) I. L. R. 17 Cal. 498.
(2) (1882) I. L. R. 9 Cal. 176.
(3) (1896) I. L. R. 19 All. 211.
(4) (1908) 6 A. L. J. 115; I. L. R., 31 All. 136.
(5) (1894) I. L. R. 18 Mad. 201.
(6) (1910) 7 A. L. J. 1095.

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Mr. *B. E. O'Conor* (with him Maulvi *Ghulam Mujtaba*), for the appellant.

The Hon'ble Pandit *Sundar Lal* (with him Maulvi *Muhammad Ishaq*), for the respondent.

STANLEY, C.J.—The plaintiff in the suit out of which this appeal has arisen claims possession of 286 out of 512 *sihams* of zamindari property situate in the villages of Mawaya and Surahi in the district of Shahjahanpur and also mesne profits. The property claimed belonged to Muhammad Altaf Ali Khan, the cousin of the plaintiff, who died so far back as the 27th of November, 1875. He had no issue, and on his death the following were his heirs: Abdulla Khan, father of the plaintiff, Husain Raza Khan, uncle of the plaintiff and Musammat Barkat-un-nissa, his widow, who was step-sister of the plaintiff. The dower of Musammat Barkat-un-nissa is said to have been Rs. 1,25,000. On the death of her husband she entered into possession of his property, and, amongst others, of the villages of the Mawaya and Surahi. On the 21st of June, 1898, Musammat Barkat-un-nissa executed a deed of endowment of the lands situate in these villages and appointed herself *mutawalli* during her life, and after her death she directed that her sister's son, the defendant, Mazhar Husain Khan, should be *mutawalli* of the property in mauza Mawaya and Muhammad Nur-ul-Haq of the property in the village of Surahi. Abdulla Khan, father of the plaintiff, **[402]** died on the 27th of May, 1880 leaving Abdul Baqi Khan, brother of the plaintiff, Musammat Muhammadi Begam, mother of the plaintiff, Musammats Barkat-un-nissa and Naim-un-nissa, his daughters, together with the plaintiff as his heirs. Husain Raza Khan, uncle of the plaintiff, died during the lifetime of Barkat-un-nissa, leaving Abdul Baqi Khan, brother of the plaintiff, Raiz-ul-Raza Khan and Ali Raz Khan, his nephews, Musammat Moti Begam, his widow, and the plaintiff as his heirs. On the 2nd of February, 1906, and 5th of June, 1908, Abdul Baqi Khan trasferred to the plaintiff his interest in the estate of his father and of Barkat-un-nissa; and Muhammadi Begam, the mother of the plaintiff, also transferred to him her interest by a deed of sale of the 4th of June, 1908. Thus the plaintiff claims to be the owner of 286 *sihams* of the estate of Muhammad Altaf Ali Khan. In his plaint he impeached the deed of waqf of the 21st of June, 1898, alleging that Musammat Barkat-un-nissa had no power to make the endowment, and that it was fictitious and colourable and was executed under undue influence. It was contended on behalf of the plaintiff that Barkat-un-nissa entered into possession of her husband's property for the purpose of satisfying her dower thereout and that she was therefore incomptent to make a waqf of it.

The Court below held that Barkat-un-nissa had been during her life in proprietary possession of one-fourth of her husband's properties by right of inheritance and that in respect of this one-fourth share she was competent to make a waqf. As to the remaining three-fourths it held that her possession was in lieu of dower, and that she had no right to dispose of her interest in this share of the property. It held that the waqf was valid as to one-fourth of the properties and gave a decree to the plaintiff for mesne profits.

This appeal was preferred and the main contention advanced before us on behalf of the appellant is that Barkat-un-nissa's possession of the entire estate of her husband was proprietary and not to any extent in lieu of dower, and that the waqfnama was valid and effectual as regards all the property comprised in it.

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[403] A cross appeal, namely, F. A. No. 315 of 1909, was filed by Abdul Hadi Khan, and in that appeal he disputes the correctness of the court below in regard to the volidity of the waqf contending that the objects for which the waqf was created are not proper objects of waqf.

The suit was not instituted until the 22nd of January, 1909, that is, nearly three years after the death of Barkat-un-nissa, which took place on the 17th of June, 1906. It is not denied that Barkat-un-nissa was in possession from the death of her husband up to the time of her death, that is, upwards of 30 years, but the contention of the plaintiff respondent is that she was put into possession for the purpose of satisfying her dower, and that the dower having been satisfied out of the usufruct, her husband's heirs are entitled to recover the property.

The defendant appellant met this case by the production of a number of documents which according to the arguments of his learned counsel, abundantly show that from the death of her husband the possession of Barkat-un-nissa of his property was adverse and proprietary, and that the members of the family treated her ownership as proprietary. I shal deal with these documents.

[The judgment, after dealing with the documentary evidence, proceeded as follows:—]

The plaintiff, as we have said, impeached this deed of endowment as being fictitious and executed under undue pressure and influence. There is no evidence worthy of the name to indicate that any undue influence was exercised over Barkat-un-nissa or pressure brought to bear upon her in the matter of the waqf. The court below held that Barkat-un-nissa endowed the property of her own free will without any undue pressure being brought to bear upon her, and in this I agree with the court below.

It also held that the objects of the waqf were valid, but that, inasmuch as Barkat-un-ntssa was in possession and enjoyment of the property merely in lieu of dower, the waqf was only good as regards the one-fourth share to which she was entitled as an heir of her husband. Now the expenses directed [404] to be met out of the property by the deed of waqf include, as I have said, the expenses of the *fatiha* ceremony of private individuals including the *fatiha* of the executant. There is also a provision of Rs. 60 annually as a salary for Hafiz and readers of the Quran. It has been contended that these are not proper objects of waqf. There is also a direction that a certain annual sum should be applied in the expenses of lighting a mosque, offerings on the occasion of the celebration of the birth of the Prophet and offerings to the great Piran Pir, and on the tenth day of Muharram and Cheblum; also for the salary of the head teacher of a school established by the executant and the salary of a Hafiz and servant employed in the school and the lighting and carpeting of the school. As to these last mentioned objects they appear to me to be clearly valid objects of waqf. But as regards the expenses of *fatiha* ceremonies and the salary of Hafiz and readers of the Quran, I am disposed to think that these are not proper objects of waqf. Generally speaking, a waqf is valid if it be for pious or charitable purposes, as for instance. construction of bridges and musjids, the building of a *madrasa* providing books for a library, the building and maintaining of mosques, the providing of shrouds for the dead, and the providing and maintenance of burial grounds. As regards a waqf for *fatihat* in its popular sense. my brother KARAMAT HUSAIN has expressed the view that it is neither religious nor charitable in the sense of charity for the benefit of the poor. which they may claim

as a matter of right. If he be right in his views, a waqf for a *fatiha* cannot be a valid waqf. I quote from my learned brother some of his observations on the *fatiha* ceremony. After explaining what the orthodox *fatiha* ceremony is, he remarks :—

"The superstitious tendency of the human mind has added to it (i. e. the *fatiha* ceremony) innovations which are not sanctioned by the Muhammadan Law and seem to have been borrowed from non-Moslem communities and cannot possibly be regarded as part and parcel of Islam. They, in fact, are stains on the purity of Islam. One of them with which I am concerned is that during the first year of Muhammad's death his *fatiha* ceremony is performed on the third day of his death (sometimes the second day), tenth day, the twentieth day, fortieth day, and so on. After the first year it is performed, if performed at all, annually. There is, however, nothing in the Muhammadan Law to sanction such [405] a periodical *fatiha*. Another innovation is that instead of reading the Surat *fatiha* and offering the reward to the deceased on the *fatiha* day some food is prepared, a priest or a Maulvi is asked to repeat the Surat *fatiha* on the food which is distributed among the relatives and friends of the person who spent the money for the preparation of the food Some of it sometimes, as a matter of usage is given to the poor also, but they have no claim to it as a matter of right."

He later on observes that :—

"From what has been said it follows that the *fatiha* ceremony in its popular sense means the preparation of food or sweets at the death anniversary of a deceased Muhammadan, which, after the recital of a *fatiha*, is distributed among the friends and the relation of the person who spent the money over it without any regard to the poverty of the recipients. No one who is familiar with the Hanafi Law can say that a waqf for spending the income of endowed property in preparing food, which after the reading of the Surat *fatiha* over it, is given to people without any regard to their poverty is a waqf for a religious or charitable purpose. The preparation of food and the reading of the Surat *fatiha* over it cannot possibly be a religious act, and the giving of such food to persons who are not poor and who cannot claim it as a matter of right is no charity in the sense in which that term is used in the case-law of waqf."

Then he refers to the case of *Kaleloola Sahib* v. *Nuseerudeen* (1) as supporting his view that a waqf for the annual *fatiha* ceremonies of an ordinary deceased Muhammadan, although those ceremonies necessarily involve the distribution of charity, is illusory and void (7 A. L. J. R. 1095).

The view so stated seems to me to be in accordance with the tenets of Muhammadan schools. *Fatiha* ceremonies do not seem to fall within any definition of a charitable or religious use and tend to no public advantage. They closely resemble masses for the repose of the souls of deceased persons, which have been held in Ireland to be contrary to public policy and invalid. Then as regards the Rs. 60 set apart annually for the salary for Hafiz and readers of the Quran, it seems to me that this also is not a proper object of waqf. The reading of the Quran in private serves no purpose of public utility and comes within the principle of the Muhammadan Law applicable to *fatiha* ceremonies. If the expenses of *fatihat* and the salary of Hafiz and readers of the Quran directed to be discharged annually in the deed of waqf are eliminated from the endowment as being invalid, it seems to [406] me to follow that the portion of the endowed property devoted to these expenses must be exempted from the operation of the waqf. The general dedication of the villages in the name of God in my opinion would not be sufficient to render the waqf valid in respect of so much of the property as has been dedicated expressly for specific objects which are not proper objects of waqf. Income to the extent of about Rs. 200 a year has been, as I am disposed to hold, directed to be applied for purposes which are not valid. The provision in the document that the *mutwallis*

(1) (1894) I. L. R. 18 Mad. 201.

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shall be competent to apply the income in other charitable expenses if the income of the endowed property permit the same to be done, would not, I think, allow of their so applying the income expressly devoted to the expenses of *fatiha* and salary of Hafiz and readers. This provision appears to me to be intended only to meet a case in which the annual income exceeds the amount required for the expenses specifically mentioned in the waqfnama. If the dedication of the property for the *fatiha* and other ceremonies in question are valid, then the *mutawalli* is bound to apply the income to meet these expenses and not other expenses. If my view as to this be correct, so much of the property as represents the income directed to be applied for objects which are not legal, should be treated as unendowed property. When immovable property is given for mixed purposes, partly valid and partly invalid, the beneficial interest in the invalid portion passes to the heirs. I do not understand that the Privy Council have laid down any contrary ruling. What their Lordships laid down in *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhri* (1) was that provision for the dedicator's family out of appropriated property might be consistent with the making of a valid waqf where the appropriation is substantially for a pious or charitable purpose. They did not hold that where property is dedicated partly for invalid purposes and substantially for valid objects, the portion appropriated for invalid purposes should not go to the heirs. In view, however, of the rulings which are referred to in the judgment of my brother BANERJI, which I have had an opportunity of [407] reading, particularly the judgment of my brothers RICHARDS and GRIFFIN in *Biba Jan* v. *Kalb Husain* (2), in which they held that the expenses of *fatiha*, *barsi*, *et cetera*, of the members of the waqf's family were legitimate objects of waqf, I do not feel justified in recording a dissentient judgment on this question.

It remains to determine whether Barkat-un-nissa was in possession of the endowed property at the date of the execution of the deed of waqf merely in lieu of dower. It appears to me idle to contend that she was so in possession. The documents to which I have referred show that from the death of her husband she set up a claim to possession of the property as its absolute owner. There is nothing to show that either she or the other heirs of her husband regarded her possession as referable to dower, and there is nothing to indicate that she was put into possession in lieu of her dower.

There is only one piece of evidence which, if at all, supports the plaintiff's contention in this respect. In a lease of certain villages, which was executed by Barkat-un-nissa on the 14th of December, 1881, there is a statement that the property, the subject matter of the lease, was owned by her without any one's partnership by virtue of its being her property and "by virtue of her dower." This it is contended is an admission by Barkat-un-nissa that she was in possession in lieu of her dower, but I am unable to accede to this contention. In the first place we do not know the circumstances under which this lease was prepared. It does not appear that it was ever read over or explained to Barkat-un-nissa, and it is quite possible that the words in reference to dower were inserted without her knowledge. The document was signed by the pen of her nephew, Riaz-ul-Raza, and was witnessed by, amongst others, Hasan Raza Khan, the brotner of Altaf Ali Khan. She was identified before the Commis-

(1) (1894) I. L. R. 22 Cal. 619.
(2) (1909) 6 A. L. J. 115 : I. L. R. 31 All. 196.

sioner by Hasan Raza Khan and Riaz-ul-Raza Khan, and it does not appear from the registration endorsement that the document was read over or explained to her. Moreover, the words " by virtue of my dower" (*bazarya den-mahar*) are equivocal. They do not **[408]** necessarily mean that she was in possession in satisfaction of her dower. The property is described as being owned by the Musammat by virtue of its being her property and by virtue of her dower, and the expression would be applicable if the property had been given to her by her husband in satisfaction of her dower, as is not uncommon. I think that the learned Subordinate Judge attached too much weight to the recital in this document in view of the fact that Barkat-un-nissa dealt with the property as her own absolute property for over 30 years, and that none of the heirs of her husband ever, prior to this litigation, set up the case that she was not in full proprietary possession of it, but on the contrary showed by their acts and conduct that they recognized her ownership. I am of opinion that the decision of the Court below is erroneous. I therefore concur in the order proposed by my brother BANERJI.

BANERJI, J.—Two questions have to be determined in this appeal : first, what was the nature of the possession of Barkat-un-nissa in respect of the property left by her husband Altaf Ali Khan, at his death ; and, second, whether the waqf made by her on 21st of June, 1898, is valid or not.

As regards the first question, the allegation of the plaintiff is that Barkat-un-nissa was in possession of her husband's property for the realization of her dower. The Court below has held that she was in possession of one-fourth of the property in her own right as heir to her husband and of the remainder in lieu of her dower. It is contended that this latter finding is opposed to the evidence on the record and that Barkat-un-nissa was in adverse proprietary possession. The weight of evidence, in my opinion, supports this contention. The evidence on the point is set forth in detail in the judgment of the learned Chief Justice, and it is unnecessary to recapitulate it. After the death of Altaf Ali Khan the name of Barkat-un-nissa was recorded in the revenue papers as his heir under the management of the plaintiff's father, Abdulla Khan, who was one of the heirs of Altaf Ali Khan. In the mutation proceedings no mention was made of her dower. Subsequently she obtained partition of a portion of her husband's property as the owner thereof and in partition **[409]** proceedings held at the instance of Ali Raza she was made a party as one of the proprietors. Later on a reference was made to arbitration, and under the award of the arbitrator she was given her husband's share. After her death in 1906 the plaintiff and his brothers divided her property, and in all these proceedings she was treated as absolute owner and no reference was made to her dower, and it was never alleged that she was in possession for the realization of her dower. The learned Subordinate Judge has given undue weight to a recital contained in a lease granted by her in 1881, as pointed out by the learned Chief Justice. She was alive for more than thirty years after her husband's death, and the total amount of her dower was realized from the usufruct long before her death. Had she been in possession for her dower the heirs of her husband would undoubtedly have taken back the property from her possession. If it be assumed that her dower was due, that fact alone would not raise any presumption in favour of the contention that her possession was in lieu of her dower. A

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Muhammadan widow may, no doubt, be allowed to take possession for the realization of her dower, but it does not follow from the mere fact of her taking possession that she did so for her dower. For these and other reasons I fully agree with the learned Chief Justice in holding that Barkat-un-nissa was in adverse proprietary possession after her husband's death.

In regard to the second question, namely, that of the validity or otherwise of the waqf, the Court below has held it to be valid in respect of Barkat-un-nissa's own one-fourth share. The correctness of this conclusion is impugned in the connected First Appeal No. 335 of 1909, and it is urged that some of the objects of the waqf are not valid. In my judgment this contention has no force. The deed of waqf contains the following recital :—

"I, while in a sound state of body and mind and of my own free will and accord, have made an endowment of the villages, lands, groves and houses detailed above, in the name of God. I have divested myself of possession of the property and have endowed it in the name of God."

She then declares herself to be the first *mutawalli* and directs that after her death two *mutawallis* would be appointed, one for each of the two villages which are the subject of the **[410]** waqf. The document proceeds to give a detail of the expenses to be incurred and the duties to be performed by the *mutawallis* and among these details are—

(1) The expenses of the annual *fatiha* of the waqf, of her husband and of other members of her family and of two spiritual guides : (2) annual expenses of burning lamps in a mosque; (3) the salary of *hafiz* and readers of the Quran.

It is in regard to these expenses that the plaintiff urges that they are unlawful. The details of each item of expenditure under the above heads are given in the judgment of the learned Subordinate Judge, and I consider it unnecessary to repeat them here. They amount to Rs. 212 out of a total of Rs. 527.

According to the well-known decisions of their Lordships of the Privy Council a valid waqf, is created if the owner of the property, the subject of the waqf divests himself of it and appropriates it to religious or charitable purposes. Their Lordships held that in order to constitute a valid waqf there must be a substantial dedication of the property to religious or charitable uses at some time or other ; *Mahomed Ahsan-ul-la Chowdhry* v. *Amarchand Kundu* (1). In this case the maker of the waqf completely divested herself of the ownership of the property. The question is whether there was a substantial dedication for religious or charitable purposes. It is said that a provision for the *fatiha* ceremony of the appropriator and members of her family is not a religious or charitable object, and in support of this contention the dictum of our learned colleague, KARAMAT HUSAIN, J., in *Fakhr-ud-din Shah* v. *Kafayat-ul-lah* (2), is relied upon. In the view taken by the Bench which heard an appeal under the Letters Patent from the judgment of our learned brother the question of the validity of a waqf for *fatiha* ceremonies did not arise. However, any expression of opinion by our learned colleague on a question of Muhammadan Law is entitled to great weight. He holds that a waqf for the performance of *fatiha* ceremonies is invalid, not because it is so under the strict rules of Muhammadan Law but because in his opinion *fatiha* is not a charity "in the sense in which that **[411]** term is used in the case-law of waqf." He observes in the course of his judgment that "the word 'charitable' has no doubt a wider significance in Musalman Law. But now, under the rulings of the Privy

(1) (1899) I. L. R. 17 Cal. 498.

(2) (1910) 7 A. L. J. 1095.

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Council 'charity' means 'charity to the poor'." I am unable to agree with my learned brother in the view which he takes of the decisions of Their Lordships of the Privy Council. All that Their Lordships lay down is that there must be a substantial and not a merely colourable dedication of the property, and that the religious and charitable purpose should not be so unsubstantial and illusory as to give to the settlement merely a colour of piety, the real object being the aggrandisement of the family. See *Abul Fata Mahomed Ishak Chowdhri* v. *Rasamaya Dhur* (1). They nowhere held that no waqf would be valid unless its object is charity to the poor only. For instance, the establishment of a school or a *caravan serai*, which are availed of both by the rich and the poor, are admittedly objects of a valid waqf. *Fatiha*, as our learned colleague points out, is " the offering up of prayers to the Almighty for the remission of sins and the acceptance into heaven of the individual in whose name it is desired." This undoubtedly is a religious act, and expenses for such an act cannot but be regarded as expenses for a religious purpose. The weight of authority is in favour of the view that a waqf for the performance of *fatiha* ceremonies of the donor and of the members of his family is valid. In *Luchmiput Singh* v. *Amir Alum* (2) a waqf for *fatiha* at the tomb of members of the dedicator's family was held by the Calcutta High Court to be valid. In *Phul Chand* v. *Akbar Yar Khan* (3) a Bench of this Court held that a waqf for the performance of *fatiha* ceremonies, which involve according to the custom of this country the distribution of alms, is a good waqf. Similarly in the recent case of *Biba Jan* v. *Kalb Husain* (4) RICHARDS and GRIFFIN, JJ., held that expenses of the death anniversaries (*fatiha*, *barsi*, etc.) of the members of the waqi's family are legitimate objects of waqf. Original authorities [412] of Muhammadan Law were cited in the argument in support of this view and are set forth on page 7 of the Appendix to the report of the case. The only case in which a contrary view was held is that of *Kaleloola Sahib* v. *Nuseerudeen Sahib* (5) which was followed by KARAMAT HUSAIN, J., in the case to which I have already referred. I have expressed my dissent from the view of COLLINS, C. J., and PARKER, J., in that case in my decision in *Sayed Mustafa* v. *Amina Begam* (6), and I see no reason to alter my opinion. That case was, it is true, followed by TAYABJI, J., in *Zooleka Bibi* v. *Syed Zynulabdin* (7), but not on the question of *fatiha*. TAYABJI, J., approved of that ruling in so far as it laid down that a valid dedication could not be made for the maintenance of a private tomb, but he expressed no opinion on the question of *fatiha*. That question did not also arise in *Muhammad Munawar Ali* v. *Rasulan Bibi* (8). Referring to the ruling of the Appellate Court in *Kaleloola Sahib* v. *Nuseerudeen Sahib*, Mr. Ameer Ali remarks (Mahomedan Law, Vol. I, p. 390, 3rd Edition) that "under Mahomedan Law there could not be the faintest doubt that the waqf in this case was absolutely valid." Among the objects of the waqf in that case were the salaries of repeaters of the Quran, and the expenses of the annual *fatiha* of the deceased, and as to all these Mr. Ameer Ali is of opinion that they are valid objects of waqf. No authority was referred to by the learned Judges of the Madras High Court

(1) (1894) I. L. R. 22 Cal. 619.
(2) (1882) I. L. R. 9 Cal. 176.
(3) (1896) I. L. R. 19 All. 211.
(4) (1909) 6 A. L. J. 115; I. L. R. 31 All. 136.
(5) (1894) I. L. R. 18 Mad. 201.
(6) (1904) 2 A. L. J. 519.
(7) (1904) 6 Bom. L. Rep. 1058.
(8) (1899) I. L. R. 21 All. 329.

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33 A. 400=9 I. C. 758=8 A. L. J. 162.

for holding a contrary opinion, and I see no reason to accept it. I hold that *fatiha* expenses are a valid object of waqf.

As for the expenses of burning lamps in a mosque and the salary of Hafiz and readers of the Quran they are, according to Mr. Ameer Ali, valid objects of waqf. That the lighting of mosques and the reading of the Quran are meritorious acts cannot admit of any doubt. The authorities cited on pages 5 and 6 of the Appendix to the report of the case of *Biba Jan* v. *Kalb Husain* (1) show that what Abu Hanifa considered as repugnant was the reading of the Quran at graves, but that [413] the payment of remuneration to readers or repeaters of Quran generally is not illegal or improper. I may observe that on the above questions no authorities were cited at the hearing by the learned advocate for the plaintiff.

Furthermore, the deed of Waqf in this case gives full power to the *mutawalli* to defray "other necessary charitable expenses if the income of the endowed property permits the same to be done." If, therefore, the objects referred to above, are not proper objects of waqf the *mutawalli* has the power to devote the income to other charitable objects which are not open to objection. I have pointed out above that the total amount of expenses mentioned in the deed of waqf is Rs. 527, out of which exception is taken to items amounting to Rs. 212 only. There was therefore a substantial dedication of the property to religious or charitable purposes within meaning of the rulings of Their Lordships of the Privy Council and the waqf is valid. For the above reasons I am of opinion that the decision of the Court below on this point is correct.

The result is that in my judgment the plaintiff's suit should be dismissed in its entirety, the appeal of the defendant (No. 256 of 1909) should be allowed and the plaintiff's appeal No. 315 of 1909 should be dismissed. I would order accordingly.

BY THE COURT:—The order of the Court is that this appeal is allowed, the decree of the Court below is set aside and the plaintiff's suit is dismissed with costs in this Court and in the court below.

Appeal allowed.

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33 A. 414 (=8 A. L. J. 199=9 I. C. 935).

[414] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

KANTI CHANDRA MUKERJI, (*Plaintiff*) *v.* AL-I-NABI AND OTHERS (*Defendants*). *

[25th January, 1911.]

Act No. IV of 1882 (Transfer of Property Act), section 6—Transfer of expectancy—Compromise between Hindu brothers that property of a brother dying without male issue should be divided amongst survivors—Hindu law—Dayabhaga—Administration—Suit to enforce administration bond—Limitation.

Held that a provision in a family settlement whereby certain Hindu brothers divided the family property belonging to them amongst themselves and agreed that upon the death of any one of them without male issue his share should pass to the surviving brothers was neither in contravention of Hindu Law nor obnoxious to the provisions of the Transfer of Property Act, section 6 (*a*), as

* First Appeal No. 263 of 1909, from a decree of E. H. Ashworth, District Judge of Benares, dated the 20th of May, 1909.

(1) (1909) 6 A. L. J. 115; I. L. R. 31 All. 136.

being a transfer of an expectant interest in property. *Ram Nirunjun Singh* v. *Prayag Singh* (1) followed.

Held, also, that where the assignee of a bond given by an executor for the due administration of the estate sues to enforce the bond, time does not begin to run against him necessarily until the death of the obligor.

[Ref. 51 I. C. 919=41 All. 611; Fol. 79 I. C. 514=22 A. L. J. 419=46 All. 525; Cause of action—Suit on administration bond—Time when begins to run. Fol. 29 M. L. J. 214=1915 M. W. N. 405=29 I. C. 549; Ref 76 I. C. 802=1 Rang. 463]

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THE facts of this case were as follows:—

One Durga Shankar Bhattacharji was one of the executors to the will of one Musammat Shib Kali Debia. He obtained probate from the District Judge of Benares on the 12th of June, 1899. On the 21st of June, 1899, an administration bond was executed by Durga Shankar and the defendants, Syed Al-i-Nabi and Syed Shah Tasadduk Husain, as his sureties for the due administration of the estate of Musammat Shibkali. The plaintiff, who is the step-son of Musammat Shibkali, came into court alleging that the assets of the deceased were misappropriated, and consequently the plaintiff had to apply for letters of administration with the copy of the will annexed, which were granted to him on the 16th August, 1904, by the District Judge of Benares. Therefore the plaintiff applied for assignment of the administration bond, and the bond was transferred to him on the 10th of April, 1907. The plaintiff brought the present suit on the 16th June 1907, to recover from the representatives of Durga Shankar (who had since died), *viz*, his brother's nephew and widow, and also from the sureties, the **[415]** amount of the assets which had been misappropriated by Durga Shankar.

The District Judge of Benares decreed the plaintiff's claim as against the sureties and also against the widow of Durga Shankar to the extent of Rs. 4,891-8-0, but dismissed the suit as against the brothers and nephew of Durga Shankar, on the ground that they were neither the legal representatives of Durga Shankar nor in possession of any of his property.

The plaintiff appealed against the decree of the court below dismissing his claim as against the brothers and nephew of Durga Shankar.

Babu *Jogindro Nath Chaudhri* (with him Dr. *Satish Chandra Banerji*, Babu *Satya Chandra Mukerji* and Babu *Surendra Nath Sen*), on behalf of the appellant, contended that the evidence on the record proved that the brothers and nephew are in possession of the assets of the deceased Durga Shankar, that the agreement of compromise, which was on the record, and which was made the subject of a decree of court long before the present suit was brought, in the course of a litigation between Durga Shankar and his brothers, provided that in the event of the death of any of the brothers without male issue, his property would devolve on the surviving brothers in equal shares, subject to certain conditions, and as Durga Shankar had died without male issue, his brothers and nephew were his heirs and legal representatives. He relied mainly on *Ram Nirunjun Singh* v. *Prayag Singh* (1), and also on the definition of the words "legal representative" as given in section 52 of the Code of Civil Procedure.

Dr. *Tej Bahadur Sapru* (with him Babu *Beni Madhub Ghosh*), on behalf of one of the brothers and the nephew of Durga Shankar contended that the provision in the compromise was repugnant to the Hindu law of succession and that the brothers and nephew of Durga Shankar had not been properly sued, inasmuch as they did not represent Durga Shankar's

(1) (1881) I. L. R. 8 Cal. 133.

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estate. He further contended that the provision in the agreement of compromise relied on by the plaintiff appellant purported to be a [416] transfer of a mere expectancy and was in contravention of section 6 (a) of the Transfer of Property Act.

STANLEY, C. J., and BANERJI, J.:—This appeal arises under the following circumstances :- One Musammat Shib Kali Debia of Benares made a will on the 11th of January, 1891, and thereby bequeathed her property for certain purposes and appointed six persons executors. She died on the 8th of April, 1897, and thereupon an application for probate was made by one of the executors, Durga Shankar, now deceased, and probate was granted to him on the 12th of June, 1899. On the 21st of June 1899, an administration bond was executed by Durga Shankar and the defendants, Syed Al-i-Nabi and Syed Shah Tasadduk Husain, as his sureties for the due administration of the estate of Musammat Shib Kali Debia. In this bond the executants undertook responsibility for the due administration of the estate by Durga Shankar, and it was provided by it that the obligation under the bond was to remain in force until Durga Shankar had discharged the duties of the administration of the estate. Durga Shankar did not administer the assets as he had undertaken to do, but misappropriated them, and in consequence the plaintiff, who is the step-son of Musammat Shib Kali Debia, applied for letters of administration of her esate with the will annexed, and such letters were granted to him on the 16th of August, 1904. He further applied to the District Judge for an assignment of the administration bond executed by Durga Shankar and his sureties, and this bond was transferred to him on the 10th of April, 1907.

The suit out of which this appeal has arisen was then instituted by the plaintiff to recover from the representatives of Durga Shankar, including his widow, and also from the sureties, the amount of the assets which had been misappropriated by Durga Shankar.

A defence to the suit was filed by both the sureties and also by Bishnu Shankar, one of the brothers of Durga Shankar.

The court below decreed the plaintiff's claim as against the sureties and also as against the widow of Durga Shankar to the extent of Rs. 4,891-8-0. The decree was passed against the defendants 1 and 2 as sureties only and as against the widow of Durga Shankar as his heir. The claim was dismissed as [417] against the defendants 3—6, who are three of the brothers and a nephew of Durga Shankar.

This appeal has been preferred by the plaintiff, and the contention put forward on his behalf is that the court below was wrong in dismissing the suit as against the defendants 3 to 6. These defendants, as we have said, are the brothers and a nephew of Durga Shankar, and liability is sought to be fixed on them by reason of the following facts. Prior to the 11th of October, 1890, Durga Shankar and his brothers and a nephew had disputes in regard to family property. They entered into a compromise whereby the ancestral property was divided between them and this compromise was subsequently embodied in a decree. One of the terms of the compromise was that if Durga Shankar or any of his brothers should die without leaving male issue, then the surviving brother would by division in equal shares take possession of and enjoy and appropriate the share of the person so dying. Durga Shankar having died without male issue, the allegation of the plaintiff is that his share of the property comprised in the aforesaid compromise and decree passed to his brother and

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nephews and that the defendants, the brothers and one of the nephews of Durga Shankar, are actually in possession of Durga Shankar's share of the family property.

In the written statement of Bishnu Shankar it is denied by him that he is in possession of any property left by Durga Shankar. He states that after the death of Durga Shankar he, along with the other members of the family, paid debts due by Durga Shankar and had been paying Rs. 25 per mensem to the widow of Durga Shankar, namely, the defendant, Musammat Sarojini Debia, for her maintenance; and he put forward the defence that if any portion of the property possessed by him were considered to be of the estate of Durga Shankar, having regard to the above facts he could in no wise be held responsible to pay the amount claimed.

The surety Al-i-Nabi was examined, and he in his evidence, which has not been controverted, alleged that the property which belonged to Durga Shankar was still in the possession of his heirs, namely, Bhikari Shankar, Bishnu Shankar, Sarat Shankar, and Addiya Shankar, his brothers, [418] and Musammat Sarojini Debi, his widow. This evidence was as we have said, not controverted, and it shows that the property of Durga Shankar did pass under the compromise upon his death into the hands of his brothers.

The question, then, for our determination is whether or not the Court below was right in exempting the brothers and nephew, defendants 3 to 6, from the operation of the decree. It is contended on their behalf that the provision in the compromise which provided that on the death of any brother without male issue his share shall go to the other brothers is repugnant to Hindu Law being repugnant to the ordinary rule of succession to property and that the defendants 3 to 6 have not been properly sued, inasmuch as they do not represent Durga Shankar's estate. It is said that the parties are governed by the Dayabhaga School of law and that the widow of Durga Shankar is his heir, and, as such, entitled to the estate of Durga Shankar. It is further contended that the provision to which we have referred above purports to be a transfer of a mere expectancy and is in contravention of section 6 (*a*) of the Transfer of Property Act. We are of opinion that there is no force in this contention. Durga Shankar was not dealing with an expectant interest in property. He and the other parties to the agreement of compromise were dealing with the property, which at the time belonged to them, and we are unable to hold that a provision, whereby, upon a family settlement, such as this was, brothers agreed that upon the death of any of them without male issue the share to which he should be entitled, should go to the other brothers, is in contravention of Hindu Law, or obnoxious to the provisions of the Transfer of Property Act.

This is very case similar to the case of *Ram Nirunjan Singh* v. *Prayag Singh* (1). In that case two or four brothers had disputes in regard to the property of their father. They entered into a compromise for themselves, and one of them also as guardian of his two minor brothers, whereby it was agreed that with the exception of certain trust property the estate of their father should be divided equally between the four brothers, [419] with this provision superadded that "if any of the brothers should die without any issue, then the surviving brothers should succeed to his heritage in equal shares, none of them having any claim or contention against the other on the score of commensality of joint tenancy." It was

(1) I. L. R. 8 Cal. 138.

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contended in that case that this provision was repugnant to Hindu Law and could not therefore be enforced. MITTER and MACLEAN, JJ., held that there was nothing in the Hindu Law which made such an agreement illegal. The provision in the present case is similar to that which was considered in the case just cited, and we see no good reason for disagreeing with the views of the learned Judges who decided it. Defendants 3 –6 ought not, therefore, to have been exempted from liability as representatives of Durga Shankar.

It may be that they have not received any portion of the assets of Durga Shankar, and it may be that they will not recover any portion of his assets ; but if this be so, they will not be damnified by the decree which we propose to pass against them. These defendants are representatives of the deceased Durga Shankar within the meaning attached to that term by the Code of Civil Procedure. A representative means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of a deceased person. Section 52 of the Code prescribes the mode of execution of a decree against such a representative. A plaintiff has a right to sue the representatives of his deceased debtor and to obtain a decree against them, although it is not proved that assets have come into their hands. It is sufficient to prove that there are assets of which they may become possessed. In this case the existence of assets is not denied. We, therefore, upon this question, overrule the decision of the Court below.

The only remaining question is raised in the connected cross appeal. It is an appeal on the part of one of the sureties, Syed Al-i-Nabi, and the only ground of appeal which has been pressed before us in argument is the first, namely, that the suit is time-barred. The contention of this defendant is that one of the provisions of the bond was that an [420] inventory should be exhibited within a certain time, and that on a breach of this condition of the bond time began to run as against the sureties and the suit is time barred. We do not think that the date on which one of the conditions of the bond was broken is the starting point from which limitation is to be calculated in a case such as the present in which the plaintiff's case is that Durga Shankar in his lifetime failed to administer the assets of the deceased. The bond itself, as we have pointed out, expressly provides that the obligation undertaken in it was to remain in force until Durga Shankar fulfiled the duties of the administration of the estate, probate of which had been granted to him. Durga Shankar died on the 12th July, 1903. Time did not begin to run against the plaintiff until his death, and six years did not elapse between the date of the death of Durga Shankar and the bringing of the suit.

The appeal therefore of Syed Al-i-Nabi must be dismissed. We vary the decree of the Court below, and we give a decree to the plaintiff for Rs. 4,891-8-0 against the defendants 1 and 2 as sureties, to be satisfied by them jointly and severally, and against the defendants 3 —7, to be satisfied out of any assets of Durga Shankar which have come to or may hereafter come to their hands. The costs of this appeal will be borne by the defendants 3—6. Those defendants and defendant No. 7 will bear their own costs in both Courts. In other respects we affirm the decree of the Court below

Decree valid.

33 A. 421 (=10 I. C. 727=8 A. L. J. 206).

[421] APPELLATE CIVIL.

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33 A. 421= 10 I. C. 727=8 A. L. J 206.

Before Sir John Stanley, Knight, Cheif Justice, and Mr. Justice Banerji.

MUBARAK-UN-NISSA (*Defendant*) *v.* MANSAB HASAN KHAN AND ANOTHER (*Plaintiffs*).*

[26th January, 1911.]

Mahomedan law—Dower—Agreement between husband and wife as to satisfaction of wife's dower—Construction of document—Mortgage—"Mahabat."

A Muhammadan made over to his wife, to whom a dower of Rs. 1,25,000 was due, certain property. In the deed of transfer it was stipulated (1) that the wife was to take possession of the property in lieu of her dower and enjoy the usufruct; (2) that the property was to revert to the husband if the wife predeceased him, the dower debt being deemed to have been discharged; (3) that if the husband predeceased the wife the property was to become hers absolutely.

Held that the transaction was neither a mortgage by conditional sale nor a *mahabat*, but the wife obtained a right to enjoy the usufruct during her husband's lifetime, with the possibility of the interest developing into full ownership if the husband predeceased her.

[Fol. 21 M. L. J. 958=(1911) 2 M. W. N. 412; Dist. 3 Pat. L. W. 232=43 I. C. 196.]

THE following pedigree shows the relationship of the parties :—

HAMID HASAN KHAN.

Mahmud Hasan Khan.	Masnad Hasan Khan = Mubarak-un-nissa, defendant 1.	Mahbub Hasan Khan.
		Mansub Hasan Khan, plaintiff 1.
Maulud Hasan Khan, defendant 4.	Mamnun Hasan Khan, plaintiff 2.	Maujud Hasan Khan, defendant 5.
		Mashud Hasan Khan, defendant 6.

Masnad Hasan Khan transferred certain properties to his wife, the appellant, by a deed of *tasfia-nama*, dated the 22nd of September, 1883, in which he admitted that Rs. 1,25,000 was due to her as dower. The *tasfia-nama* provided :—

"That the property shall be put in possession of the wife in lieu of the dower debt with the conditions that during her lifetime she shall collect and enjoy the profits of all the properties in lieu of the dower debt ; that if she dies before the husband the dower debt shall be deemed paid up, no matter whatever portion thereof is realized by that time ; that the dower debt being deemed as satisfied, the properties shall revert to the husband; that in such a case the wife's possession shall be deemed to be (one under) a *bil mukta theka*; that the annulment of this lease and the satisfaction of the debt shall be deemed from that time in the year of the wife's death in which she may make the last collection before her death of any portion of the profits from any property; and that if the husband dies before the wife the properties shall be owned by the wife in lieu of [422] the dower debt remaining due at that time, no matter whatever amount it may be, and the husband's proprietary rights shall become extinct."

On the 7th of April, 1892, both husband and wife executed a deed whereby a greater portion of the property comprised in the *tasfia-nama* was declared to be *waqf*. In the year 1898 Masnad Hasan Khan inherited some property from his mother, which, along with some other property,

* First Appeal No. 332 of 1907 from a decree of Achal Behari, Subordinate Judge of Shahjahanpur, dated the 9th September, 1907.

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passed into the hands of the wife as the result of a compromise between the two, by which the wife was to hold the property affected on the terms of the *tasfia-nama* of 1883, except that a life-interest was given to him. On the 15th of August, 1903, the husband and wife executed a *tauliat-nama* appointing defendants 2 and 3 as *mutawallis* of the *waqf* property after the death of the wakifs. On the 9th of September, 1903, Masnad Hasan Khan executed a deed of relinquishment in favour of his wife by which he relinquished the life interest reserved to him under the compromise, in favour of his wife. Masnad Hasan Khan died on the 1st of March, 1905. This suit was brought by the plaintiffs respondents for their share in the property left by Masnad Hasan Khan at his death, on the allegation that the deed of *waqf* was invalid, and that the dower debt of the appellant had been satisfied out of the usufruct of the property. The lower Court allowed the claim, holding the possession of the widow to be one analogous to that of a mortgagee. It further held that the *waqf* was an invalid one, executed chiefly to defeat the claims of the heirs after the death of Masnad Hasan Khan. The defendant appealed.

The Hon'ble Pandit *Sundar Lal* (with him Maulvi *Muhammad Ishaq*), for the appellant :—

Masnad Hasan Khan did not leave any estate at the time of his death. By the *tasfia-nama* of 1883 in case of the death of Masnad Hasan Khan the transaction was to be treated as a sale of the property comprised in the deed in lieu of the amount of the dower that might happen to be due then. It was an ordinary contract, and as a result of that the property became the wife's absolutely at the time of the husband's death. Again, both the husband and wife joined in executing a waqf of the whole of the zamindari property for certain purposes. They supplemented this waqfnama by the *tauliat-nama* of 1903. The waqf is quite [423] valid and the heirs have no right to claim a share in the property thus dedicated to pious uses. Thirdly, when the property subsequently acquired by Masnad Hasan Khan was made the subject of arbitration proceedings, the award only reserved a life interest to the husband, and as he effected a deed of relinquishment with reference to this and what had not formed part of the waqf of 1892, there was nothing left in him which the heirs could claim. On principle there is no difference between this and an ordinary sale. Either had the chance of enjoying the property free in case the other died. In a conditional sale the main object is the payment of money, It is not so here. As to the waqf, it is a perfectly valid one. The fact that the executant wanted to deprive their nephews is no argument against the validity of the deed of waqf. A good portion of the property has been endowed ; *Kaleloola Sahib* v. *Nuseerudeen Sahib* (1), *Delroos Banoo Begum* v. *Nawab Sayad Asghar Ali Khan* (2), *Nizamudin Gulam* v. *Abdul Gafur valad Mainudin* (3), *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (4), *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (5), *Deoki Prasad* v. *Inaitullah* (6) and *Luchmiput Singh* v. *Amir Alum* (7).

There was nothing to prevent the waqifs from including the small items for the support of their family. A waqf in favour of a waqif's children is held to be valid by some writers.

(1) (1894) I. L. R. 18 Mad. 201.
(2) (1875) 5 B. L. R. 167.
(3) (1888) I. L. R. 13 Bom. 264.
(4) (1870) 13 W. R. 255.
(5) (1889) I. L. R. 17 Cal. 498.
(6) (1892) I. L. R. 14 All 375.
(7) (1882) I. L. R. 9 Cal. 176.

The Hon'ble Pandit *Moti Lal Nehru* (with him Babu *Durga Charan Banerji* and Maulvi *Ghulam Mujtaba*), for the respondents.

The deed of 1883 created a usufructuary mortgage by way of conditional sale. The essence of a usufructuary mortgage is that possession is security for the debt and not the property itself. A usufructuary mortgagee has no right to bring property to sale. If a creditor is to pay himself out during his lifetime, it would not prevent the transaction being a mortgage. The parties could make its termination depend on any contingency they liked. It could not be anything else. Both parties retained their life interest with the expectancy of an absolute interest in the event [424] of one surviving the other. Neither party, however, could enforce his or her right till after the death of the other. Here the case is stronger than that in *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein* (1). On the one hand there is a right to retain possession till payment—all that a mortgagee can do; on the other there is a right to account—all that a mortagagor can claim. If the wife predeceased the husband, it was to be a *zar-i-peshgi* lease. If he died before the wife, she was to remain in possession. He did not part with his interest *in præsenti*. He continued to be the owner of the property; *Khajooroonissa* v. *Rowshan Jehan* (2).

Having regard to Muhammadan law the transaction was a "mahabat." Certain principles of Muhammadan law had to be borne in mind. (i) A transfer or disposition *in præsenti* made in health (gift or sale or "mahabat") was valid. (ii) A disposition which took effect after death in whatever form, was a bequest and valid only to the extent of $\frac{1}{3}$rd if made to a stranger and not valid at all if made to an heir without the consent of other heirs. (iii) A transfer *in præsenti* made on death-bed, had the same effect as a bequest. (iv) A transfer for inadequate consideration was a "mahabat," *i. e.*, it was a sale to the extent of the property covered by the consideration and a gift as to the excess. (v) Mahabat could be so made as to take effect immediately or after death, (*a*) if immediately and not made on death-bed, it was valid. (*b*) If after death, or immediately, but on death-bed it was valid only as to the property covered by consideration plus $\frac{2}{3}$rds of the excess: if it was in favour of an heir it was wholly void. Here the wife was to become owner on death of husband in return for whatever was left due to her of the dower debt. That balance could be in excess of the value of property or fall short of it. In the former case there was no "mahabat", and she took possession of the whole, in the latter case it was a "mahabat"; Hidaya p. 258 (Printed at the Haidri Press, Bombay); Kifaya.—A commentary on Hidaya p. 289; Durrul Mukhtar, Part v. p. 667 (margin), Chapter of Emancipation in (mortal) illness; Ruddal Mukhtar, p. 667; Hidaya (edn. as above), p. 267; Bailey's Hidaya, Book 52, Ch. 2, pp. 676, 685.

[425] The gift here was void:—Wilson's Muhammadan Law, section 313, page 332. It was not a gift *in præsenti*, for the rights of the wife were not to be complete till the death of the husband. His case was that either it was a mortgage or a testamentary disposition: *Saiad Kasum* v. *Shaista Bibi* (3). Any disposition to take effect after death was a testamentary disposition. There was no present gift: the husband continued in possession. Ownership was not to accrue to wife till his death. Even a sale for full consideration was a testamentary disposition under Muhammadan law if it took effect after death. But the Muhammadan law did

(1) (1871) 14 Moo. I. A 877.
(2) (1876) I. L. R. 2 Cal. 184.
(3) N. W. P. H. C. Rep. 1875, p. 313.

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not apply to sales in India. The value of the transaction was to be determined by circumstances as they prevailed at the time of death, it would be a sale if there was any dower due and it would be valid as the law governing sales was not Muhammadan law. But if the dower due was less than the value of the property, it would be a gift as to the excess and the Muhammadan law of gifts would apply, provided, of course, it was to take effect after death: Wilson's Muhammadan Law, section 283, page 309; *ibid.*, section 285, page 310; Bailey's Muhammadan Law, page 651.

As to validity of the waqf it was no substantial dedication of the property. The Privy Council had decided that point. There was no intention that the interest should be paid. The case of *Hamira Bibi* v. *Zubeda Bibi* (1) only placed dower debt on footing of an ordinary contract. It did not award interest in all cases of dower debt.

The Hon'ble Pandit *Sundar Lal*, in reply: —

The word used in the deed was * * * (exchange). Property went in exchange for the debt. The wife acquired an interest in the property which was equivalent to a right of present enjoyment plus the right of ownership on death of the husband. It was a sale of property liable to be defeated if she died before him.

The question of "mahabat" did not arise. A present interest would be given to the wife which would not be the case in a "mahabat."

STANLEY, C. J., and BANERJI, J.,: —The suit out of which this appeal has arisen was brought by the plaintiffs respondents for [426] possession of a share of certain property which originally belonged to their deceased uncle, Masnad Hasan Khan. They claim as his heirs the share to which they are entitled under the Muhammadan law. They also pray for mesne profits.

Masnad Hasan Khan died on the 1st of March, 1903, leaving him surviving as his heirs, the first defendant Musammat Mubarak-un-nissa, his widow and five nephews' two of whom are the plaintiffs. It is common ground that the dower of Musammat Mubarak-un-nissa was Rs. 1,25,000, and that this amount was due to her. In order to provide for the payment of the dower, Masnad Hasan Khan executed a document in her favour on the 22nd of September, 1883, by virtue of which she is admittedly in possession of his estate. The construction of this document is the principal question to be determined in this appeal. Whilst it is asserted in the plaint that the instrument was a lease granted to Mubarak-un-nissa for the realization of her dower and that she is bound to surrender the property on her dower being discharged, it is urged on her behalf that she has acquired an absolute interest in the property under the provisions of the document. The plaintiffs allege that she has realized the whole amount of her dower from the usufruct of the property, and they are therefore entitled to obtain possession of their share.

On the 7th of April, 1892, Mubarak-un-nissa and Masnad Hasan Khan jointly executed a deed of waqf in respect of a portion of the property, and by a later deed of the 15th of August, 1903, they provided for the management of the waqf and appointed the second and third defendants as their successors in the office of *mutawallis*. It is asserted by the plaintiffs that this waqf is nominal and fictitious that Masnad Hasan Khan continued to be the owner of the property till his death, and that the waqf is also invalid under the Muhammadan law.

Upon the death of Masnad Hasan Khan's mother a reference to arbitration was made by him and Mubarak-un-nissa for the settlement of their

(1) (1910) I. L. R 33 All. 182.

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claims in regard to the property inherited from the mother, and an award was delivered by the arbitrator on the 10th of October, 1898. This was made a rule of Court on the 30th of November, 1898. Subsequently on the 9th of September, 1903, Masnad Hasan Khan executed a deed of relin- [427] quishment in favour of his wife. These transactions are alleged by the plaintiffs to be fictitious and collusive and made with a view to deprive them of the property.

The Court below has held that under the instrument of the 22nd of September, 1883, Masnad Hasan Khan made a usufructuary mortgage in favour of his wife for the amount of her dower; that the transaction was at least analogous to a mortgage; that Mubarak-un-nissa was in possession in lieu of her dower; that the waqf is invalid and that the plaintiffs are entitled to possession on payment of the balance of dower due to Mubarak-un-nissa. It has accordingly made a decree in favour of the plaintiffs for possession of their share of the property (except movables and house property, in respect of which they abandoned their claim), on condition that they do pay to Mubarak-un-nissa their proportionate share of Rs. 43,482 which it has found to be the balance of dower due to her.

The defendant, Mubarak-un-nissa, has preferred this appeal. The plaintiffs have filed the connected appeal No. 21 of 1908 in which they question the correctness of the finding of the Court below as to the amount of the dower due to the defendant.

The decision of this appeal hinges mainly on the construction of the instrument, dated the 22nd of September, 1883, mentioned above. That document was executed both by Masnad Hasan Khan and Mubarak-un-nissa, and the material portion of it is thus translated :—

"In order to make arrangement for repayment of the dower debt and to shake off the liability of the husband both in this and the next world, the husband and the wife have made settlement as follows :—That is to say, all the properties detailed below, now possessed by the husband, shall be put in the possession of the wife in lieu of the dower debt, with the conditions that during her lifetime she shall collect and enjoy the profits of all the properties in lieu of her dower debt; that if she dies before the husband, the dower debt shall be deemed paid up, no matter whatever portion thereof is realized by that time; that the dower debt being deemed as satisfied, the properties shall revert to the possession of the husband, that in such case the wife's possession shall [428] be deemed to be (one under) a *bil makta theka* (lease for a fixed sum); that the annulment of this lease and the satisfaction of the debt shall be deemed from that time in the year of the wife's death at which she may make the last collection before her death of any portion of the profits from any property; and that if the husband dies before the wife, the properties shall be owned by the wife in lieu of the dower debt remaining due at that time, no matter whatever amount it may be, and the husband's proprietary rights shall become extinct."

The scope of the document is three-fold : (1) the wife is to take possession of the property in lieu of her dower and enjoy the usufruct; (2) the property is to pass to the husband, if the wife predeceases him, and the dower debt is to be deemed to be discharged; and (3) if the husband predeceases the wife, she is to become absolute owner of the property, whatever may be the balance of dower due. It is claimed on behalf of the wife that as her husband is dead, she has acquired the absolute ownership of the property. We are unable to agree with

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the Court below in the view that a mortgage was effected. The property of the husband was not made security for the wife's dower, and it was not pledged for the dower. The mere fact that possession was delivered to the wife did not create an hypothecation of the property for the amount of the dower. This, in our opinion, is the effect of the decision of their Lordships of the Privy Council in the case of *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein* (1), and we do not think the learned Subordinate Judge has correctly appreciated it. Their Lordships observed : —" The claim of Musammat Bebee Bachun to hold the property to satisfy her dower cannot be founded upon an original hypothecation of the estate for her dower—for such a right does not arise under the Muhammadan Law as a consequence of the gift of dower, nor was there any agreement on the part of the husband to pledge his estate for the dower." In the document before us we fail to find any provision which may be construed to be a hypothecation or pledge of the property. The learned advocate for the respondent contends that the document must be deemed to be a will. We cannot accede to this contention. **[429]** There was no disposition of the property to take effect only after the husband's death. Nor do we think the transaction was of the nature of what is known in Muhammadan Law as *muhabat*. In our opinion the property was, by the instrument in question, vested in Musammat Mubarak-un-nissa *in præsenti* in lieu of her dower, subject to the condition that in the event of her predeceasing her husband it should go to her husband alone to the exclusion of her other heirs. It was a conveyance which has not happened and to a condition the validity of which we are not called upon to determine. The interest created, was, as Mr. *Sundar Lal* aptly put it, a right to enjoy the usufruct of the property during the lifetime of the husband, which was to develope into full ownership on the happening of a contingency, namely, the death of the husband in the lifetime of the wife. That contingency having happened and the husband of Musammat Mubarak-un-nissa being dead, she has become the absolute owner of the property and the plaintiffs as some of the heirs of her husband are not entitled to recover any portion of it from her.

In this view it is unnecessary to consider whether the waqf created by her is or is not valid under the Muhammadan Law. Even if it is invalid, the plaintiffs have no right to question it.

Furthermore by the deed of relinquishment executed by Masnad Hasan Khan on the 9th of September, 1903, property of all descriptions was vested in Mubarak-un-nissa. The plaintiffs' suit must therefore fail.

We accordingly allow the appeal, set aside the decree of the Court below and dismiss the suit with costs in both Courts.

Appeal allowed.

(1) (1871) 14 Moo. I. A. 377.

33 A. 430 (=9 I. C. 501=8 A. L. J. 454).

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[430] APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Tudball.

SHEORAJI (*Defendant*) *v.* RAMJAS PANDE AND OTHERS (*Plaintiffs.*)*

[26th January, 1911.]

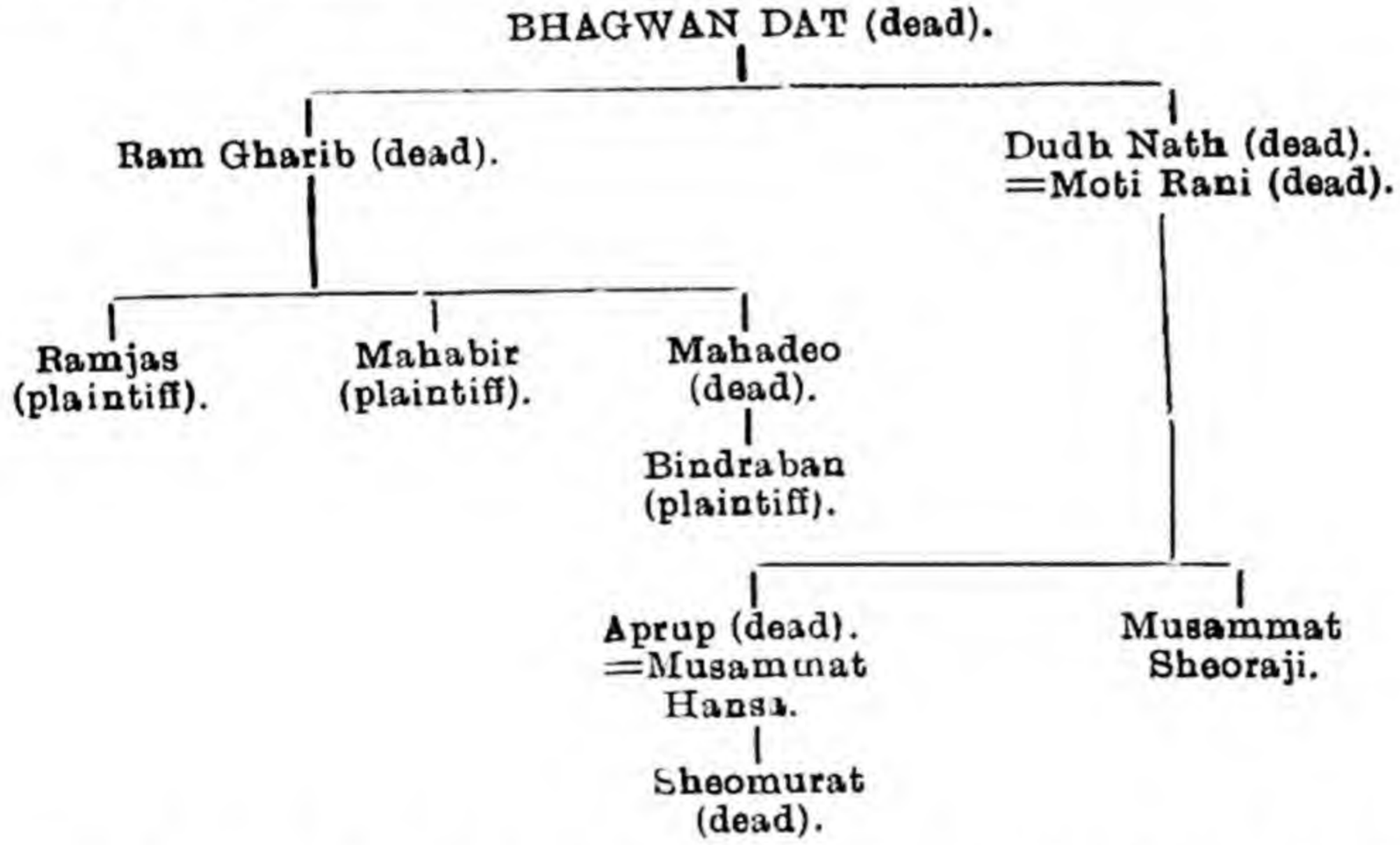
Act No. I of 1877 (Specific Relief Act), section 42—Hindu Law—Reversioner—Suit for declaration of title—Cause of action—Will made by Hindu widow in possession——Limitation.

D, a separated Hindu, and his son A died in 1891 on the same day, the father dying first. A's son, S M, died a week later, leaving his mother H and his grandmother M. The property was then recorded in the names of M and H; but M got possession, and in 1908 executed a will in favour of her daughter S. The reversioners of D brought a suit in 1908 for a declaration that the will would have no effect on their reversionary right. S set up her right to the property, ignoring that of H. *Held* that even during the lifetime of H, the plaintiffs were entitled to institute a suit for a declaration only under the provisions of section 42, Specific Relief Act.

Held, further that the suit was not barred by limitation. Mutations of names in M's favour was more or less an equivocal act and might possibly have given a cause of action, but when in 1908 M. specifically declared that the heir to the property was S and S herself asserted her title, the plaintiffs acquired a cause of action sufficient to entitle them to sue.

[Ref. 1912 M. W. N. 70=13 I. C. 489.]

THE parties to this case were related in the manner shown in the subjoined pedigree :—



Dudh Nath, who was separated from his brother Ram Gharib, died in 1891, and his son Aprup died later on the same day. Sheomurat the grandson died a week later. After the death of Sheomurat the names of Moti Rani and Hansa were recorded [431] in respect of the property of Dudh Nath. In 1908 Moti Rani made a will, in which she declared that Sheoraji was the heir to the whole property in dispute. The surviving members of the other branch of the family of Bhagwan Dat thereupon brought

* Second Appeal No. 1009 of 1910, from a decree F. D. Simpson, District Judge of Gorakhpur, dated the 20th of June, 1910, confirming a decree of Gokul Prasad, Subordinate Judge of Gorakhpur, dated the 18th of May, 1909.

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the present suit asking for a declaration that the will of Moti Rani did not affect the succession to the property after the death of Hansa. The Court of first instance (Subordinate Judge of Gorakhpur) decreed the claim and this decree was affirmed in appeal by the District Judge. Sheoraji then appealed to the High Court, the main ground of appeal being that the plaintiffs could not sue for a declaration so long as Musammat Hansa was alive.

Munshi *Hari bans Sahai*, for the appellant.

The respondent was not summoned.

RICHARDS and TUDBALL, JJ.:—The following pedigree will show the relationship of the parties:—

BHAGWAN DAT (dead).

Ram Gharib (dead).

Ramjas (plaintiff).

Mahabir (plaintiff).

Mahadeo (dead).

Bindraban (plaintiff).

Dudh Nath (dead). =Moti Rani (dead).

Aprup (dead). =Musammat Hansa.

Musammat Sheoraji.

Sheomurat (dead).

The plaintiffs are the sons and grandson of Ram Gharib. The defendants are Musammat Sheoraji and Musammat Hansa. The Court below finds that Ram Gharib and Dudh Nath were separate, that Dudh Nath died in the year 1891. that his son died next on the same day and that his grandson, Sheomurat, died a week after. These findings of fact are binding on us in second appeal. After the death of Dudh Nath, Aprup and Sheomurat, the names of Moti Rani and Musammat Hansa were recorded. In the year 1908, Moti Rani purported to make a [432] will declaring that Sheoraji was heir to the whole property in dispute. The plaintiffs then sued, amongst other things, for a declaration that the will did not affect their reversionary rights. Primarily the plaintiffs claimed actual possession on the ground that the family was joint, but this has been found against the plaintiffs. The main question which has been urged in the present appeal is as follows. It is said that, on the findings of the Court below, Musammat Hansa is entitled to possession of the property according to Hindu Law for her lifetime. Neither Moti Rani nor Musammat Sheoraji have any title whatsoever, and accordingly Mr. *Haribans Sahai*, while admitting that plaintiffs would be the heirs on the assumption that Musammat Hansa was now dead, argues they cannot bring a suit for a declaration of title against Sheoraji in respect of anything that she has done or put forward in respect of the property, so long as Musammat Hansa lives. Section 42 of the Specific Relief Act is as follows:—

"Any person entitled to any legal character or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such

character or right; and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any other relief."

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The defendant, Musammat Sheoraji, who is appellant here, in her written statement expressly alleged that Moti Rani was entitled to the property as heir to her husband, Dudh Nath, who was the last male owner. She claimed that on the death of Moti Rani she had become entitled to the property by right of succession to her father, and that the plaintiffs had no interest whatsoever in the property. This contention necessarily includes a denial of Musammat Hansa's right to possession as the mother of Sheomurat. In our opinion the case, unless there is good authority, is just one of those cases in which a suit for declaration of title is not only permissible but also desirable. It may be that Musammat Hansa may live for a very long time. At her death it would probably be extremely difficult to produce the evidence which was available when the present suit was instituted. There can be no doubt on the facts as found by the court below and on the allegation in the written statement of the appellant herself that she was a person who was denying or at least was [433] interested in denying the title of the plaintiffs as reversioners. A passage from Mr. Mayne's Hindu Law (7th edition, page 874) is quoted in support of the appellant's contention. The passage is as follows:—

"But the mere fact that strangers are affecting to deal with the property as their own without actual dispossession of the intermediate estate . . . gives no right of action against them either for a declaration of title or otherwise."

It is argued that although the plaintiffs might have brought a suit against Musammat Hansa, they have no right to bring the suit against Musammat Sheoraji. In the present case, as we have pointed out, the court finds that Moti Rani was in possession after the death of Sheomurat. Having regard to the fact that the father and the son died on the same day and the grandson died within a week, the probabilities are that the finding is correct. The life estate of Musammat Hansa has been ignored by Musammat Moti Rani, and it is quite clear that it was being ignored by the appellant Sheoraji. She does not suggest from the beginning to the end of the written statement that Musammat Hansa had any right or title whatever to the property. Under these circumstances we are clearly of opinion that the plaintiffs were entitled to institute a suit under the provisions of section 42 of the Specific Relief Act.

The only other point that is raised before us is that the suit is barred by limitation. It is said that when Moti Rani obtained mutation of names and entered into possession the plaintiffs' right to bring the suit so far as it is a suit under section 42 of the Specific Relief Act arose, and as this was done in 1891, the suit is barred by limitation. In our opinion this plea cannot prevail. Mutation of names was more or less an equivocal act. It might possibly have given cause of action, but we consider that when in the year 1908 it was specifically declared by Moti Rani that the heir to the property was Sheoraji and when we also find that Musammat Sheoraji herself asserted this very title, the plaintiffs acquired a cause of action sufficient to entitle them to sue in 1908. In our opinion the appeal fails on both the grounds. We accordingly dismiss it.

Appeal dismissed.

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APPELLATE CIVIL.

33 A. 434=8 A. L. J. 227=10 I. C. 729.

33 A. 434 (=8 A. L. J. 227=10 I. C. 729).

[434] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

CHUNNI LAL (*Defendant*) *v.* SIKISHAN SINGHAND OTHERS (*Plaintiffs*).*

[31st January, 1911.]

Mortgage—Mortgage of sir *land—Purchase of proprietary rights by mortgagee—Suit for redemption—Amount payable by mortgagor.*

After a usufructuary mortgage of certain *sir* lands the mortgagee at an auction sale in execution of a simple money decree purchased the proprietary rights in the mortgaged property, the mortgagor becoming an ex-proprietary tenant. On a suit for redemption being brought, *held* that the mortgagee, having himself broken up the integrity of his security, could not be permitted to cast the whole burden of the debt upon the ex-proprietary rights. *Bisheshar Dial* v. *Ram Sarup* (1) referred to.

THE facts of this case were as follows :—

Certain plots of *sir* land were mortgaged with possession by the plaintiffs' ancestor to the defendants' ancestor in 1881 for Rs. 1,300. In 1888 the zamindari rights, including the *sir*, were sold at auction and purchased by the defendant. The plaintiffs sued for redemption of the mortgage. The first court held that the effect of the sale was to leave the ex-proprietary rights of the plaintiffs liable for part only of the mortgage debt, and allowed them redemption on payment of a proportionate part of the mortgage money. The lower appellate court upheld that decision. The defendant appealed.

Mr. *B. E. O'Conor* (with him Munshi *Gokul Prasad*), for the appellant, contended that on sale of proprietary rights in the *sir* the mortgage attached to the newly-acquired rights of ex-proprietary tenancy and a new security having been substituted the plaintiffs could not redeem except on payment of the entire amount of the mortgage money ; *Sham Das* v. *Batul Bibi* (2).

Munshi *Gulzari Lal*, for the respondents, submitted that the rights of an ex-proprietary tenant were part and parcel of the proprietary rights which under the law were secured to a person who lost his *sir* land ; *Bhawani Prasad* v. *Ghulam Muhammad* (3). The principle applicable was that laid down in *Bisheshur Dial* v. *Ram Sarup* (1).

STANLEY, C. J., and GRIFFIN, J.—This appeal arises out of a suit for redemption of a mortgage made in 1881 by the [435] plaintiffs' predecessor in interest. By the mortgage in suit certain specified plots, aggregating an area of 191 bighas, were mortgaged as security for the loan of Rs. 1,300. The lands were described as the *sir* holdings of the mortgagor. In the year 1888 the defendant, appellant in this Court, at an auction sale in execution of a simple money decree, purchased the proprietary rights in the property in suit. The plaintiffs in this suit seek to redeem the mortgage of 1881. The courts below have repelled the contention of the defendant appellant that the whole burden of the mortgage debt should be thrown upon the ex-proprietary rights now held by the mortgagor. They hold that the mortgagor's ex-proprietary interest was still liable for a share of the mortgage debt proportionate to

*Second Appeal No. 1289 of 1909 from a decree of Jagat Narain, Additional Judge of Aligarh, dated the 18th of November, 1909, confirming a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 25th of January, 1909.

(1) (1900) I. L. R. 22 All. 284.
(2) (1902) I. L. R. 24 All. 538.
(3) (1895) I. L. R. 18 All. 121.

the value of the ex-proprietor's rights vested in the mortgagor. The first Court held that the plaintiffs should pay one-fourth of the mortgage money in order to redeem the ex-proprietary tenures. The lower Appellate Court upon appeal by the defendant has in its decree affirmed decision of the Court of first instance.

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The ground taken in appeal to this Court is that after the sale in 1888 of the mortgagor's proprietary rights in the property in suit the burden of the mortgage debt continued upon the rights which still remained to the mortgagor, namely, his ex-proprietary rights in the land formerly held by him in the *sir*. The contention advanced on behalf of the appellant is that there has been merely a substitution of security.

It appears to us that the view taken by the Courts below is a correct one. What was mortgaged in the year 1881 was the mortgagor's right as proprietor in the mortgaged property and further his rights to occupy the plots specified in the mortgage as *sir* holder. In the year 1888, the defendant, appellant to this Court, acquired at auction sale, the proprietary rights of the mortgagor. The defendant appellant has by his own act broken up the integrity of his security. He cannot now be permitted to cast the whole burden of the mortgage debt upon the remainder of his security. The principle of the ruling in *Bisheshur Dial* v. *Ram Sarup* (1) is applicable to the present case. It has not been shown to us that the amount assessed by the Court **[436]** below as the proportionate share which the ex-proprietary rights should bear to the mortgage debt is erroneous. We dismiss the appeal with costs.

Appeal dismissed.

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33 A. 436 (=9 I. C. 476=8 A. L. J. 216).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

KEHRI SINGH AND OTHERS (*Plaintiffs*), *v.* CHUNNI LAL *and another* (*Defendants*) *

[31st January, 1911.]

***Hindu law**—Mitakshara—Joint family property—Mortgage by father—Sons not made parties to suit for sale on mortgage—Sale under the decree—Suit by sons to redeem their interests.*

Where ancestral property belonging to a joint Hindu family has been sold in execution of a decree for sale on a mortgage executed by the father, the sons cannot maintain a suit for redemption of their interests in the property sold upon the ground solely that they had not been made parties to the suit of the mortgagee, nor is their position affected by the fact that the auction-purchaser is the mortgagee. *Debi Singh* v. *Jia Ram* (2) *Lal Singh* v. *Pulandar Singh* (3) and *Balwant Singh* v. *Aman Singh* (4) followed. *Ram Prasad* v. *Man Mohan* (5) dissented from. *Ram Nath Rai* v. *Lachhman Rai* (6) referred to.

[Fol: 12, I. C. 111=8 A. L. J. 922; 37 I. C. 833=1 Pat. L. W. 197=1917 Pat. 113; Ref. 68 I. C. 283.]

The facts of this case were as follows :—

One Man Singh executed a usufructuary mortgage of certain property on the 15th of February, 1864, in favour of one Bhim Sen, who was the

* Second Appeal No. 700 of 1908, from a decree of H. J. Bell, District Judge of Aligarh, dated the 9th April, 1908, confirming a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 2nd of September, 1907.

(1) (1899) I. L. R. 22 All. 284.
(2) (1902) I. L. R. 25 All. 214.
(3) (1905) I. L. R. 28 All. 182.
(4) (1910) I. L. R. 38 All 7.
(5) (1908) I. L. R. 30 All. 256.
(6) Weekly Notes, 1899, p. 27.

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ancestor of the respondents. Subsequently, on the 10th of February, 1878, he executed a simple mortgage of the same property in favour of Bhim Sen. Again, on the 11th of February, 1878, he executed a simple mortgage in favour of one Bijai Pal Singh. Bijai Pal Singh instituted a suit on foot of his mortgage and obtained a decree for sale against the sons and widows of Man Singh on the 29th of February, 1884. In execution of this decree the property was sold on the 20th of December, 1888, to Ram Lal, a son of Bhim Sen. The sons of Bhim Sen obtained a decree for sale on foot of their mortgage of the 10th of February, 1878, on the 9th of June, 1885, and at a sale held in execution of that decree purchased the property. The suit out of which this appeal has arisen, was instituted by the [437] plaintiffs appellants, who are the grandsons and one great-grandson of Man Singh for redemption of the mortgage of the 15th of February, 1864. In their plaint the plaintiffs refer also to the mortgage of the 10th of February, 1878. They do not anywhere allege that Bijai Pal Singh, who obtained a decree on foot of the mortgage of the 10th of February, 1878, had any notice of the interests of the plaintiffs at the time of the institution of the suits by them for sale on foot of their mortgage.

Both the lower Courts dismissed the suit. The plaintiffs thereon appealed to the High Court.

Munshi *Gulzari Lal*, for the appellants.

Mr. *B. E. O' Conor* and Munshi *Gokul Prasad*, for the respondents.

STANLEY, C. J., and GRIFFIN, J.—The weight of authority militates against this appeal. The facts are these:—One Man Singh executed a usufructuary mortgage of certain property on the 15th of February, 1864, in favour of one Bhim Sen, who is the ancestor of the respondents. Subsequently, on the 10th of February, 1878, he executed a simple mortgage of the same property in favour of Bhim Sen. Again, on the 11th of February, 1878, he executed a simple mortgage in favour of one Bijai Pal Singh. Bijai Pal Singh instituted a suit on foot of his mortgage and obtained a decree for sale against the sons and widows of Man Singh on the 29th of February, 1884. In execution of this decree the property was sold on the 20th of December, 1888, to Ram Lal, a son of Bhim Sen. The sons of Bhim Sen obtained a decree for sale on foot of their mortgage of the 10th of February, 1878, on the 9th of June, 1885, and at a sale held in execution of that decree purchased the property. The suit out of which this appeal has arisen, was instituted by the plaintiffs appellants, who are the grandsons and one great-grandson of Man Singh for redemption of the mortgage of the 15th of February, 1864. In their plaint the plaintiffs refer also to the mortgage of the 10th of February, 1878. They do not anywhere allege that Bijai Pal Singh, who obtained a decree on foot of the mortgage of the 10th of February, 1878, had any notice of the interests of the plaintiffs at the time of the institution of the suits by them for sale on foot of their mortgage.

[438] Both the lower Courts have dismissed the plaintiffs' claim. This appeal has, therefore, been preferred, and the contention of the learned vakil for the appellants is that in view of the decision of this Court in *Ram Prasad* v. *Man Mohan* (1), they are entitled to maintain their suit. Mr. *O'Conor*, on behalf of the respondent, referred us to several decisions of this Court which are inconsistent with the ruling in the case of *Ram Prasad* v. *Man Mohan*.

(1) (1908) I. L. R. 30 All. 256.

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33 A. 436=
9 I. C. 476=8
A. L. J. 216.

In *Debi Singh* v. *Jia Ram* (1) a Full Bench of this Court, of which one of us was a member, held that where property belonging to a joint Hindu family has been sold by auction in execution of a decree obtained upon a mortgage of such property executed by the father of joint family, it is open to the sons to sue for the recovery of their shares in the property so sold, if they were not made parties to the suit in which the decree against their father was obtained, *provided that the mortgagee had at the time of suit notice of their interests in the property*, but that their suit must be based upon some ground which under the Hindu Law would free them from liability, as sons of a Hindu joint family, to pay their father's debts and that, a sale once having taking place, the sons cannot succeed in a suit to recover the property sold upon the sole ground that they were not made parties to the original suit.

Again, in *Lal Singh* v. *Pulandar Singh* (2) a Bench of this Court, of which one of us was also a member, held that where ancestral property of a joint Hindu family has been sold in execution of a decree upon a mortgage executed by the father, no suit for redemption of their interest is maintainable by the sons upon the mere ground that they were not made parties to the suit under the decree in which the ancestral property was sold.

Again, in the case of *Balwant Singh* v. *Aman Singh* (3), our brothers TUDBALL and CHAMIER held, following the ruling in *Debi Singh* v. *Jia Ram* (1), that after a sale of joint family property in execution of a decree passed upon a mortgage executed by a father his sons are not entitled to sue to recover [439] their shares in the property merely on the ground that they were not parties to the suit brought by the mortgagee. In this case, CHAMIER, J., in his judgment observes that "until December, 1907, there was an undisturbed current of authority to the effect that after a sale of joint family property has taken place in execution of a decree passed upon a mortgage made by a father, the sons are not entitled to sue to recover their shares in the property" upon the ground mentioned above, and that "they cannot sue to redeem the property or their interest in the property merely upon that ground." The learned Judge further remarks that the same rule was followed "whether the auction purchaser was a stranger or was the mortgagee."

The only case to which we have been referred which lends colour to the contention of the learned vakil for the appellants is the case of *Ram Prasad* v. *Man Mohan* (4). In that case AIKMAN and KARAMAT HUSAIN, JJ., in a suit in which the mortgagees under a mortgage of joint family property, executed by the father alone had sued for and obtained a decree for foreclosure, the sons and grandsons not having been made parties to the suit, although the mortgagees had knowledge at the time of the institution of the suit that there were sons and grandsons jointly interested with the mortgagor in the mortgaged property, held that the sons and grandsons were not precluded from instituting a suit for redemption. The learned Judges, in commenting upon the decision of the Full Bench in *Debi Singh* v. *Jia Ram* (1), directed attention to the fact that in that case the sons sued to get back from innocent purchasers their share of the family estate, and they refer to passages in the judgments as showing that stress was laid upon the fact that the plaintiff wished to oust innocent strangers.

(1) (1902) I. L. R. 25 All. 214.
(2) (1905) I. L. R. 28 All. 182.
(3) (1910) I. L. R. 33 All. 7.
(4) (1908) I. L. R. 30 All. 256.

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33 A. 436=9 I. C. 486=8 A. L. J. 216.

It appears to us that the fact that the defendants in that case were strangers was not a governing factor in the case. It seems to us to be immaterial whether the purchaser at a sale is a stranger, or is the mortgagee himself. We may point out also that the learned Judges who decided *Ram Prasad* v. *Man Mohan* (1) laid stress on the fact the defendants had knowledge [440] of the plaintiffs' interest and did not make them parties to the suit for foreclosure. As to this we may observe that it lay upon the plaintiff seeking to redeem to allege and prove that the defendants who purchased at a sale in execution of a decree, had notice of the plaintiff's interests.

In *Ram Nath Rai* v. *Lachhman Rai* (2) it was held by STRACHEY, C. J., and KNOX, J., that where sons in a joint Hindu family come into court seeking to get rid of the effect as against their interests in the joint family property of a decree on a mortgage executed by their father obtained in a suit to which they were not made parties, *the burden of proof lies on them to establish that the mortgagee, when he brought the suit, had notice of their interests in the mortgaged property.* In the present case the mortgagors do not allege that the debt contracted by their ancestor, Man Singh, was a debt contracted for any immoral or illegal purpose. They do not allege that the plaintiffs in the mortgage suits in which the property was sold had notice of their interests, and there was no evidence adduced to establish that they had any such notice. Under these circumstances and in view of the weight of the authorities of this Court we think that there is no force in this appeal. We dismiss it with costs.

Appeal dismissed.

33 A. 440 (=9 I. C. 475=8 A. L. J. 245).

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Banerji.

TIRBENI SAHAI AND OTHERS (*Defendants*) *v.* GOKUL PRASAD AND ANOTHER (*Plaintiffs*).*

[31st January, 1911.]

Act (Local) No. III of 1901 (United Provinces Land Revenue Act), section 233 (k)—Partition—Land belonging to plaintiffs' mahal allotted to defendants and a different plot to plaintiffs—Civil and Revenue Courts—Jurisdiction.

By a mistake of a partition amin a plot belonging to the defendants was alloted to the plaintiff and two plots belonging to the plaintiff were allotted to the defendant. *Held* that no suit would lie in a civil court to rectify this error. *Kishan Prasad* v. *Kadher Mal* (3) distinguished.

[Ref: 25 I. C. 177=12 A. L. J. 1126.]

THE facts of this case were as follows :—

The plaintiffs brought a suit for a declaration that they were the owners and in possession of certain plots numbered 43/3 and 43/4. [441] They alleged that on the application of defendants 1-3, certain *pattis* were partitioned, but that the *patti* of the plaintiffs remained separate, and that by mistake at the time the distribution of plots was made the amin coloured the said numbers as belonging to the defendants and

* First Appeal No. 92 of 1910, from an order of Banke Behari Lal, Subordinate Judge of Mainpuri, dated the 31st of August, 1910.

(1) (1908) I. L. R. 30 All. 256.
(2) Weekly Notes, 1899, p. 27.
(3) Weekly Notes, 1900, p. 11.

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33 A. 440=8 9 I. C. 475= 8 A. L. J. 244.

No. 43/1 as belonging to them. One of the pleas in defence was that the suit was not cognizable by the Civil Court. The Court of first instance, relying on section 233 (*k*) of Act No III of 1901, dismissed the suit. The lower Appellate Court reversed the decree on the ground that the plaintiffs' *patti* not having been the subject of partition, the suit was maintainable in the Civil Court and remanded the case to the first Court for disposal of the suit. The defendants appealed to the High Court.

Babu *Sital Prasad Ghose*, for the appellants, submitted that it was immaterial whether or not the plaintiffs had applied for partition. Section 233 (*k*) of Act III of 1901 clearly barred the suit. He relied on *Jagannath* v. *Tirbeni Sahai* (1).

Munshi *Gokul Prasad*, for the respondents, contended that in partition proceedings the defendants' application was that the *pattis* which belonged to the applicants should be made into one mahal. The plaintiffs who owned a separate *patti* were not made parties to that application. This fact distinguishes the present case from the case in I. L. R., 31 All., 41. The land in dispute not having been comprised in the *pattis* which were the subject of partition, section 233 (*k*) was not applicable. He relied on *Kishen Prasad* v. *Kadher Mal* (2).

Babu *Sital Prasad Ghose* was not called upon to reply.

KNOX and BANERJI, J J. :—This appeal arises out of a suit brought by Gokul Prasad and Musammat Gangoli, plaintiffs respondents in this Court. They began by stating that in the mahal there was a separate *patti* of theirs, which had been in their proprietary possession, and that it had all along been included in a separate lot and had no connection with other *pattis*. In 1905 certain of the appellants who were owners of some *pattis* in the same mahal applied to the Revenue Court to have their **[442]** *pattis* formed by partition into a single *patti*. The other *pattidars* made similar applications. The plaintiffs, however, abstained from the proceedings, as they were not interested in them, and took no part in them from beginning to end. Before the partition had been confirmed and when the lots were prepared, they found that a certain plot bearing No. 43/1, which was actually in the defendants' proprietary possession, had been included in the lot of the defendants, and plots Nos. 43/3 and 43/4 had remained in the plaintiffs' lot as before. After that the Court Amin made a mistake in the preparation of the map. He coloured plot 43/1 with the colour of the plaintiff's lot and plots 43/3 and 43/4 with the colour of the defendants' lot. In October, 1908, as the various lots were pointed out on the spot, the plaintiffs became aware of this mistake. They then applied to the Revenue Court to have this mistake corrected, but their petition was struck off by the Collector on the 7th of June, 1909, with the remark that such a mistake could be rectified by a Civil Court. Hence the present suit for a declaration that the plaintiffs are in possession as proprietors and zamindars of plots 43/3 and 43/4, and that they are comprised in their lot and *patti* and that the defendants have no concern with these plots. They had also an alternative prayer for recovery of possession.

In the written statements, among other pleas, a plea was taken that the suit as brought could not be entertained by a Civil Court. The Court of first instance accepted this plea and dismissed the suit, holding that section 233 (*k*) of the Revenue Act was a clear bar. Before the lower Appellate Court, the plaintiffs contended that the partition proceedings

(1) (1908) I. L. R. 31 All. 41.

(2) Weekly Notes, 1900, p. 11.

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33 A. 440=9 I. C. 475=8 A. L. J. 244.

could not bar the civil suit. That Court recorded the following finding:—"The record of the partition proceeding which was sent for by this court shows that the appellants' *patti* was not the subject of partition, and therefore, with reference to the ruling in *Kishan Prasad* v. *Kadher Mal* (1), I find that the suit is cognizable by the Civil Court."

In appeal before us the contention is again raised that the suit is not cognizable by the Civil Court. We think that this contention is well founded. It is admitted that at the time **[443]** when partition was completed and was finally confirmed, the whole mahal was divided into separate *pattis*, and the plots in suit were taken out of the plaintiffs' *patti*, and one of them allotted to the defendants and the second to the *patti* of Jagannath. In place of these plots, plot 43/1 was allotted to the plaintiffs' *patti*. This is a matter which is entirely within the jurisdiction of the Revenue Court, and by section 233 (*k*) of Local Act III of 1901 no suit or other proceeding can be instituted in the Civil Court with respect to it. The case which has been relied upon by the lower Appellate Court is clearly distinguishable. In that case land belonging to a different mahal had been taken from the mahal and added to the mahal under partition. The case differs *toto coelo*. We decree the appeal, set aside the order of the Court below, and restore the decree of the Court of first instance with costs in all Courts.

Appeal decreed.

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33 A 443 (=9 I. C. 498=8 A. L. J. 220.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Griffin.

DURGA DAT AND OTHERS (*Plaintiffs*) *v.* GITA AND OTHERS (*Defendants*).*

[1st February, 1911.

Hindu law—Hindu widow—Nature of estate held by two widows succeeding jointly—Power to partition.

Whatever limitations there may be upon the power of alienation of one of two Hindu widows succeeding as such to a life interest in their husband's estate, so long as the property remains undivided there is nothing to prevent them effecting a partition of such estate. *Musammat Sundar* v. *Musammat Parbati* (2) and *Kanni Ammal* v. *Ammakannu Ammal* (3) followed. *Ram Piyari* v. *Mulchand* (4) distinguished. *Bhugwandeen Doobey* v. *Myna Baee* (5) and *Gajapathi Nilamani* v. *Gajapathi Radhamani* (6) referred to.

[Dist. 68 I. C. 989=20 A. L. J. 780.]

THE facts of this case were as follows:—

One Bidya Ram died leaving two widows, Gita and Mulo. The two widows jointly succeeded to the property left by Bidya Ram. Mulo made a gift of her share in the property to the plaintiffs, Durga Dat and his Brother Lachman Prasad, on 7th February, 1908. The plaintiffs made an application for mutation of **[444]** names but the application was dismissed on the objection of Musammat Gita. The plaintiffs thereupon brought this suit on the basis of the gift for a declaration of their right in the

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* Second Appeal No. 160 of 1910 from a decree of B. J. Dalal, District Judge of Shahjahanpur, dated the 6th of December, 1909, reversing a decree of Gopal Das Mukerji, Munsif of Bisauli, dated the 28th of August 1909.

(1) Weekly Notes, 1900, p. 11.
(2) (1889) I. L. R. 16 I. A. 186; I. L. R. 12 All 51.
(3) (1899) I. L. R. 23 Mad. 504.
(4) (1884) I. L. R. 7 All. 114.
(5) (1867) 11 Moo. I. A. 487.
(6) (1877) I. L. R. 1 Mad. 291.

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zamindari portion of the property and for possession of a moiety of a house by partition. The plea in defence, among other things, was that the transfer in favour of the plaintiff was void and inoperative. The Munsif found in favour of the plaintiffs, and decreed the suit. The defendants appealed to the District Judge, who, holding that a co-widow could not alienate the share even for her lifetime, dismissed the suit. The plaintiffs appealed.

Mr. *Abdul Raoof*, for the appellant, contended that a Hindu co-widow was perfectly competent to alienate her interest in her husband's property in whatever way she chose to enure at least for her lifetime. He submitted that the case of *Ram Piyari* v. *Mulchand* (1), relied upon by the lower Appellate Court, proceeded upon a misconception of the ruling of Their Lordships of the Privy Council in *Bhagwandeen Doobey* v. *Myna Baee* (2). Moreover, it was clearly distinguishable from the present case. In *Musammat Sundar* v. *Musammat Parbati* (3) the Privy Council clearly held that a partition like the one claimed in the present case could be allowed. He also relied on *Kanni Ammal* v. *Ammakannu Ammal* (4) and *Vadali Mamidigadu* v. *Kotipalli Ramayya* (5).

Babu *Sital Prasad Ghose*, for the respondents, submitted that the case in I. L. R. 7 All. 114, was absolutely indistinguishable from the present case. The case in 11 Moo. I. A. 487, was an authority for the proposition that a suit for partition like the present could not be entertained. In the case in 16 I. A. 186, Their Lordships of the Privy Council were dealing with a case in which the widows had nothing more than a possessory title, not with a case like the present in which the widows claimed to be in possession for their lives by rights of inheritance to their deceased husband. In a case like the present the estate was of the widows and was a joint estate, and neither of them could alienate her own share in the property without the consent of the [445] other. The Madras case relied upon by the other side could not be regarded as authority where there was an authority to the contrary of this Court in I. L. R. 7 All. 114.

Mr. *Abdul Raoof*, was not called upon to reply.

STANLEY, C J., and GRIFFIN, J.:—One Bidya Ram died, possessed of a 20 biswas mahal in mauza Sarah Banslia, and also a house and two inclosures situated in the same village. He died about 30 years ago, leaving two widows, namely, Musammat Gita and Musammat Mulo, who thereupon became entitled to his property to the extent of Hindu widows' estates. Musammat Mulo on the 7th of February, 1908, executed a deed of gift of her entire share in the property in favour of the plaintiffs. The plaintiffs applied in the Revenue Court for mutation of names in respect of the zamindari property and also sought delivery of possession of a share in the house by partition. Musammat Gita objected to the mutation applied for and refused to deliver up possession of any portion of the house or to allow partition of it. It is stated and not denied that Musammat Gita also executed a deed of gift in favour of the defendant Sri Ram not merely of her share of the property but of the entire zamindari property and the house and its enclosures.

The suit out of which this appeal has arisen was instituted by the plaintiffs for the purpose of obtaining a declaration that under the deed of gift to them of the 7th of February, 1908, they are entitled to 10 biswas

(1) (1884) I. L. R. 7 All. 114.
(2) (1867) 11 Moo. I. A. 487.
(3) (1889) L. R. 16 I. A. 186.
(4) (1899) I. L. R. 23 Mad. 504.
(5) (1902) I. L. R. 26 Mad. 334.

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33 A. 443=9 I. C. 498=8 A. L. J. 220.

out of the 20 biswas mahal in question and of having a partition of the house and the inclosures.

The Court of first instance gave a decree to the plaintiffs, but upon appeal the learned District Judge set aside the decree of the Court below and dismissed the plaintiffs' claim on the ground that Musammat Mula had no authority to part with her life interest in any portion of the property without the consent of her co-widow. The learned Judge in the judgment observes as follows :—

"The ruling in the case of *Ram Piyari* v. *Mulchand* (1) is supported by the authority of the Privy Council and has not so far been overruled. It may appear strange that a co-widow can't part with her life interest in a property held jointly with other co widows, but such is the enunciation of the law. I do not believe that Mr. Mayne is correct in stating as a general rule of law that 'it [446] his been held that a widow can alienate her life interest as against her co-widows just as she can against her reversioners'."

Mr. Mayne's statement of the law on the subject is to be found in paragraph 554 of his work on Hindu Law, at page 752, 7th edition. It runs as follows :—

"Where several widows hold an estate jointly, or where one holds as manager for the others, each has a right to her proportionate share of the produce of the property, and of the benefits derivable from its enjoyment. And the widows may be placed in possession of separate portions of the property, either by agreement among themselves, or by decree of Court where from the nature of the property, or from the conduct of the co-widows, such a separate possession appears to be the only effectual mode of securing to each the full enjoyment of her rights. But no partition can be effected between them, whether by consent or by adverse decree, which would convert the joint estate into an estate in severalty, and put an end to the right of survivorship."

There are two objects which may be attained by partition. The one is to get rid of the right of survivorship in joint property, and the other to obtain a division of the joint property for the purpose of more convenient enjoyment of it without affecting any right of survivorship and without creating a right in the estate in severalty. It is clear that one of two widows cannot either by agreement, or by recourse to law, obtain a partition of joint property which will prejudice the right of survivorship of her co-widow or the rights of the reversioners after the death of the survivor of the widows. But the question before us is whether or not a donee of one of two widows can obtain from the Court a decree for partition of joint property which will have effect during the lives of the widows. According to Mr. Mayne such a partition may be carried out.

The case of *Ram Piyari* v. *Mulchand* has been strenuously relied upon as a ruling which supports the contention of the respondents that there cannot be a partition between widows of a deceased Hindu which will be effectual during their joint lives. The facts of that case shortly stated are these :—One Badri Dayal was the owner of a house. He died, leaving two widows, Chandan Kunwar and Ram Piyari, and a daughter by name Chandan Kunwar. On the death of Badri Dayal, his estate passed to his widows, *between whom there had been no partition*. On the 29th of November, 1892, Chandan Kunwar sold the house to Mulchand, but Mulchand did not succeed in obtaining [447] possession of the property and he, thereupon, on the 28th of May, 1883, sued his vendor and others for possession of it. He did not implead Musammat Ram Piyari, but she was made a defendant at her own request. The claim of Mulchand was to obtain possession of the entire house. MAHMOOD and DUTHOIT, JJ., held that one of the widows was

(1) (1884) I. L. R. 7 All. 114.

not competent to *alienate the property* which she had so derived from her husband without the consent of the other even for purposes of legal necessity. The learned Judges quote several rulings of their Lordships of the Privy Council, and amongst others the ruling in *Bhagwan Deen Doobey* v. *Myna Baee* (1), as supporting the view taken by them. In that case Their Lordships stated the law as follows: —

"The estate of two widows who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion of daughters of the deceased widow. They are, therefore, in the strictest sense co-parceners, and between undivided co-parceners there can be no alienation by one without the consent of the other."

This passage from Their Lordships' judgment is quoted as authority for the proposition that between co-widows there cannot be partition, nor can one widow alienate her share for her life without the consent of her co-widow. It appears to us that what was intended by Their Lordships by the word alienation in the passage, which we have quoted, is alienation of the absolute interest in property and not the alienation of a widow's life estate. Referring to *Bhagwan Deen* v. *Myna Baee*, Their Lordships in the subsequent case of *Gajapathi Nilamani* v. *Gajapathi Radhamani* (2) carefully guard themselves against expressing any opinion as to the right of Hindu widows to partition property which has devolved upon them for life. They say:—

"Therefore, their Lordships, guarding themselves against being supposed to affirm by this order that either widow has power to dispose of the one-fourth share of the estate allotted to her, or that they have any right to a partition in the proper sense of the term, are not disposed to vary the form of the order under which one fourth of the profits of the estate will go to each widow during their joint lives, their respective rights by survivorship and otherwise remaining unaffected."

It appears to us that the decision in *Ram Piyari* v. *Mulchand* is not an authority for the proposition which has been contended for by the learned vakil for the respondents.

[448] Now turning to the case of *Musammat Sundar* v. *Musammat Parbati* (3), we find an express statement of Their Lordships of the Privy Council upon this question. In that case one Baldeo Sahai died, leaving two widows, and possessed of movable and immovable property. This property he had bequeathed to one Prem Sukh, his sister's son, whom, it is said, he had previously adopted and who died a minor shortly after the death of Baldeo Sahai. The widows took possession of the property of which they were so possessed, and it was contended that the other widow was not competent to maintain a suit for partition of the property of which they were so possessed, and it was contended that the other widow was not competent to maintain a suit for partition of the estate. In the course of the judgment of Their Lordships delivered by LORD WATSON, he observed that the only issue which it was necessary to consider was the sixth which was in these terms:—

"Has the plaintiff a right to have the property in dispute divided in equal shares as she claims?"

We may observe here that the learned Judges of this Court, PETHERAM, C. J. and BRODHURST, J. had held that she had no such right, overruling the decision of the Subordinate Judge. In the course of the Judgment, LORD WATSON remarked:—

"Their Lordships are at a loss to understand, at all events, to appreciate the grounds

(1) (1867) 11 Moo. I. A. 487.
(2) (1877) I. L. R. 1 Mad. 291.
(3) (1889) L. R. 16 I. A. 186.

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33 A. 443=9 I. C. 498=8 A. L. J. 220.

upon which the Chief Justice (PETHERAM, CJ.) endeavours to differentiate between the authorities which he cites, the import of which he correctly states, and the position of the parties to this action. Their (*i.e.* the two widow's) possession was lawfully obtained, in this sense, that it was not procured by force or fraud, but peaceably, no one interested opposing. In these circumstances it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs of Prem Sukh, or Baldeo Sahai, one or other of whom (it is unnecessary to say which) is the only person who can plead a preferable title. But neither of these possible claimants is in the field, and the widows have therefore each of them an estate or interest in respect of her possession which cannot be impaired by the circumstance that they may have ascribed their possession to one or more other titles which do not belong to them. *It is impossible to hold that a joint estate is not also partible;.....*"

This appears to us to be a clear authority for the contention of the learned counsel for the appellants that Hindu widows who become entitled to an estate for their lives on the death of their husband are entitled to have a partition of their interests.

[449] In the Madras High Court in the case of *Kanni Ammal* v. *Ammakannu Ammal* (1), the facts of which are substantially on all fours with the case before us, SHEPHARD and BENSON, JJ., held that partition may be enforced by one of two sisters. In that case a party purchased certain property from one of two sisters jointly entitled to their deceased father's estate under the Hindu law and resold it, whereupon the other daughter sued for a declaration that the sales were invalid as against her and prayed that the property might be restored to her and her sister, or that there might be a partition of it. It was held that she was entitled to partition. The learned Judges in their judgment, after quoting a number of authorities, observe:—

"Having regard to those authorities we must hold that, while one of two daughters cannot by any alienation alter the character of the daughter's estate so far as concerns the right of survivorship or the rights of reversioners, she may alienate her interest in the property or have that interest taken and sold in execution of a decree against her. She may also, subject to the same condition, demand a partition of the property."

This decision appears to us to be in accordance with the rulings of the Privy Council and to be consonant with Hindu Law.

For the reasons we must allow the appeal. We observe that the Court of first instance in its decree declared the plaintiff entitled to get profits to the extent of the share of Musammat Mulo. In their plaint they do not ask for mesne profits. It may be said that by this decree mesne profits were awarded, but such was evidently not intended. We therefore think it right to delete from the decree of the Court of first instance the words "and that they are entitled to get profits to the extent of that share." We accordingly set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with this modification, namely, that the words "and that they are entitled to get profits to the extent of that share" be deleted and a clause inserted to the effect that any partition of the house or zamindari property which may be carried out under this decree shall not operate so as to prejudice the reversionary heirs or the right of the surviving widow to enjoy the entire property during her life after the death of her co-widow. The rights of the plaintiffs shall only enure during the lifetime of their donor. **[450]** We direct that the parties shall bear their own costs in the lower Appellate Court and that the appellants shall have their costs of this appeal.

Appeal decreed.

(1) (1889) I. L. R. 23 Mad. 504.

33 A. 450 (=8 A. L. J. 230=10 I. C. 730).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Griffin.

MAHDI HUSAIN AND ANOTHER (*Defendants*) *v.* SUKH CHAND AND OTHERS (*Plaintiffs*).*

[6th February, 1911.]

1911 FEB. 6.

APPELLATE CIVIL.

33 A. 450=8 A. L. J. 230 =10 I. C. 730.

Money deposited "in usum jus habentis" improperly withdrawn by a person not entitled to it—Money had and received.

Where money is deposited in Court *in usum jus habentis*, and it is withdrawn by a person who is declared not to have any right thereto, the money so obtained may properly be held to be received for the use of the person entitled to it. *Litt* v. *Martindale* (1), referred to.

THE facts of this case are fully stated in the judgment of the Court.

Mr. G. W. Dillon (with him Mr. *Abdul Raoof*), for the appellants.

Dr. *Satish Chandra Banerji* (with him Babu *Surendra Nath Sen*), for the respondents.

STANLEY, C. J. and GRIFFIN, J.—This was a suit for a refund of Rs. 842 paid in satisfaction of a decree under the following circumstances. On the 31st March, 1883, the plaintiffs mortgaged certain property in favour of one Kallu Mal. Kallu Mal died, leaving his widow, Musammat Gulab Dei and a minor son Har Saran. On the 4th of December, 1897, Musammat Gulab Dei, as mother and guardian of her infant son, transferred the mortgagee rights under the mortgage to Musammat Shibia. Subsequently, on the 18th of March, 1900, Har Saran, who was still a minor, purported to transfer the mortgagee rights in the mortgage to the defendants. The defendants, on the 21st of May, 1900, instituted a suit for sale on foot of the mortgage of 1883 and obtained a decree which was made absolute on the 14th of September, 1901. Musammat Shibia was not a party to these proceedings. On the 5th of November, 1903, Musammat Shibia brought a suit to enforce the mortgage of **[451]** 1883, which had been transferred to her by Musammat Gulab Dei on the 4th of December, 1897. She obtained a decree, and in execution of that decree the mortgagee rights under the mortgage of 1883 were sold and purchased by Musammat Shibia. She then sued for sale of the mortgaged property impleading both the defendants and the plaintiffs, and obtained a decree for sale on the 23rd of December, 1903. In order to protect the property from sale under the decree of the 14th of September, 1901, the plaintiffs under protest deposited the amount of the mortgage in court; and they subsequently filed an objection to the execution of the decree of the defendants alleging that no interest in the mortgaged property passed to the defendants under the transfer of the 18th of March, 1900, Har Saren being at the date of the execution of that mortgage a minor. The defendants applied to the Munsif in whose court the money was deposited for payment of it and they alleged that the defendant, Nabi Baksh, had already paid off the amount due to Musammat Shibia under her decree. We find in the order of the court, dated the 14th of March, 1906, the following statement:—"Then it is shown that Nabi Baksh has already paid off the decretal amount of Musammat Shibia." The learned

* Second Appeal No. 994 of 1909 from a decree of Louis Stuart, District Judge of Meerut, dated the 27th of July, 1909, confirming a decree of Hanuman Prasad, Third Additional Munsif of Meerut, dated the 21st of April, 1909.

(1) (1856) 18 C. B. 314.

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33 A. 450=8 A. L. J. 230=10 I. C. 730.

Munsif then observes:—"Under the circumstances I am of opinion that the present decree is capable of execution and the mortgagors cannot derive any advantage from the decree obtained by Musammat Shibia. It is obvious from this that the order for payment of the money was obtained on the faith of the false representation, made by Nabi Baksh that Shibia's decree had been paid off. The order of the Munsif was subsequently affirmed on appeal. In the suit brought by Musammat Shibia on the basis of the bond of the 4th of December, 1897, on appeal to the High Court, it was held on the 27th of June 1906, that the sale executed by Har Saran in favour of the defendants was absolutely void, and that the defendants had no right whatever in the mortgaged property in dispute. Despite this decree, the defendants, in January, 1907, withdrew from the court of the Munsif the sum which had been deposited by the plaintiffs under protest. The court, however, before making payment, required from the defendants security for the re-payment of the money if it should turn out [452] that the defendants were not entitled to it. A security bond by one Wajah-ud-din was executed for this purpose on the 2nd of January, 1907, and by that bond the surety hypothecated certain immovable property. The decree of Musammat Shibia was not paid by Nabi Baksh and has not been satisfied, but is still under execution. The suit out of which this appeal has arisen was brought for the refund of the money improperly drawn from court by the defendants. Both courts have decreed the claim.

This appeal was then preferred and the main ground of appeal is that it is not open to the plaintiff, in view of the decree of the 24th of January, 1901, which has never been set aside, to recover back money obtained in execution of it, and that the matter must be deemed to be *res judicata*. There is no force in this contention. The defendants were parties to the suit brought by Musammat Shibia, and in that suit it was held that the transfer executed by Har Saran on the 18th of March, 1900, was absolutely void. In view of this ruling the defendants were not justified in making an application for and obtaining payment of the money lodged in court under protest. They acted improperly in representing to the court of the Munsif that Musammat Shibia's decree had been paid off by one of them. The money was deposited in court *in usum jus habentis*, and before it was withdrawn this court had declared that the defendants had no right to it. Under these circumstances the defendants were not justified in their action in withdrawing the money. They improperly withdrew money which in justice and equity belonged to the plaintiffs. Money so obtained may properly be held to be received for the use of the person entitled to it; see *Litt* v. *Martindale* (1). We think, therefore, that the decision of the courts below was perfectly right and dismiss this appeal with costs.

Appeal dismissed.

(1) (1856) 18 C. B. 314.

33 A. 453 (=10 I. C. 924=8 A. L. J. 341.)

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FULL BENCH.

33 A. 453=10 I. C. 924=8 A. L. J. 341.

[453] FULL BENCH.

Before Justice Sir George Knox, Mr. Justice Banerji and Mr. Justice Karamat Husain.

BED SARAN KUNWARI, (*Plaintiff*) *v.* BHAGAT DEO AND OTHERS (*Defendant*).*

[7th February, 1911.]

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 68—*Civil Procedure Code* (1908), *section* 11, *Explanation VI—Suit for ejectment in Revenue Court—Question of title decided by Assistant Collector—Decision allowed to become final*—Res judicata.

In a suit for ejectment in the Revenue Court, the defendants to that suit pleaded title in themselves, and the Assistant Collector determined that question and held that the plaintiff had failed to prove title as against them. This decision became final. In a subsequent suit in the Civil Court for declaration of title against the former defendants and also certain others; *held* that the decision of the Revenue Court operated as *res judicata* so far as concerned those persons who had been defendants to the previous suit, but not as against those who were no parties to the suit. *Behari* v. *Sheobalak* (1) referred to.

[Ref. 37 All. 280.]

The facts of this case were as follows:—

THE plaintiff, Sri Rani Bed Saran Kunwari, instituted a suit for ejectment in the Revenue Court in 1905 against Bhagat Deo [defendant No. 5] and Rabinath [father of defendants Nos. 6 and 7] on the allegation that the village in dispute was herancestral property; that Bhagat Deo and Rabinath were lessees of the land in dispute; that the lease had expired and that the defendants had in collusion with the patwari got their names entered in the Revenue papers. The valuation of the suit was Rs. 132-6-0.

The defendants opposed the suit on the ground that they with certain other relatives were themselves the proprietors. On the 8th March, 1906, the Revenue Court found in favour of the defendants and dismissed the suit. The plaintiff did not appeal from this decree, but on the 21st March, 1906, she applied for correction of the entries in the revenue papers. Her application was disallowed in August, 1907, and she was directed to seek her remedy in the Civil Court. Accordingly she filed the suit out of which the present appeal arose for ejectment of Bhagat Deo [454] and Rabinath, and those persons who were alleged to be proprietors. The valuation of this civil suit for purposes of jurisdiction was fixed at Rs. 1,800. One of the pleas set up in defence was that the suit was barred by *res judicata*. The defendants who were not parties to the ejectment suit also said in their defence that they were owners of an 8-anna share in the village and that the other defendants were owners of specific shares.

The Court of first instance held that the suit was barred by the rule of *res judicata*, the question of proprietary title having been decided by the Revenue Court. Regarding the case as against those defendants who were not parties to the ejectment suit, it held that Baldeo and Rabinath had claimed a title, not only for themselves, but also for the other defendants, and that under Explanation VI of section 11, the suit was barred as against them too.

* First Appeal No. 67 of 1910 from an order of Muhammad Ali, District Judge of Mirzapur, dated the 26th of February, 1910.

(1) (1907) I. L. R. 29 All. 601.

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33 A. 453=10 I. C. 924=8 A. L. J. 341.

The lower Appellate court, on appeal, held that the suit was barred as against those defendants who were parties to the ejectment suit, but that explanation VI of section 11 of the Civil Procedure Code had no application and the suit was not barred against the defendants who were no parties to that suit. The plaintiff Appealed.

Munshi *Haribans Sahai* (with him The Hon'ble *Nawab Muhammad Abdul Majid*, for the appellant :—

The judgment in the former suit cannot opperate as *res judicata* as the present suit cannot be tried by the Revenue Court. He referred to section 11 of the Code of Civil Procedure. The present suit is for a declaration of title as well as for possession, and it cannot be entertained by the Revenue Court which tried the first suit. The decision in that suit cannot operate as *res judicata* unless it be held that the present suit could be entertained by the Revenue Court ; *Gokul Mandar* v. *Pudmanand Singh* (1).

There is a special provision for partition cases, and a Revenue Court is to be considered a Civil Court for that purpose. The valuation of the ejectment suit being only Rs. 132, the Revenue Court could only become a Court of lowest civil jurisdiction, *i.e.*, a Munsif's Court, and could not try the present suit, the [455] valuation of which was Rs. 1,800 and which could be tried by the Subordinate Judge. He referred to *Behari* v. *Sheobalak* (2).

Dr. *Tej Bahadur Sapru*, for the respondents, was not called upon.

KNOX, BANERJI, and KARAMAT HUSAIN, JJ.—This appeal arises out of a suit brought by Sri Rani Bed Saran Kuar, appellant before us, in which she asked for recovery of possession of mauza Jamvanwa and for a declaration of her proprietary right to the same. One of the pleas raised in defence was that the present suit was barred by reason of section 11 of the Code of Civil Procedure. It appears that prior to the institution of the suit out of which this appeal has arisen, a suit had been instituted in the Court of the Assistant Collector, First Class, under section 63 of the local Tenancy Act. The appellant was the plaintiff in that suit. The defendants were (3) Ramnath Prasad, who was the father of Ram Kinkin Deo and Harbans Deo, two of the present respondents, and also (4) Bhagat Deo, the third respondent before us. The appellant then sued for ejectment of the defendants on the ground that they were lessees, and that the lease under which they held would expire at the end of the then current agricultural year.

The defence was to the effect that the defendants were not lessees, but proprietors, and that the plaintiff had no title to the property in question. The Assistant Collector took upon himself to determine the question of title then in issue before him. We cannot help saying that the action of the Assistant Collector seems to us to have been inexpedient. He would have shown better discretion if he had required the defendants to institute a suit in the Civil Court for the determination of this question, which was particularly a question for the Civil Court to determine. Section 199 of the Local Tenancy Act, however, gave the Assistant Collector power to determine the question, and he determined it against the plaintiff, namely, the appellant before us. He held that the plaintiff had no title to the property in dispute.

The plaintiff might have carried this decision in appeal before the District Judge. Had she done so, it would have been within [456] the

(1) (1902) I. L. R. 29 Cal. 707, (715). (2) (1907) I. L. R. 29 All. 601.

power of the District Judge either to try the question of title himself, or, if he had not all the materials before him necessary for the determination of the question, to have framed issues with reference to that question, and have referred them for trial to any subordinate court of civil jurisdiction. That court might, for instance, have been the court of the Subordinate Judge. The plaintiff, however, did not take any action in this direction, with the result that she has now to meet a decree against her which has become final. The decree was pronounced, it is true, by a Revenue Court, but by a Revenue Court which, as we have held in previous decisions, and as we now hold, is *pro tanto* a Civil Court of competent jurisdiction to decide the question of title. The rulings to which we refer will be found mentioned and considered in *Behari* v. *Sheobalak* (1).

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To return to the suit out of which this appeal arises, the court of first instance held that the plaintiff's case was barred by the rule of *res judicata*. The lower appellate court also held that the suit of the plaintiff was barred against such of the defendants as were parties to the previous suit brought under section 63 to which we have already referred. With this view of the lower appellate court we agree for the reasons stated above. So far as the present case is concerned the result is, that the appellant's claim must be held to be barred against the respondents to this appeal. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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33 A. 457 (=9 I. C. 530=8 A. L. J. 275).

[457] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

NASIR-UL-HAQ AND OTHERS (*Defendants*) v. FAIYAZ-UL-RAHMAN AND OTHERS (*Plaintiffs*).*

[8th February, 1911.]

Muhammadan law—Suit for dower—Compromise—Family arrangement—Transfer of expectancy—Act No. IV of 1882 (*Transfer of Property Act*), *section* 6 (*a*).

A Muhammadan wife brought a suit for dower against her husband which resulted in a compromise, the terms being that the wife was given possession of some property in lieu of her dower and the husband retained possession of some other property for life, which life interest in case of urgent necessity he was authorized to sell or hypothecate, and it was agreed that on the death of the wife the persons who should be the heirs of both would be the owners of the properties. The wife predeceased her husband, who then transferred certain properties in his own right and as heir of his wife, *held* that the compromise was in the nature of a family settlement under which the husband was not competent to dispose of more than the life interest in certain property therein named. The relinquishment by the husband of his right to succeed as heir to his wife was not obnoxious to the prohibition contained in section 6 (*a*) of the Transfer of Property Act, 1882. *Musammat Hurmat-ul-nissa Begum* v. *Allah-dia Khan* (2) *Shums-ud-din Goolam Husein* v. *Abdul Husain Kaim-ud-din* (3), *Kunhi Mamod* v. *Kunhi Moidin* (4) and *Ram Nirunjun Singh* v. *Prayag Singh* (5) referred to.

[Ref. 17 A. L. J. 822=51 I. C. 919=41 All. 611; Fol. 65 I. C. 27=33 C. L. J. 457=48 Cal. 536; Diss. 28 M. L. J. 650=1915 M. W. N. 626=39 Mad. 554.]

THE facts of this case were as follows:—

One Abdullah owned, among other properties, 10 biswas of the village

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* Appeal No. 82 of 1909 under section 10 of the Letters Patent.

(1) (1907) I. L. R. 29 All. 601.
(2) (1871) 17 W. R. 108.
(3) (1906) I. L. R. 31 Bom. 165.
(4) (1896) I. L. R. 19 Mad. 176.
(5) (1881) I. L. R. 8 Cal. 138.

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of Nizam-ud-dinpur and 17½ biswas of Tayabpur. His wife, Musammat Mubarak-un-nissa, brought a suit against him for the recovery of her dower of Rs. 10,000, and this suit was compromised and the compromise embodied in a decree of the 29th of August, 1889. The material portions of the decree ran as follows:—

"The defendant, Abdullah, gives the whole of the undermentioned properties to the plaintiff in lieu of Rs. 10,000 dower claimed by her. Now the plaintiff is the owner of the said properties, but the defendant will retain possession over 10 biswas of Nizam-ud-dinpur for his life; the income of it will be appropriated by the defendant, and in case of urgent necessity he may hypothecate or sell his life estate in 5 biswas out of the said 10 biswas . . . On the death of the plaintiff those who may be the heirs of both the plaintiff and the defendant will be the owners of the properties."

Mubarak-un-nissa died on the 25th of May, 1894, and was survived by her husband Abdullah. He, on the 19th of [458] April, 1897, executed a usufructuary mortgage in favour of the defendant No. 1 of 4 biswas of Nizam-ud-dinpur and 2½ biswas of Tayabpur. On the 2nd of April, 1899, he sold to the plaintiff 3 biswas out of the 5 biswas of Nizam-ud-dinpur, of which, according to his construction of the abovementioned decree, he was the owner, and 1¼ biswas out of the other 5 biswas of the same village to which he claimed title by inheritance from his wife. Abdullah died in 1899, and on the 14th of June, 1907, the plaintiff brought the suit out of which this appeal has arisen for the redemption of the property mortgaged by Abdullah under the mortgage of the 2nd of April, 1889. He impleaded the mortgagee and the heirs of Mubarak-un-nissa and Abdullah, namely the defendants 2—13, who are their children and grand-children. These last mentioned defendants 2—13 disputed the right of the plaintiff to redeem the mortgage, contending that Abdullah had only a life estate in 10 biswas of Nizam-ud-dinpur, and that the interest of the plaintiff in the 5 biswas, which was transferred to him, came to an end with the death of Abdullah. It was further contended that according to the terms of the decree Abdullah relinquished his chance to succeed as an heir to any part of the estate of Mubarak-un-nissa, inasmuch as he agreed with her that only those who might be the heirs of both himself and her would be the owners of her property on her death.

The court of first instance dismissed the suit, holding that under the compromise incorporated in the decree, Abdullah got only a life estate in the 10 biswas and that he relinquished his right of inheritance to his wife as to the properties comprised in the decree.

An appeal was preferred and before the lower appellate court it was admitted that Abdullah had only a life estate in a 10 biswa share of Nizam-ud-dinpur, but it was contended that on the death of his wife he inherited 2½ biswas out of the remaining 10 biswas. The decree of the court of first instance was upheld.

The plaintiff Faiyaz-ul-Rahman appealed to the High Court, when his appeal coming before a single Judge of the Court was [459] allowed and the suit decreed. The defendants thereupon appealed under section 10 of the Letters Patent.

Mr. *Muhammad Ishaq Khan*, for the appellants.

Mr. *D. R. Sawhny* (for Babu *Surendra Nath Sen*), for the respondents.

STANLEY, C. J., and BANERJI, J.—The facts of this case are not in dispute. They are these:—One Abdullah owned, among other properties, 10 biswas of the village of Nizam-ud-dinpur and 17½ biswas of Tayabpur. His wife, Musammat Mubarak-un-nissa, brought a suit against him for the

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recovery of her dower of Rs. 10,000, and this suit was compromised and the compromise embodied in a decree of the 29th of August, 1889. The material portions of the decree ran as follows:—

"The defendant, Abdullah, gives the whole of the undermentioned properties to the plaintiff in lieu of Rs. 10,000 dower claimed by her. Now the plaintiff is the owner of the said properties, but the defendant will retain possession over 10 biswas of Nizam-ud-dinpur for his life; the income of it will be appropriated by the defendant, and in case of urgent necessity he may hypothecate or sell his life estate in 5 biswas out of the said 10 biswas...On the death of the plaintiff those who may be the heirs of both the plaintiff and the defendant will be the owners of the properties."

Mubarak-un-nissa died on the 25th of May, 1894, and was survived by her husband Abdullah. He, on the 19th of April, 1897, executed a usufructuary mortgage in favour of the defendant No. 1 of 4 biswas of Nizam-ud-dinpur and $2\frac{1}{2}$ biswas of Tayabpur. On the 2nd of April, 1899, he sold to the plaintiff $3\frac{3}{4}$ biswas out of the 5 biswas of Nizam-ud-dinpur, of which, according to his construction of the above-mentioned decree, he was the owner, and $1\frac{1}{4}$ biswas out of the other 5 biswas of the same village, to which he claimed title by inheritance from his wife. Abdullah died in 1899, and on the 14th of June, 1907, the plaintiff brought the suit out of which this appeal has arisen for the redemption of the property mortgaged by Abdullah under the mortgage of the 2nd of April, 1889. He impleaded the mortgagee and the heirs of Mubarak-un-nissa and Abdullah, namely, the defendants 2—13, who are their children and grand-children. These last mentioned defendants 2—13 disputed the right of the plaintiff to redeem the mortgage, contending that [460] Abdullah had only a life estate in 10 biswas of Nizam-ud-dinpur, and that the interest of the plaintiff in the 5 biswas, which was transferred to him came to an end with the death of Abullah. It was further contended that according to the terms of the decree Abdullah relinquished his chance to succeed as an heir to any part of the estate of Mubarak-un-nissa, inasmuch as he agreed with her that only those who might be the heirs of both himself and her would be the owners of her property on her death.

The Court of first instance dismissed the suit, holding that under the compromise incorporated in the decree, Abdullah got only a life estate in the 10 biswas and that he relinquished his right of inheritance to his wife as to the properties comprised in the decree.

An appeal was preferred and before the lower Appellate Court it was admitted that Abdullah had only a life estate in a 10 biswa share of Nizam-ud-dinpur, but it was contended that on the death of his wife he inherited $2\frac{1}{2}$ biswas out of the remaining 10 biswas. The decree of the Court of first instance was upheld.

A second appeal was then preferred and the learned Judge of this Court before whom it was argued, reversed the decisions of the Courts below, holding that the agreement on the part of Abdullah to relinquish his chance to succeed Mubarak-un-nissa was void and unlawful, and that the Court had no jurisdiction to pass the decree, on its basis, of the 29th of August, 1889, under section 375 of the Code of Civil Procedure (Act No. XIV of 1882). The Court held that the decree of the 29th of August, 1889, so far as it debarred Abdullah from inheriting his share in the assets of Mubarak-un-nissa is a nullity and that Abdullah's representative in interest is not bound by it, and accordingly that Abdullah, on the death of Mubarak-un-nissa, inherited $2\frac{1}{2}$ biswas out of 10 biswas of Nizam-ud-dinpur, and that the plaintiff as a purchaser from him is entitled to redeem the entire mortgage. We may point out that Abdullah could not inherit

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more than a sixth of the share of his wife, and not a fourth, as stated by our learned brother. There being children of the marriage, [461] his share according to the Muhammadan law would only be one-sixth. This, however, is of no importance so far as regards the present appeal.

From the decision of our learned brother this appeal has been preferred under the Letters Patent. In his judgment the authorities bearing on the subject of the right of a Muhammadan to relinquish his chance of succeeding as an heir to the estate of a living person are reviewed. We do not think it necessary in the view which we take of the facts to refer particularly to all the authorities. In the case of *Musammat Hurmut-ul nissa Begum* v. *Allahdia Khan* (1) Their Lordships of the Privy Council held that according to the Muhammadan law there may be a renunciation of the right to inherit. The ruling has not, so far as we are aware, been questioned by Their Lordships in any subsequent case. The ruling was, however, prior to the passing of the Transfer of Property Act, and it may be that that Act has some bearing upon the question, as was held by JENKINS. C. J. and BEAMAN, J, in *Shumsuddin Goolam Husein* v. *Abdul Husein Kalimuddin* (2). In that case it was held that the chance of an heir-apparent succeeding to an estate is under Muhammadan law neither transferable nor releasable, that it is only by application of the principle that equity considers that done which ought to be done that such a chance can, if at all, be bound. In *Kunhi Mamod* v. *Kunhi Moidin* (3), decided long subsequent to the passing of the Transfer of Property Act, it was held by COLLINS, C. J. and PARKER, J., that the renunciation by a Muhammadan of his chance of succeeding to an estate was valid. In that case the plaintiff, in consideration of Rs. 150, which was paid to him by his mother in respect of the share in her estate to which he would become entitled on her death, admitted that he had no longer any right to her property. The learned Judges held that "*prima facie* there is nothing illegal in the transaction" and in the absence of clear proof that it is forbidden by Muhammadan law, they thought that the plaintiff should be held to be bound by it.

[462] There is no doubt a conflict of decisions in the High Courts in India upon this question, but is it necessary in this case to determine it? We think not. Prior to and at the date of the decree of the 29th of August, 1889, Abdullah was the absolute owner of the property affected by that decree. His wife claimed her dower. They had children, and an arrangement was come to, whereby the wife accepted in lieu of her dower a life estate in portion of the property of her husband, and Abdullah accepted a life estate in other portions of his property, and subject to the life estate the properties were settled upon the children of the marriage. This was in the nature of a family settlement. Both Abdullah and Mubarak-un-nissa agreed that upon their respective deaths the property in which life estates were reserved to them should devolve upon their heirs. There is nothing, so far as we are aware, unlawful in such an agreement. There was no transfer or renunciation of an expectant interest or of a mere possibility. The Court, which passed the decree upon the compromise, considered it lawful and passed a decree in accordance with it. It appears to us that the decree debarred Abdullah, or any one claiming under him, from successfully asserting a title to any interest in the property outside and beyond the life interest which was reserved to him. Having taken benefits under the compromise it was not open to him, nor is it open to

(1) (1871) 17 W. R. 108.
(2) (1906) I. L. R. 31 Bom 165.
(3) (1896) I. L. R. 19 Mad. 176.

any one claiming under him now to impugn the validity of the transaction or deprive the heirs of the rights and interests conferred upon them not merely by Abdullah but by Mubarak-un-nissa. Section 6 (*a*) of the Transfer of Property Act merely provides that "the chance of an heir apparent succeeding to an estate . . . or any other mere possibility of a like nature, cannot be transferred." This clause seems to strike at transfers of a mere possibility or expectancy not coupled with any interest or growing out of any existing property. It does not, for example, strike at agreements by expectant heirs, such as an agreement to divide a particular property in a certain way on the happening of a particular contingency : see *Ram Nirunjun* v. *Prayag Singh* (1).

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[463] For these reasons we think that our learned brother was wrong in reversing the decrees of the lower courts. We accordingly allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs in all courts.

Appeal decreed.

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33 A. 463 (=8 A. L. J. 324=9 I. C. 572).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice, Griffin.

JAGDIP NARAIN SINGH (*Plaintiff*) *v.* BILAR SINGH AND OTHERS (*Defendants*).*

[11th February, 1911.]

Limitation—Adverse possession—Purchaser of a decree on a mortgage allowing a puisne mortgagee to pay him off—Such position inconsistent with a claim to be in adverse possession of the mortgaged property.

Held that when the purchaser of a decree for sale on a mortgage accepted from a puisne mortgagee the amount due under the decree which he had purchased, he by so doing admitted the validity of the puisne mortgage, and his position was not consistent with a claim to be in adverse possession of the mortgaged property. *Ramcharan* v. *Sadashiv* (2) referred to.

THIS was a suit for a declaration that the plaintiff had acquired a title by adverse possession to certain property. The claim had first been asserted in a similar suit in 1894, but that suit had been dismissed. The immediate cause of the bringing of the present suit was that one of the defendants had executed a mortgage of the property in favour of other defendants, who had obtained a decree thereon and were about to bring the property to sale. The court of first instance, Subordinate Judge of Gorakhpur, decreed the claim in part On appeal the District Judge dismissed the suit *in toto* for reasons which will be found set forth at length in the judgment of the High Court. The plaintiff appealed to the High Court.

Mr. *B. E. O' Conor* (with him Babu *Durga Charan Banerji*), for the appellant.

Mr. *W. Wallach* (with him the Hon'ble Pandit *Sundar Lal*), for the respondents.

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* Second Appeal No 676 of 1910 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 26th of May, 1910, reversing a decree of Gokul Prasad, Subordinate Judge of Gorakhpur, dated the 9th of August, 1909.

(1) (1881) I. L. R. 8 Cal. 138.

(2) (1886) I. L. R. 11 Bom. 422.

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APPELLATE CIVIL.

33 A. 463=
8 A. L. J. 324
=9 I. C. 572.

STANLEY, C. J., and GRIFFIN, J.—This appeal arises out of a suit for a declaration that the plaintiff had acquired a title by [464] adverse possession to shares in four villages specified in the plaint, and that the defendants, second party, were not entitled to bring that property to sale in execution of a mortgage decree against the defendants, first party.

The defendants, first party, were recorded in the revenue papers as owners of a three-fourths share in the property in suit, but according to the plaintiff they never were in possession and he alone was in exclusive enjoyment of the property for over 12 years. Defendant No. 1, one of the recorded co-sharers, executed a mortgage of the property on the 12th April, 1899, in favour of the defendants, second party. The latter sued on this mortgage and obtained a decree for sale on the 14th of December, 1905. The present suit was instituted on the 3rd July 1906.

Prior to this, namely, on the 16th of February, 1894, the plaintiff had instituted a suit praying for maintenance of possession and establishment of his title by adverse possession over the property. This suit was dismissed on the 18th December, 1894, upon the finding that the plaintiff had failed to prove adverse possession for a period of twelve years. This decision was upheld on appeal by the High Court. The present suit, it will be noted, was filed more than twelve years after the institution of the former suit. It was dismissed by both the Courts below upon the ground that the suit was barred by the rule of *res judicata* by reason of the decision in the former suit. This decision was reversed by this Court on appeal, the Court holding that the plaintiffs might have acquired a title by adverse possession since the 16th February, 1894, and that the doctrine of *res judicata* did not bar it. This Court in its order of remand framed two issues for determination, namely:—

(1) Whether the plaintiff has been in possession of the land since the 16th of February, 1894, and, if so, for what period?

(2) If the plaintiff has been in possession for any time, what was the nature of that possession?

The Court of first instance found that the plaintiff had been in possession of the property in suit for a period of over twelve years since the 16th of February, 1894, before the institution of the present suit, and (2) that his possession during that period [465] over three out of the four villages in suit was adverse to the defendants.

On these findings the learned Subordinate Judge decreed the plaintiff's suit in respect of three villages, and dismissed it with regard to the fourth village.

The defendants appealed against the order decreeing the plaintiff's claim, while the plaintiff appealed against the dismissal of his suit with regard to the fourth village.

The learned District Judge has allowed the defendants' appeal and has dismissed the plaintiff's suit *in toto*. The ground upon which he dismissed the suit appears to be, that there was no evidence of an assertion by the plaintiffs of possession adverse to the defendants, first party, subsequent in date to the 16th of February, 1894 The learned District Judge observes:—"It is obvious that any assertion of plaintiff, earlier than the 16th of February, 1894, is nothing, since it is *res judicata* that he was not then in possession. It is equally clear that the plaint is nothing, since it relates to the date of insitibution and no later, and the *res judicata* relates to the same period as the plaint."

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8 A. L. J. 324
9 I. C. 572.

The learned Judge appears to labour under some misconception as to what was decided in the former suit. The decision in that suit was not that the plaintiff was not in possession, but that he had failed to establish the acquisition by him of a title by adverse possession. It appears to us that the assertion of adverse title contained in the plaint of the 16th of February, 1894, cannot be ignored in the manner the Court below has ignored it. If the plaintiff had succeeded in proving that for a period of twelve years or upwards prior to the institution of this suit he has held uninterrupted possession over the property in suit adverse to the defendants, then he would be entitled to a declaration of his title as against them.

But there is another ground upon which the lower Appellate Court dismissed the plaintiff's suit. The defendant, Ganesh Prasad, in conjunction with two other persons, mortgaged his share in the villages in dispute to the Gorakhpur Bank, and on the 29th of November, 1901, the Bank obtained a decree on foot of his mortgage, and on the 16th of January, 1903, sold that decree to a *benamidar* for the plaintiff in this suit who has [466] been found to have been the real purchaser. At this date the possession of the plaintiff had not ripened so as to give him a title by prescription. The defendants, second party, as puisne mortgagees, paid to the plaintiff the amount of the decree so transferred to him and thus stepped into the shoes of the prior mortgagee. The learned District Judge held that by his conduct in taking the amount of the decree from the defendants, second party, the plaintiff admitted the validity of the mortgage held by these defendants, and did not hold out his own possession as adverse to the defendant, first party, and he also held that there was no evidence of any adverse possession later than the 16th February, 1894. Adverse possession is a question of fact to be determined upon evidence, and we think that the lower Appellate Court was justified under the circumstances in holding that adverse possession could not be set up as existing at the date of the redemption by the defendant, second party, of the debt of the Bank. The plaintiff not merely paid off the debt of the Bank, but also on the strength of the security of the Bank and of the transfer to him of the Bank's decree induced the defendants, second party, to pay to him the debt so transferred. In doing so he must be taken to have acknowledged that the Bank had a subsisting claim to the share of the defendant, Ganesh Prasad, and also the right of the defendants, second party, to redeem the earlier security by virtue of their rights as puisne mortgagees. It was in evidence that the plaintiff did not at this time assert adverse possession of Ganesh Prasad's share. He held himself out, to the puisne mortgagees, as owners of the Bank's interest in that share, and his possession, so far as the respondent's interest in the property is concerned, might properly be deemed to have been referable to his title by virtue of the Assignment of the Bank's decree. A man cannot hold a mortgage on his own property, and in taking payment from the puisne mortgagees the plaintiff ought, we think, to be deemed to have acknowledged the title of Ganesh Prasad to the equity of redemption in his share of the property. "As long as possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement, so long must the possession be referred to that [467] right rather than to a right which contradicts the ownership."

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Ram Chandra v. *Sadashiv* (1). In the case of a co-sharer holding mortgaged property after redemption by him of the mortgage, limitation is computed only from the date when the possession becomes adverse by the assertion of an exclusive title. At the date of the transactions to which we have referred, we do not think it can be rightly held that the plaintiff asserted an exclusive title. This being so, whether the possession of the plaintiff was adverse or not prior to the redemption of the mortgage of the Bank by the defendants, second party, is immaterial. By the transactions above referred to the prior possession, if adverse, was interrupted and limitation could only be deemed to run as from their date.

For these reasons we think that the learned District Judge came to a right conclusion, and we dismiss this appeal with costs.

Appeal dismissed.

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33 A. 467 (=8 A. L. J. 280=9 I. C 628.)

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

SUKHDEI (*Opposite Party*) *v.* KEDAR NATH (*Applicant*).*

[13th February 1911,]

Act No. V of 1882 (*Indian Easements Act*), *section* 13—*Easement of necessity—Definition.*

An easement of necessity is an easement without which a property cannot be used at all and not one merely necessary to the reasonable enjoyment of the property. *Wheeldon* v. *Burrows* (2) followed. *Union Lighterage Company* v. *London Graving Dock Company* (3) and *Ray* v. *Haseldine* (4) referred to.

[Ref. 50 I. C. 646=17 A. L. J. 672; 72 I. C. 199.]

THE facts of this case were as follows:—

On the 19th of December, 1908, a decree was passed for partition of moveable and immoveable property, which, among other things, provided that the plaintiff should have a two-thirds share in the immoveable property and ordered "that the plaintiff should get possession of the house marked yellow and green in the map which is incorporated in the decree." This house was only 25 feet wide, was surrounded by other houses on three sides, and had a road to the north on which a door situate in the yellow portion opened. Upon the plaintiff applying for execution of the decree in her favour, the **[468]** judgment-debtors objected that the said door and the passage over the yellow portion to which it gave access should be kept open for his benefit. The Subordinate Judge allowed the objection and said:—

"The defendant, however, has not lost by partition the easement over the other portion of the house for purposes of egress and ingress. The decree-holder cannot stop that by building a partition wall . . . No doubt, this right of passage will make the decree-holder's share also almost useless, but fear I cannot help it."

The plaintiff appealed, and on his behalf *Bolye Chunder Sen* v. *Lalmoni Dasi* (5) and *Kadombini Debi* v. *Kali Kumar Halder* (6) were cited, and it was argued that the executing Court was not competent to read any terms into the decree or recognise any right not reserved thereby, and

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* First Appeal No. 403 of 1909, from a decree of Srish Chandra Basu, Subordinate Judge of Allahabad, dated the 11th of September, 1909.

(1) (1886) I. L. R. 11 Bom. 422.
(2) (1879) L. R. 12 Ch. D. 31.
(3) (1902) 2 Ch. D. 557.
(4) (1904) 2 Ch. D. 17.
(5) (1887) I. L. R. 14 Cal. 797.
(6) (1899) 3 C. W. N. 409.

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that so long as there was unity of ownership, there could be no right of easement. KNOX and KARAMAT HUSAIN, JJ., remitted the following issue to the Court below, namely:—"Is the doorway over which the lower Court has granted a right of passage the only possible means of egress and ingress to the defendant's property?" The finding returned was to the following effect:—

"At any rate I do not think there is any other such convenient possible means of ingress and egress to the house of Kedar Nath as to keep his house capable of residence. I may further remark that if a partition wall be erected to separate his share, his house will be unfit for residence on sanitary grounds."

Dr. *Satish Chandra Banerji*, for the appellant, contended that the Court below had confounded convenience with necessity; and relied upon *Union Lighterage Co.* v. *London Graving Dock Co.* (1), *Roy* v. *Hazeldine* (2), Goddard on *Easements*, (ed. 6,) pp. 38-9. Gale on *Easements* (ed. 8), p. 172. Peacock on *Easements* (ed. 2), p. 21 and *Wutzler* v. *Sharpe* (3).

The Hon'ble Pandit *Sundar Lal*, for the respondent, urged that the map clearly showed that the portion of the house allotted to the defendant could not be enjoyed as heretofore if he were not permitted to use the old passage and had to pull down some walls and fill up a well. It would practically amount to a rebuilding of the house. The easement therefore was one of necessity.

[469] Dr. *Satish Chandra Banerji*, in reply, submitted there was no question of rebuilding the house, and no authority in favour of the contention that the old conditions should be completely maintained. The case in 2 Ch for 1904, supported the opposite view.

KNOX and KARAMAT HUSAIN, JJ.—One Sukhdei got a decree for a portion of certain buildings and the rest was given to Kedar Nath. It is admitted that the buildings before partition belonged to one owner and that the decree reserved no easement of way in favour of Kedar Nath.

Sukhdei, in execution of the decree, applied for the possession of the share allotted to her. Kedar Nath objected that he had the easement of way over the doorway in question. The Court below granted the easement claimed by him. Sukhdei appealed to this Court, and her learned advocate contended that the Court below, as an executing Court, could not grant an easement which had not been awarded by the decree. We, by our order, dated the 11th of July, 1910, remitted the following issue to the Court below for trial:—"Is the doorway over which the lower Court has granted the right of passage the only means of egress and ingress to the defendant's property?"

The findings of the Court below are to the effect that a door can be opened on the north, in Kedar Nath's share, but that it will not be convenient inasmuch as the utility of the house will be very much reduced, and that excepting the doorway in question there is no other possible and convenient means of egress and ingress to the share of Kedar Nath. The learned advocate of Sukhdei urges that the findings fail to establish an easement of necessity which is founded upon *absolute* necessity and not upon a more convenient use of the dominant tenement. This contention of the learned advocate in our opinion is sound.

The English law on the subject is that an easement of necessity arises only when it is *absolutely* necessary, and not when it is necessary to the reasonable enjoyment of the dominant tenement.

(1) (1902) 2 Ch. D. 557, 573.
(2) (1904) 2 Ch. D. 17.
(3) (1893) I. L R. 15 All. 270 (292).

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33 A 467 = 8 A. L. J. 280=9 I. C 628.

[470] The leading case on the point before us is *Wheeldon* v. *Burrows* (1), and was followed in *Union Lighterage Company* v. *London Graving Dock Co.* (2) in which, at page 573, we find the following passage :—

"In my opinion an easement of necessity such as is referred to, means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property."

The cases of *Wheeldon* and *Union Lighterage Company* are referred to in *Ray* v. *Hazeldine* (3), and as the judgment of KEKEWICH, J., is highly instructive, we quote the following portion therefrom :—

"If a vendor of land desires to reserve any right in the nature of an easement for the benefit of his adjacent land which he is not parting with, he must do it by express words in the deed of conveyance. That is settled law, and expresses the result of the decision in *Wheeldon* v. *Burrows* (1), where the Court of Appeal affirmed the decision of BACON, V. C. That is the general rule, but the rule is subject to certain exceptions. One of them is the well-known exception of an easement of necessity, that is to say. where the enjoyment of the alleged right over the adjoining land is necessary to the property which is not conveyed, then the Court will consider the easement as impliedly reserved, though it has not been reserved by express words. Such easement, or right in the character of an easement, may be a right to the access of light to a particular window. In a large majority of cases a window which lights a room is deemed necessary to the lighting of that room and is, on the whole, essential to the comfortable enjoyment of that room, but it does not follow that the right to access of light is an easement of necessity. Where are you to draw the line? Suppose the blocking up of the window largely interferes with the comfort and enjoyment of the room, is the grantee of the adjacent land entitled to block it up, or does the exception stand? It seems to me that the line to be drawn is pointed out by STIRLING, L. J.. in *Union Lighterage Co.* v. *London Graving Dock Co.* (2). His Lordship makes a distinction between an easement of necessity and an easement necessary to the reasonable enjoyment of property. After referring to the two rules laid down in *Wheeldon* v. *Burrows* (1) and the exception thereto, he says :—

'The appellants did not dispute that there is no express reservation in the conveyance to the plaintiffs, but they contended that the easement claimed by the defendants is an 'easement of necessity' within the recognised exception to the second rule. Now, in the passages cited, the expression 'way of necessity and' 'easement of necessity' are used in contrast with the other expressions, 'easements which are necessary to the reasonable enjoyment of the property granted' and 'easements XXX necessary to the reasonable [471] enjoyment of the property conveyed, and the word 'necessity' in the former expression has plainly a narrower meaning then the word 'necessary' in the latter. In my opinion an easement of necessity such as is referred to means an easement without which the property retained cannot be used at all, and not merely necessary to the reasonable enjoyment of the property.' Then after pointing out that the lights in *Wheeldon* v. *Burrows* was reasonably necessary to the enjoyment of the workshop, he says:—'So here it may be that the tie-rods which pass through the plaintiff's property are reasonably necessary to the enjoyment of the defendant's dock in its present condition, but the dock is capable of use without them, and I think that there cannot be implied any reservation in respect of them. That seems to me to draw the distinction between what is absolutely necessary and what is reasonably required for the enjoyment of the land or building as it stands. In my judgment this is a window to which the access of light cannot be reserved by implication upon the ground that the light is necessary to the pantry. It cannot be that there is any necessity by reason of its being used as a pantry, since it can be used for some other purposes. It cannot be said that a special use of light attaches to it as a pantry, and to say, as the defendant does, that the access of light to that window is reserved to him by necessity is giving to the word 'necessity' a meaning which it does not bear in this connection."

The reason of the law that there must be *absolute* necessity is very well stated by Goddard. He says :—

"In support of this view, the name by which they are known—easement of necessity—points to the fact that there must be *absolute* necessity before the law will compel a land owner to submit to so detrimental a right as an easement in his land—

(1) (1879) L. R. 12 Ch. D. 31.
(2) (1902) 2 Ch. D. 557.
(3) (1904) 2 Ch. D. 17.

a right in reality though not in theory imposed on his land against his will. It must be borne in mind how detrimental generally it is to an estate to be burdened with an easement. what a nuisance it is to an owner of land to have another person walking at his pleasure over a field, or digging through the surface, or erecting a steam-engine thereon, and how such rights may prevent building on land or using it in many of the ways the owner may desire." pp. 38, 39, 6th edition.

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The above rule of the English law, so far as partition of land is concerned, is enacted in the following portion of section 13 of the Indian Easements Act (Act No. V of 1882).

"Where a partition is made of the joint property of several persons.—

(*e*) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement." ...."The easements mentioned in this section, clauses (*a*), (*c*) and (*e*), are called easements of necessity."

It may be noted here that the Indian Easements Act was extended to these provinces by Act No. VIII of 1891 on the 6th of March, 1891, and the case is governed by the Indian Easements Act.

[472] Reading the findings of the Court below in the light of the provisions of section 13 as to easements of necessity, we hold that Kedar Nath failed to prove facts which would entitle him to the right of way claimed, inasmuch as the user of that right is not *absolutely* necessary for the benefit of his share of the house. He certainly can open a door towards the north for access to his share. It is contended by his learned advocate that with reference to the existing state of the building and without any alteration therein, the use of the doorway in question for access to this share of the building is an absolute necessity. There is, however, no authority to favour the contention, and the share cannot be deemed to be absolutely useless without the right of way claimed.

For the above reasons we allow the appeal, set aside the decree of the Court below and disallow the objection of Kedar Nath with costs.

Appeal allowed.

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33 A. 472 (=9 I. C. 624=8 A. L. J. 306.)

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Griffin.

SUMER SINGH (*Defendant*) *v.* LILADHAR AND OTHERS (*Plaintiffs*).*

[13th February, 1911.]

Hindu Law—Debts—Sons' liability for father's debts—Money borrowed to defend a suit for defamation not an immoral debt.

Held, that under the Hindu Law money borrowed by the father to defend a suit for defamation is a debt for which a Hindu son and grandson are liable.

[Fol. 26 M. L. J. 528=24 I. C. 356 ; **Ref.** 34 All. 4 ; 83 I. C. 413=5 P. L. T. 135=3 Pat. 250.**]**

THE facts of this case were as follows :—

One Rushton brought a suit for damages for libel against Chaube Rikhi Lal. The Court of first instance dismissed the suit, but the lower Appellate Court passed a decree in his favour. Rikhi Lal borrowed money from a Bank to file a second appeal, and the defendant's father stood surety for him. The Bank realized its money from the surety, and Rikhi Lal

* Second Appeal No. 367 of 1910 from a decree of H. W. Lyle, District Judge of Agra, dated the 14th of March, 1910, reversing a decree of Kalka Singh, Additional Subordinate Judge of Agra, dated the 5th of October, 1909.

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executed a promissory note in favour of the defendant's father. The defendant obtained a decree against Rikhi Lal, and attached the ancestral property. The sons and grandsons of Rikhi Lal brought the present suit for a declaration that the property could not be attached and sold. [473] The Court of first instance dismissed the suit, but the lower Appellate Court reversed the decree. The defendant appealed.

Pandit *Mohan Lal Sandal* (with him Dr. *Satish Chandra Banerji*), for the appellant—

The debt is not immoral, and the son can only escape from liability if he shows it to be immoral; *Yajnavalkya Smriti, Vyavahara Adhyaya* v. 47; Mitakshara, Chap. VI, sec. III, Pc. 47, and the Commentary thereon; *Paryag Sahu* v. *Kasi Sahu* (1) *Dalip Singh* v. *Sri Kishen Pandey* (2).

The case relied on by the lower Appellate Court, *Durbar Khachar* v. *Khachar Harsur* (3) is distinguishable. There the father caused a damage to the property of another; he was sued and a decree was passed against him, after the death of the father the son was brought on the record. There the loan itself was taken to defend the honour of the father.

No one appeared for the respondents.

RICHARDS and GRIFFIN, JJ.:—This appeal arises out of a suit in which the plaintiff claimed that a certain ancestral house which has been attached in execution of a decree against one Chaube Rikhi Lal, could not be attached and sold. The plaintiffs were the son and grandson of the said Chaube Rikhi Lal. A decree had been granted against Chaube Rikhi Lal at the suit of the appellant Sumer Singh. The suit instituted by Sumer Singh was a suit on foot of a promissory note given by Rikhi Lal under the following circumstances. Rikhi Lal had been sued for libel. He was successful in the Court of first instance. On appeal, however, a decree was given against him. He was anxious to file a second appeal in the High Court, and having no money, Sumer Singh's father went security for him, had to pay the money for him and obtained the promissory note. The plaintiff raised the plea that the debt due to the father of Sumer Singh was not a debt for which a Hindu son and grandson could be held liable. The court of first instance held that the son and grandson were liable and dismissed the suit. The lower Appellate Court reversed the decree of the Court of first instance and gave the plaintiff a decree. Hence the present appeal. The learned Judge having [474] referred to certain authorities and came to the conclusion that they were so conflicting that he was entitled to follow his own view. The case of *Durbar Khachar* v. *Khachar Harsur* (3) was one of the authorities cited before the learned Judge and was the authority which he thought fit to follow. Speaking generally, the debts which a son is not liable to pay are debts incurred for spirituous liquor, gratification of lust or gambling. (*Vide* Colebrooke's Mitakshara, Chapter VI, section 3, Placitum 47). The text also declares that a son is not bound " to pay any unpaid fines or tolls or idle gifts. " In the Bombay case cited above a decree was obtained against the defendant's father for damages to the plaintiff's property caused by a dam erected by the defendant's father, and it was sought to execute this very decree against the son. The facts of the present case are, when carefully considered, very different from those in the case cited. It was not sought to execute against the son or grandson

(1) (1899) 4 C. W. N. 659.
(2) (1872) 4 N. W. P. H. C. Rep. 88.
(3) (1908) I. L. R. 32 Bom. 348.

a decree for damages for libel. The decree which the decree-holder sought to execute was a decree in a suit on a promissory note. The promissory note represented money which the father had borrowed for the purpose of defending himself against a suit for damages. Without expressing any opinion as to whether the case above referred to was or was not rightly decided, we think that the debt in the present case was a debt for which a Hindu son and grandson were liable. We may mention that no one appears on behalf of the respondents. We allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs.

Appeal allowed.

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33 A. 472 = 9 I. C. 625 = 8 A. L. J. 306.

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33 A. 475 (=8 A. L. J. 309=10 I. C. 843).

[475] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

BHAGWAN SAHAI AND ANOTHER (*Defendants*) *v.* HAR CHAIN AND OTHERS (*Plaintiffs*).*

[15th February, 1911.]

Act No. III of 1877 (*Indian Registration Act*), *sections* 17, 49—*Registration—Evidence—Petition of compromise unregistered and not embodied in any decree of Court.*

Held that a petition containing the terms of a compromise between parties to a Revenue Court suit, which had been filed in the Court, but was unregistered and had not been acted upon or embodied in the Revenue Court's decree, could not in a subsequent civil suit be used as evidence of the terms of such compromise, the property purporting to be dealt with thereby being above the value of Rs. 100. *Sadar-ud-din Ahmad* v. *Chajju*, (1) and *Kashi Kunbi* v. *Sumer Kunbi* (2) followed.

[Dist. 18 A. L. J. 877=58 I. C 732.]

THIS was a suit for a declaration that the plaintiffs are entitled to retain possession of certain immovable property, and in the alternative, if they were found not to be in possession, that possession might be delivered to them. The property exceeded Rs. 100 in value. It belonged to one Gulzari Lal. Upon his death his daughter, Musammat Sujan, succeeded to it. On her death in 1907, the plaintiffs applied for mutation of names in their favour, as did also the father of the defendants. A compromise was entered into between the parties on the 8th of February, 1908, whereby it was agreed that portion of the property should pass into the hands of the father of the defendants and the remaining portion into the hands of the plaintiffs. The father of the defendants subsequently repudiated this compromise. An application was made to the Revenue Court for mutation, and that Court ignoring the compromise ordered mutation in favour of the defendant's father.

In the present suit the compromise above referred to was tendered in evidence in the first Court, but it was rejected on the ground that not being registered and the property being of the value of Rs. 100 and upwards, it was not admissible in evidence; and holding that the plaintiff's suit was based upon this compromise alone that Court dismissed the plaintiff's claim *in toto*, [476] without giving the plaintiffs an opportunity of

* First Appeal No. 109 of 1910 from an order of L. Johnston, District Judge of Meerut, dated the 10th of August, 1910.

(1) (1908) I. L. R. 31 All. 13. (2) (1909) I. L. R. 32 All. 206.

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33 A. 475=8 A L J. 309=10 I C. 843.

establishing their title to the property or portion of it as the reversionary heirs of Gulzari.

On appeal, however, the District Judge held that the compromise was admissible and remanded the case under order XLI, rule 23 of the Code of Civil Procedure. From this order the defendants appealed to the High Court.

Dr. *Satish Chandra Banerji* (with him Babu *Harendra Krishna Mukerji*), for the appellants.

Dr. *Tej Bahadur Sapru* for the respondents.

STANLEY, C.J., and BANERJI, J.—This is an appeal from an order of remand passed under order XLI, rule 23, of the Code of Civil Procedure. The suit was one for a declaration that the plaintiffs are entitled to retain possession of certain immovable property, and in the alternative, if they were found not to be in possession, that possession may be delivered to them. The property exceeds Rs. 100 in value. It belonged to one Gulzari Lal. Upon his death his daughter, Musammat Sujan, succeeded to it. On her death in 1907, the plaintiffs applied for mutation of names in their favour, as did also the father of the defendants. A compromise was entered into between the parties on the 8th of February, 1908, whereby it was agreed that portion of the property should pass into the hands of the father of the defendants and the remaining portion into the hands of the plaintiffs. The father of the defendants subsequently repudiated this compromise. An application was made to the Revenue Court for mutation, and that Court ignoring the compromise ordered mutation in favour of the defendant's father. Hence the present suit.

In their claim the plaintiffs alleged that Musammat Sujan, the daughter of Gulzari, was the last owner of the property and was the plaintiff's cousin by family relationship and was in possession of the property as daughter in a Hindu family and had a life-interest in it. A reference was then made to her death, and in the second paragraph of the plaint the plaintiffs say that on the death of Musammat Sujan a dispute arose between the plaintiffs and the father of the defendants, and that an application for mutation of names was presented on behalf of both parties in the Revenue Court; that the plaintiffs alone claimed **[477]** the whole property of Gulzari on the one hand and the father of the defendants alone claimed the whole property on the other hand. Then reference is made to the compromise to which we have referred. The compromise was tendered in evidence in the first Court, but it was rejected on the ground that not being registered and the property being of the value of Rs. 100 and upwards, it was not admissibe in evidence; and holding that the plaintiff's suit was based upon this compromise alone that Court dismissed the plaintiff's claim *in toto*, without giving the plaintiffs an opportunity of establishing their title to the property or portion of it as the reversionary heirs of Gulzari.

An appeal was preferred to the lower Appellate Court. That court held that the compromise was admissible in evidence, notwithstanding the fact that it was not registered. The learned Judge says:—"I find that the compromise petition in suit did not require to be registered and was admissible in evidence," and that "the lower Court improperly held that the test was whether the compromise was incorporated in the decree, and that this was not the test of admissiblity." That Court accordingly remanded the suit to the Court of first instance for determination on the merits. This appeal was then preferred.

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APPELLATE CIVIL.

33 A. 475=8 A. L. J. 309=10 I. C. 853.

As regards the admissibility in evidence of the compromise the learned District Judge was, in our opinion, entirely in error. Neither the compromise, nor any terms of the compromise, was embodied in any decree or order, and to admit such a compromise in evidence is entirely in contravention of the provisions of the Registration Act. If authority were needed for this, it is to be found in the Full Bench case of *Sadar-ud-din Ahmad* v. *Chajju* (1). There it was held by a Full Bench, of which both of us were members, that a compromise entered into between the parties to mutation proceedings before a Court of Revenue which purported to modify the conditions of a pre-existing mortgage upon the basis of which mutation was sought, could not be allowed to take effect in opposition to the distinct terms of a registered instrument of mortgage. In the subsequent case of *Kashi Kunbi* v. *Sumer Kunbi* (2) a Bench of this Court, of which one of us was also a member, held in a case in which the [478] parties to a suit filed a compromise, which, in addition to setting forth the rights of the parties as to the property in suit, went on to provide that if either party sold his share of the property, the other party should have a right to pre-empt, and in which the decree based on the compromise was silent as to the right of pre-emption, that the compromise required registration, and not being registered, could not be used to support a suit for pre-emption. In the judgment in that case the authorities are dealt with. In that case some of the terms of the compromise were embodied in a decree, but the provision as to pre-emption was nowhere mentioned in the decree. In the present case no portion of the compromise is embodied in any decree or order. On the contrary, the order of mutation entirely ignored the petition of compromise. Clearly, therefore, this petition was not admissible in evidence to prove the agreement set out in it. The lower appellate Court was, we think, justified in remanding the suit, but not upon the ground on which it was remanded. The court of first instance ought under the circumstances to have heard the case upon the merits and tried the question of title set up by the respective parties irrespective of the compromise.

For these reasons the order of remand of the Court below was rightly passed and the Court of first instance must try the question of title set up by the respective parties. We accordingly dismiss the appeal, but under the circumstances the costs will abide the event.

Appeal dismissed.

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33 A. 479 (=9 I. C. 656=8 A. L. J. 12.)

[479] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

NAUBAT SINGH (*Defendant*) *v.* BALDEO SINGH AND ANOTHER (*Plaintiffs*).*

[15th February, 1911.]

Civil Procedure Code (1908), *section* 104, *clause* 2 *order XLIII, rule* 1 (*a*)—*Order returning a plaint for presentation to proper Court—Appeal—Case remanded to Court of first instance—Appeal from order of remand inadmissible.*

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* First Appeal No. 114 of 1910 from an order of Srish Chandra Basu, Subordinate Judge of Bareilly, dated the 5th of September, 1910.

(1) (1908) I. L. R. 31 All. 13. (2) (1909) I. L. R. 32 All. 206.

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33 A. 479=
9 I. C. 666=3
A. L. J. 12.

A Munsif returned for presentation to the proper Court a plaint filed before him. The plaintiff appealed against this order to the District Judge, who transferred the appeal to a Subordinate Judge, who in turn remanded the case to the Munsif for trial on the merits. *Held* that no appeal would lie from the appellate order of remand.

IN this case a plaint was presented to a Munsif, who, being of opinion that he had no jurisdiction to hear the case, returned the plaint to be presented to the Revenue Court. The plaintiffs appealed from the order returning the plaint to the District Judge. The District Judge transferred the appeal to the Subordinate Judge who remanded the case to the Munsif for trial on the merits. The defendant appealed.

Babu *Sital Prasad Ghosh*, for the respondent, raised a preliminary objection to the hearing of the appeal to the effect that the appeal did not lie under section 104, sub-section (2), read with order XLIII, rule 1, of Act V of 1908. He further submitted that the appeal was prohibited by section 197, clause (3), of Act II of 1901 (The Agra Tenancy Act). He relied on *Badam Singh* v. *Musammat Sabta Kuar* (1).

Mr. *Muhammad Ishaq Khan*, for the appellant, submitted that the order of remand in the present case was appealable under order XLIII, rule 1. Section 197 of the Agra Tenancy Act did not apply. He relied on *Ram Charan Ram* v. *Shcoraj*, (2).

STANLEY, C. J. and BANERJI, J.—A preliminary objection has been taken to the hearing of this appeal on the ground that having regard to the provisions of section 104 (2) of the Code of Civil Procedure, no appeal lies to this Court. The suit out of which this appeal has arisen was brought in the Court of the Munsif. He was of opinion that it was not cognizable by him and accordingly made an order under order VII, rule 10, returning the plaint to be presented to the proper Court. From this **[480]** order an appeal was preferred to the District Judge under order XLIII, rule 1 (*a*). The learned Subordinate Judge to whose Court the appeal was transferred, and who heard it, was of opinion that the suit was cognizable by the Munsif, and accordingly set aside the order of the Munsif and remanded the case to his Court for trial on the merits.

Section 104 (2) provides that no appeal shall lie from an order passed in appeal under that section. The order appealed against is an order passed in appeal under that section, because clause 1 of the section allows an appeal from an order made under rules from which an appeal is expressly allowed by rules, and order XLIII, rule 1 (*a*) allows an appeal from an order made under rule 10 of order VII. As the lower Appellate Court made an order in an appeal from an order, as allowed by order XLIII, no further appeal lies from the order of the Appellate Court.

The learned counsel for the appellants, however, relies on clause (*u*) of rule 1, order XLIII, which allows an appeal from "an order under rule 23, order XLI, remanding a case where an appeal would lie from an order of the Appellate Court." That clause only contemplates an appeal from an order of remand under clause 23 of order XLI, and only in those cases in which if the Appellate Court had made a decree an appeal could have been preferred from such a decree. That is not the case here. Clause (*u*) of rule 1 provides for cases which under the former Code of Civil Procedure would have come under section 562, with this further addition that no appeal would lie from an order of remand in cases in which a decree of the Appellate Court would have been final. In other respects the Legislature in enacting the provisions of section 104 (2) does not appear to have

(1) (1905) 2 A. L. J. 119.

(2) (1906) 3 A. L. J. 226.

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33 A. 479=9 I. C. 666=8 A. L. J. 12.

altered the provisions of the old law. It seems to us to contemplate only one appeal from an order, and not two appeals, as is contended for on behalf of the appellant. In this view this appeal does not lie and must be dismissed.

Further, we are of opinion that, having regard to the provisions of of section 197 of the Agra Tenancy Act, the appellant is not entitled to take any objection or raise any plea in respect of the order of remand made by the Court below. If the suit had been brought in the Revenue Court, the Court to which an appeal [481] from the decision of that Court could have been preferred was the Court of the District Judge, inasmuch as a question of jurisdiction was raised and decided. (See section 177 (*b*) of the Tenancy Act). As the suit was filed in the Court of the Munsif, an appeal from his order lay to the District Judge. Therefore, even if the view adopted in *Ram Charan Ram* v. *Sheoraj* (1) is corret, as to which we express no opinion, section 197 would apply to the present case and no objection can be taken to the order of remand. It was, however, held in the case of *Badam Singh* v. *Musammat Sabta Kuar* (2) that the Court of the District Judge being the Court to which an appeal lay from the decision of the Munsif, the section applied. In either view, therefore, the appeal is not sustainable. We accordingly dismiss it with costs.

Appeal dismissed.

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33 A. 481 (=8 A. L. J. 356=10 I. C. 863.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

MUHAMMAD AHMAD-ULLAH KHAN, (*Auction-purchaser*) v. AHMAD SAID KHAN (*Decree-holder*) AND RAFAT KHAN (*Judgment-Debtor*).*

[16th February, 1911.]

Civil Procedure Code (1908) *schedule* 1 ; *order XXI, rule* 89—*Execution of decree—Sale in execution of simple money decree, the decree-holder holding also a decree upon a mortgage of the property sold—Application by decree-holder to have sale set aside.*

A decree-holder held two decrees against the same judgment-debtor, the one being a decree for sale on two mortgages, and the other a simple money decree. In execution of the latter decree the decree-holder caused part of the mortgaged property to be sold by auction, and it was purchased by a stranger.

Held, that the decree-holder was not competent to apply under order XXI, rule 89, of the Code of Civil Procedure, 1908, to get this sale set aside.

[Ref. 13 A L. J. 273=27 I. C. 831.]

This was an appeal from an order setting aside an auction sale upon an application made under order XXI, rule 89, of the Code of Civil Procedure. The facts out of which the appeal arose were, briefly, as follows. The respondent, Ahmad Said Khan, obtained a decree against the judgment-debtor, Rafat Khan, on the 8th of October, 1909, for sale upon two mortgages. Subsequently, in November, 1909, he obtained another decree against the same judgment-debtor, but this was a simple decree for money. In execution of this latter decree he caused mauza Neali, one of the villages comprised in the mortgages upon which he had obtained the earlier decree, to be sold by [482] auction. It was purchased by the appellant, Muhammad Ahmadullah Khan. Thereupon the decree-holder applied under

* First appeal No. 276 of 1910 from a decree of Banke Behari Lal, Subordinate Judge of Aligarh, dated the 7th of May, 1910.

(1) (1906) 3 A. L. J. 226.

(2) (1905) 2 A. L. J. 119.

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33 A. 481=
8 A. L. J. 356
=10 I. C. 863.

order XXI, rule 89, to have the sale set aside and made the deposit required by the section. This application was granted and the auction-purchaser thereupon appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondent, decree-holder.

STANLEY, C. J., and BANERJI, J.—This is an appeal from an order setting aside an auction sale upon an application made under order XXI, rule 89, of the Code of Civil Procedure. The facts are these:—The respondent, Ahmad Said Khan, obtained a decree against the judgment-debtor, Rafat Khan, on the 8th of October, 1909, for sale upon two mortgages. Subsequently, in November, 1909, he obtained another decree against the same judgment-debtor, but this was a simple decree for money. In execution of this latter decree he caused mauza Neali, one of the villages comprised in the mortgages upon which he had obtained the earlier decree, to be sold by auction. It was purchased by the appellant, Muhammad Ahmad-ullah Khan. Thereupon the decree-holder, Ahmad Said Khan, applied under order XXI, rule 89, to have the sale aside and made the deposit required by the section. This application has been granted by the Court below, which was of opinion that the decree-holder in his capacity as mortgagee was a person who held an interest in the property sold within the meaning of rule 89. That rule empowers a person who is the owner of immovable property which has been sold in execution of a decree, or holds an interest in such property by virtue of a title acquired before the sale to make an application to have the sale set aside. It is not alleged on behalf of Ahmad Said Khan that he is the owner of the property sold, but he contends that as mortgagee of the said property he holds an interest therein by virtue of which he is competent to make the application. No doubt, ordinarily a mortgagee of the property sold is a person who has an interest in it, and in view of the provisions of rule 89 he would be competent to make an application, but we have to consider the facts of this particular case. Here the holder of the decree for money was also the holder of two mortgages in respect of the property of **[483]** which he sought to have a sale. He caused the property to be sold either free from the mortgages, or subject to the mortgages. If it was sold free from the mortgages he must be deemed to have abandoned his mortgages, and in that case he has no interest, in the property sold. If he caused the property to be sold subject to the mortgages, the sale only related to the interest of the mortgagor, that is, his right of redemption. In this right of redemption the mortgagee has no interest. Therefore, from either point of view, the decree-holder in this case has no interest in the property sold such as would entitle him to make an application under rule 89. We think the judgment of the Court below to the contrary is erroneous. We accordingly allow the appeal, set aside the order of the Court below and dismiss the application of the respondent, Ahmad Said Khan, to have the sale set aside, with costs in both Courts.

Appeal allowed.

33 A. 483 (=8 A. L. J. 368=10 I. C. 927).

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APPELLATE CIVIL.

APPELLATE CIVIL.

33 A. 483=8 A. L. J. 368 =10 I. C. 927.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

BIHARI AND ANOTHER (*Defendants*), *v.* RAM CHANDRA AND OTHERS (*Plaintiffs*).*

[17th February, 1911].

Evidence—Burden of proof—Usufructuary mortgage—Suit for possession of mortgaged property not brought for nearly twelve years—Presumption that no consideration passed.

Where the plaintiffs, who were usufructuary mortgagees, were never given possession of the mortgaged property and did not attempt to recover possession until the period of limitation had almost expired, it was *held*, on plea raised by the defendants that no consideration had passed, that the burden of proving that consideration had passed was rightly shifted to the plaintiffs. *Achobandil* v. *Mahabir* (1) followed. *Mahabir Prasad* v. *Bishan Dayal* (2) distinguished.

[Ref. 36 All. 370; 60 I. C. 730; 61 I. C. 634; 79 I. C. 596.]

THIS was an appeal under section 10 of the Letters Patent from a judgment of KARAMAT HUSAIN, J.—The facts of the case are set forth in the judgment under appeal, which was as follows:—

"The facts are as follows:—Bihari, defendant No 1, on the 15th of December, 1896, executed a mortgage with possession in favour of the plaintiffs. In that deed the recitals are that they received the entire mortgage money as detailed below, that they put the mortgagees in possession and that they from that date should continue in possession thereof and should sublet the said property. The plaintiffs on the basis of that mortgage instituted [484] a suit for recovery of possession on the 14th of December, 1903, which was the last day for instituting the suit. The first plea in defence was as follows:—"The defendant did not receive the amount of consideration of the mortgage deed, and consequently the plaintiff never demanded possession during the long period of 12 years, nor did he make an application for mutation of names. The mortgage deed is without consideration."

"The Court of first instance dismissed the claim. The Court at the end of its judgment observes:—"I presume that the suit was not filed earlier as the bond in question was not executed for consideration.' On appeal the lower Appellate Court confirmed the decree. That Court in its judgment says:—'The defendants admit execution of the deed in suit but deny receipt of consideration.' That Court disbelieved the evidence adduced by the parties and was of opinion that the decision of the case turned on the question of burden of proof. In consequence of the delay instituting the suit for possession that Court was of opinion that the burden of proving the payment of consideration lay on the plaintiffs. For this proposition it relied on *Achobandil Kuari* v. *Mahabir Prasad* (1) in which the learned Judges observe:—'It is doubtless true that the party to a deed duly executed and registered, who alleges non-payment of consideration, is ordinarily bound to prove his allegation; but we think the Judge has overlooked the peculiar circumstances of this case. He had found that possession had never been transferred, and that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years. This state of things, combined with the continuous possession of the vendors, favoured their allegation that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff vendee to give evidence that consideration had in fact passed.'

"The lower Appellate Court was further of opinion that the suit was for the specific performance of a contract of mortgage and was governed by article 113 of the Indian Limitation Act and not by article 144. The plaintiffs have preferred a second appeal to this Court and it is urged on their behalf that the suit is not barred by limitation under article 113, which has no application to the facts of the case, and that as the defendants admitted the execution and denied the receipt of consideration, they were bound to prove that they had not received the consideration of the mortgage. The view taken by the lower Appellate Court, that the suit is barred by limitation, is not correct. This action can in no way be regarded to be an action for the specific performance of the contract. The recitals in the mortgage deed are that the mortgagors

* Appeal No. 96 of 1910 under section 10 of the Letters Patent.

(1) (1886) I. L. R. 8 All. 641. (2) Weekly Notes, 1904, p. 163.

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received the motgage money and put the mortgagees in possession of the property mortgaged. That being so, the suit is clearly a suit for possession by a mortgagee against the mortgagor of immoveable property and is undoubtedly governed by article 135 of the Indian Limitation Act, vide *Gopal Rao* v. *Baji Lal* (1).

"Regarding the plea of burden of proof the question is simply this:—Does the institution of a suit for possession on the last day of limitation raise such a strong presumption of fact relating to the absence of consideration as to counteract [485] the presumption raised by the recital in the deed as to its payment. In support of the proposition that the long delay raises such a presumption, reliance is placed on section 159 of Volume I of Wigmore's Law of Evidence and on section 2517 of Volume IV of the same work; but in my opinion when the law of limitation fixes a time for the institution of a class of cases, the delay up to the last day of limitation is not sufficient to raise any presumption of the kind, because when the law of limitation sanctions such a delay no presumption of fact against that law can possibly arise. The ruling in I. L. R. 8 All. 641, is only an authority for the proposition that long delay raised a presumption of fact with reference to the circumstances of that case. That being so, that case is no authority for the proposition that a long delay in the institution of a suit for possession on the basis of a mortgage in which there is a recital that the mortgagors had received the consideration, will shift the burden of proof from them to the mortgagee in all cases.

"In *Mahavir Prasad* v. *Bishan Dayal* (2) it is laid down that 'where execution of a bond is admitted and the bond contains an admission that consideration has passed, it is for the executant to get rid of the admission which he has made in the bond. It is not enough for him to prove that prior to the institution of the suit on the bond he denied receipt of consideration, even if such denial was made before the registering officer."

"Following the above ruling, I am of opinion that the mortgagors in the case before me were bound to prove that they had not received consideration and that the delay in the institution of the suit is not, in my opinion, enough to take this suit out of the general rule that a party who admits execution of a deed in which he recites receipt of consideration is bound to prove non-payment.

"For the above reasons, I allow the appeal, set aside the decrees of the Courts below, and send down the case to the Court of first instance through the lower Appellate Court for trying the remaining issues."

The defendants appealed.

Dr. *Tej Bahadur Sapru*, for the apellants.

The respondents were not represented.

STANLEY, C. J. and BANERJI, J.:—In this suit the plaintiffs seek a decree for possession of certain property usufructuarily mortgaged to them on the 15th December, 1896. It appears from the evidence, and it is not disputed, that from the 15th of December, 1896, until the 14th of December, 1908, the day on which this suit was instituted, the plaintiffs never applied for mutation of names in their favour, nor did they take any step whatever to obtain possession from the defendants, and it is admitted in the plaint that they never got possession. The defence set up was that no consideration for the mortgage passed. Both the lower Courts dismisssed the plaintiffs' suit holding that [486] no consideration for the mortgage was proved. The lower Appellate Court did not place any reliance upon the oral evidence adduced on either side, but finding that no steps were taken by the plaintiffs for recovery of possession for a period of 12 years all but one day, drew the inference from this that no consideration had passed. The fact that no step was taken by the plaintiffs for so long a period raises the presumption that the plaintiffs did not consider during this long period that they were entitled to possession. We think that such an inference is under the circumstances not unreasonable, and that the Courts below were justified under the circumstances in throwing upon the plaintiffs the burden of

(1) Weekly Notes, 1884, p. 125. (2) Weekly Notes, 1901, p. 163.

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33 A. 483=8 A. L. J. 368 =10 I. C. 927.

proving as a fact that consideration did pass. The case is very similar to that of *Achobandil Kuari* v. *Mahabir Prasad* (1). The suit in that case was for possession of land alleged to have been purchased under a registered deed of sale. The defendant vendor admitted the execution and registration of the deed but denied receipt of consideration. The deed was dated January, 1886, and the suit was not instituted until the year 1894, that is, after the lapse of eight years. It was found that the vendor had been in possession during the whole of that period. The plaintiffs produced no evidence in proof of payment of consideration. It was held by OLDFIELD and TYRRELL, JJ., that, although under ordinary circumstances the party to a deed duly executed and registered, who alleges non-payment of consideration, is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the with holding of possession for upwards of eight years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed. We are not aware that this decision has been the subject of adverse comment, and a number of years have passed since the ruling was made. We think that the view taken by the learned Judges in that case is a reasonable one. The circumstances of this case are somewhat stronger, for here we have a mortgage executed so far back as **[487]** the 15th of December, 1896, and no steps whatsoever have been taken for the obtaining of possession of the property by the mortgagees until the last day of limitation, namely, the 14th of December, 1908, a period of 12 years. The learned Judge of this Court relied upon the ruling in *Mahabir Prasad Rai* v. *Bishan Dayal* (2). The facts of that case are unlike those in the present case. There, there was no withholding of possession for a length of time as in this case. We cannot concur in the decision of our learned brother and must allow the appeal. We accordingly allow the appeal, set aside the decree of this Court and restore the decree of the lower Appellate Court with costs in all Courts.

Appeal allowed.

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33 A. 487 (= 8 A. L. J. 378=9 I. C. 617).

FULL BENCH.

Before Mr. Justice Richards, Mr. Justice Griffin and Mr. Justice Tudball.

PARMANAND (*Applicant*) *v.* SATPRASAD (*Opposite party*).*

[21st February 1911.]

Act No. II of 1899 (*Indian Stamp Act*), *sections* 2 (21), *and* 60; *schedule* 1, *article* 48 (*g*)—*Stamp—Power of attorney—Document authorizing holder to appear and do all acts necessary for execution of decree.*

Held that a document purporting to authorize the person in whose favour it was executed, who was not a certificated mukhtar or pleader, to appear and do all acts necessary for the execution of a decree of a Court, outside the United Provinces, which had been transferred to a Court in those Provinces for execution, required to be stamped as a power of attorney with a one rupee stamp, and not as a vakalatnamah or muktar-namah.

• Civil Miscellaneous No. 445 of 1910.

(1) (1886) I. L. R. 8 All. 641.

(2) Weekly Notes, 1904, p. 163.

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FULL BENCH.

33 A. 487=
8 A. L. J.
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617.

THIS was a reference under section 60 of the Stamp Act, 1899, made by the District Judge of Cawnpore on the following facts:—

A decree of a Punjab Court was transferred to the Court of the District Judge of Cawnpore for execution. A person who was not a legal practitioner filed, on behalf of the decree-holder, some papers in the Cawnpore Court. His authority for acting on behalf of the decree-holder was a 'mukhtar-namah' which was stamped only with a Court fee label of 8 annas. The District Judge referred the following question to the High Court:—"When a private person acting on behalf of another in a matter [488] in the Civil Court files a power of attorney, should not that power be liabile to duty under the Stamp Act, or is it properly stamped if filed on plain paper bearing an 8-anna Court fee label as if it were a mukhtar-namah under the Court Fees Act?"

The Government Advocate (Mr. *A. E. Ryves*), in support of the reference:—

The question is important as it appears to be the practice, in parts of these Provinces, of the Courts to accept, as properly stamped, documents of this kind in execution cases transferred from the Punjab, where people were allowed to appear and act for parties on the authority of such documents. This practice in the Punjab was due to the exemption contained in the last paragraph of section 37 of the old Code of Civil Procedure (1882), but omitted from order III, rule 2, of the present Code. So, now, in all the Provinces a person other than a legal practitioner can appear and act only in accordance with order III, rule 2. A power of attorney which is required by clause (*a*) of that rule is defined by section 2, clause (21) of the Stamp Act; and the amount of stamp duty payable is laid down by article 48 of the schedule. The document in question comes under clause (*c*) or clause (*g*) of article 48. It should, therefore, be executed on stamp paper of the value of Re. 1. Article 10 of schedule 11 of the Court Fees Act deals with mukhtar-namahs and vakalatnamahs, which are meant only for legal practitioners, and are to be distinguished from ordinary 'powers of attorney.' The Court Fees Act itself makes this distinction between a mukhtar-namah and a power of attorney to institute or defend a suit; *vide* section 19, clause (*i*).

No one appeared against the reference.

RICHARDS, GRIFFIN and TUDBALL, JJ.:—This is a reference under section 60 of the Stamp Act of 1899. A document was produced in the Court of the District Judge of Cawnpore. It was assumed by the Court below that this was a document which authorized the holder who is nominated therein to appear and do all acts necessary for the execution of a certain decree which had been transferred from the Punjab to Cawnpore for execution. We are dealing with the case on the assumption that the document if duly stamped was sufficient for the purpose. The [489] document bears an eight anna Court fee label and no other stamp. The donee of the power is not a certified mukhtar or pleader, and the question is whether under these circumstances the document is duly stamped. Section 2, clause (21) of the Stamp Act defines the expression "power of attorney" in the following terms:—"A power of attorney includes any instrument (not chargeable with a fee under the law for the time being in force) empowering a specified person to act for and in the name of the person executing it." The present document, as we shall presently show, clearly falls within this definition. Article 48 of Schedule I of the Stamp Act provides for the stamp on a power of attorney falling within the

definition which we have quoted above. Clause (*c*) provides that when the document authorizes one person or more to act in a single transaction other than the case mentioned in clause (*a*) the proper stamp shall be one rupee. Clause (*g*) is a general provision for all such powers of attorney not provided for by other clauses.

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Article 10, Schedule II, of the Court Fees Act provides for the stamping of mukhtar-namahs and vakalat-namahs. Clause (*a*) refers to a mukhtar-namah or vakalat-namah presented to any Civil or Criminal Court other than a High Court or to a Revenue Court or to any Collector or Magistrate or other Executive officer except such as are mentioned in clauses (*b*) and (*c*). Clause (*b*) provides for the same class of documents when presented to a Commissioner of Revenue, Circuit or Customs or to any officer charged with the executive administration of a division, not being the chief revenue or executive authority. Clause (*c*) provides for the same class of documents when presented to a High Court, Chief Commissioner, Board of Revenue or other chief controlling revenue or executive authority. It appears to us that all these documents are documents which it was intended to exclude from the definition of the expression power of attorney in section 2, clause (21) of the Stamp Act. It, therefore, seems to us that it is clear that the documents referred to in article 10, Schedule II, of the Court Fees Act are restricted to documents given to and presented by duly certificated mukhtars and pleaders under the Legal Practitioner's Act. We may point out that we are not deciding that the document in the present case, **[490]** if it was duly stamped, was sufficient to entitle the donee to execute or take steps to execute the decree in Cawnpore. Our decision relates only to the question whether or not the document was duly stamped. Assuming merely for the purpose of deciding the question before us that the document was sufficient if duly stamped, we hold that the document was not duly stamped, and that it ought to have been stamped with the stamp provided for by article 48, Schedule I, of the Stamp Act. We make no order as to costs.

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33 A. 490 (= 8 A. L. J. 315=9 I. C. 827).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

SHIB CHARAN DAS (*Plaintiff*) *v.* RAM CHANDRA SARUP AND OTHERS (*Defendants*).*

[21st February, 1911.]

Award—Refusal of court to file a private award—Subsequent suit to enforce terms of award—Res judicata.

Held that the refusal of a court to file a private award will not operate as *res judicata* in respect of a subsequent suit brought to enforce the award. *Kunji Lal* v. *Durga Prasad* (1) followed. *Basant Lal* v. *Kunji Lal* (2) referred to.

THE facts of this case were as follows:—The plaintiff and other parties had disputes about the partition of certain property which belonged to them. They prepared lots and appointed an arbitrator for the purpose of assigning the lots to the different persons interested. On the 17th

*First Appeal No. 390 of 1909 from a decree of Kanhaiya Lal, Second Additional Judge of Meerut, dated the 11th of August, 1909.

(1) (1910) I. L. R. 32 All. 484. (2) (1905) I. L. R. 28 All. 21.

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33 A. 490=
8 A. L. J. 315
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December, 1904, an agreement of reference was drawn up and one Babu Ramanuj Dayal was appointed arbitrator. On the 23rd of December, 1904, lots were drawn and lot No. 1 fell to the share of the plaintiff and his co-sharers. One of the properties comprised in that lot was 20 biswas of the village Sherpur .On the 14th of December, 1905, an award was made, but in that award by a mistake instead of entering the whole of the 20 biswas of the village Sherpur in lot No. 1 only a half of that village was entered by the clerk who copied out the lots embodied in the award. The mistake was discovered and the attention of the arbitrator was drawn to **[491]** it. He accordingly made a supplementary award on the 11th of March, 1906, which was in fact an amendment of the first award. By that supplementary award he assigned to the lot of the plaintiff and his co-sharers the whole of the village Sherpur. The practical result of the two awards was this, that by the first award only a half share of the village Sherpur was assigned to lot No. 1, and by the second award the remaining half was also allotted to lot 1. On the 11th of April, 1905, the owners of lot No. 1 made an application to the court under section 525 of Act No. XIV of 1882 for the filing of both the awards. The court filed the first award and made a decree in accordance with it, but refused to file the supplementary award. Thereupon the suit out of which this appeal has arisen was brought by the plaintiff and he claimed in it a 5 biswas share in mauza Sherpur on the basis of the supplementary award —he and his co-sharers being admittedly in possession of a ten biswas share in the village.

The court of first instance (Second Additional Judge of Meerut) dismissed the suit as barred by *res judicata* owing to the refusal of the former court to file the supplementary award. The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri* (with him Pandit *Mohan Lal Sandal*), for the appellant.

Munshi *Gokul Prasad* (with him Babu *Sital Prasad Ghosh*), for the respondents.

STANLEY, C. J., and BANERJI, J. :—The question in this appeal is, whether the plaintiff's claim is barred by the rule of *res judicata*. The facts are these:—The plaintiff and other parties had disputes about the partition of certain property which belonged to them. They prepared lots and appointed an arbitrator for the purpose of assigning the lots to the different persons interested. On the 17th December, 1904, an agreement of reference was drawn up and one Babu Ramanuj Dayal was appointed arbitrator. On the 23rd of December, 1904, lots were drawn and lot No. 1 fell to the share of the plaintiff and his co-sharers. One of the properties comprised in that lot was 20 biswas of the village Sherpur. On the 14th of December, 1905, an award was made, but in that award by a mistake, instead of **[492]** entering the whole of the 20 biswas of the village Sherpur in lot No. 1, only a half of that village was entered by the clerk who copied out the lots embodied in the award. The mistake was discovered and the attention of the arbitrator was drawn to it. He accordingly made a supplementary award on the 11th of March, 1906, which was in fact an amendment of the first award. By that supplementary award he assigned to the lot of the plaintiff and his co-sharers the whole of the village Sherpur. The practical result of the two awards was this, that by the first award only a half share of the village Sherpur was assigned to lot

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No. 1, and, by the second award the remaining half was also alloted to lot No. 1. On the 11th of April, 1905, the owners of lot No. 1 made an application to the Court under section 525 of Act No. XIV of 1882 for the filing of both the awrds. The Court filed the first award and made a decree in accordance with it, but refused to file the supplementary award. Thereupon the suit out of which this appeal has arisen was brought by the plaintiff and he claimed in it a 5 biswas share in mauza Sherpur on the basis of the supplementary award—he and his co-sharers being admittedly in possession of a ten biswas share in the village.

There is no question that all the parties to the reference to arbitration intended that the plaintiff and his co-sharers should get the whole of the village Sherpur, and there is no question also that it was the intention of the arbitrator to award to the plaintiff the 5 biswas now claimed by him in addition to what he has already got. The Court below, however, has dismissed the suit on the ground that the decision of the Subordinate Judge refusing to file the supplementary award operates as *res judicata*. We are unable to agree with the learned Additional Judge. Having regard to the judgment of the Subordinate Judge in the case under section 525 of Act XIV of 1882, we must hold that the Court refused to file the supplementary award, by which, as we have pointed out above, an additional 10 biswas share in Sherpur was allotted to the share of the plaintiff and his co-sharers, the owners of lot No. 1. From this order of refusal no appeal lay as held in the case of *Basant Lal* v. *Kunji Lal* (1), in which the previous rulings on the subject were **[493]** cited. This view was adhered to in the recent case of *Kunji Lal* v. *Durga Prasad* (2). In the case last mentioned it was further held that a refusal of a Court to file an award will not operate as *res judicata* in respect of a subsequent suit brought to enforce the award. The same view was held in the case of *Mustafa Khan* v. *Musammat Phuljha Bibi* (3), which has not yet been reported. Having regard to these rulings the view taken by the Court below cannot be supported. There is no doubt as to the question of the plaintiff's title to the property claimed on the strength of the supplementary award. The result is that we allow the appeal, set aside the decree of the Court below and decree the plaintiff's claim with costs in both Courts.

Appeal allowed.

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33 A. 493 (=8 A. L. J. 345=9 I. C. 819).

FULL BENCH.

Before Mr. Justice Sir George Knox, Mr. Justice Banerji and Mr. Justice Karamat Husain.

JAIMANGAL DEO AND OTHERS (*Defendants*) *v.* BED SARAN KUNWARI (*Plaintiff*).*

[23rd February, 1911.]

Civil Procedure Code (1908), *section* 11, *explanation VI*—Res judicata—"*Right claimed in common*"—Jus tertii.

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* First Appeal No. 42 of 1910 from an order of Muhammad Ali District Judge of Mirzapur, dated the 26th of February, 1910.

(1) (1905) I. L. R. 23 All. 21.
(2) (1910) I. L. R. 32 All. 484.
(3) F. A. 209 of 1909, decided on the 19th January, 1911.

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In a suit for ejectment in a Revenue Court the defendants denied the title of the plaintiff, and set up their own title as to part of the property and a *jus tertii* as to the rest. The Revenue Court elected to try the question of title itself, and found that the plaintiff had not established her proprietorship, and that decision became final.

Held, in a subsequent suit in the Civil Court for a delaration of title, that the decision of the Revenue Court, although it constituted a *res judicata* as between the plaintiff and the then defendants, could not amount to a *res judicata* as between the plaintiff and the third parties whose rights those defendants had set up.

THE facts of this case were as follows :—The plaintiff, on the 26th of September, 1906, sued the defendants, Bhagat Deo and Rabinath, father of Kinkin Deo, and Harbans Deo, in the court of an Assistant Collector of the first class for ejectment. The Assistant Collector held that the plaintiff was not the **[494]** proprietress of the village and dismissed the suit on the 8th of March, 1906. That decision became final. The plaintiff then brought the suit out of which this appeal arose in the Court of the Subordinate Judge of Mirzapur, for a declaration that she was the owner of the village Jamvanwan. She, in addition to Bhagat Deo and the sons of Rabinath, made six others defendants. One of the pleas raised by all the defendants was that the suit was barred by *res judicata*. The Court of first instance found that this was so and dismissed the suit. The plaintiff appealed against all the defendants, and the learned District Judge, holding that it was not barred against defendants Nos. 1, 2, 3, 4, 8 and 9, who were not parties to the suit of 1905, remanded the case under order XLI, rule 23. From the order of remand two appeals were preferred ; one by the plaintiff (No. 67 of 1910), in which the contention was that the doctrine of *res judicata* was no bar to the suit against Bhagat Deo and the sons of Rabinath, and the other (No. 42 of 1910) by other defendants, in which the contention was that the doctrine of *res judicata* barred the suit against them also.

Both appeals were heard by a Bench of three Judges. In F. A. f. O. No. 67 of 1910, this Bench, on the 7th of February, 1910, held that the suit against Bhagat Deo and the sons of Rabinath, was barred by the doctrine of *res judicata*.

Appeal No. 42 was then heard.

Dr. *Tej Bahadur Sapru*, for the appellants submitted that the plaintiff had no *locus standi*. The effect of the judgment in F. A. f. O. No. 67 of 1910 (1) is that the plaintiff has no title to the land and that some third persons are the proprietors. Explanation VI of section 11, Civil Procedure Code, governs the case. In the written statement the defendants in the Revenue Court said that the title was vested in themselves and in their brethren (*biradaran*). Caspersz on Estoppel, page 196 was referred to. The defendants in the former suit were claiming a title in common with the appellants. What they said was that the plaintiffs were not zamindars and they and some others were the real owners ; *Chandu* v. *Kunhamed* (2) **[495]** and *Somasundara Mudali* v. *Kulandaivelu Pillai* (3). There is nothing in the words of Explanation VI which prevents a defendant from setting up a claim in common with others.

Munshi *Haribans Sahai*, for the respondents :—

Explanation VI refers only to representative suits; *Sadagopa Chariar* v. *Krishnamoorthy Rao*, (4). In the present case, defendants appellants

(1) Cf. p. 453 *Supra*.
(2) (1891) I. L. R. 14 Mad 324.
(3) (1904) I. L. R. 28 Mad. 457, (464).
(4) (1907) I. L. R. 30 Mad. 185, (190).

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themselves in their written statement deny that Rabinath and Bhagat Deo had any right to execute a *kabuliat* on their behalf. The judgment of the Revenue Court is not a judgment *in rem* and cannot operate as *res judicata* in the present suit.

BANERJI, J.—The facts of this case are set forth in our judgment in the connected appeal from order No. 67 of 1910, in which we held, in concurrence with the Court below, that the question of the title of the plaintiff respondent was *res judicata*. In consequence of our decision in that case the learned advocate for the appellants contends that we must be taken to have held that the plaintiff has no title to the property in suit and that, therefore, she is not entitled to maintain her claim against any of the defendants. I do not agree with this contention. We have not, in deciding the connected appeal, held that the plaintiff has no title. All that we have held is that the question of her title being *res judicata* against those defendants who were respondents to that appeal, the issue as to her title could not be tried as against those defendants. As the appellants were no parties to the suit in which the previous judgment was passed that judgment cannot operate as *res judicata* as between them and the plaintiff. This is conceded, but it is said that the title of the plaintiff being a part of her cause of action, she cannot set it up against the appellants, because it must be held that she has no title to the property in suit. As to this I may first observe that if she has no title as against some of the defendants, it does not follow that she has none against the other defendants also. In the next place, as I have pointed out above, it has not been decided in the suit that the plaintiff has no title. What has been decided is that in consequence of the decision in the former suit **[496]** she is precluded from setting up her title against those defendants who were defendants to that suit and that the issue as to her title cannot be determined as against those defendants. That, however, cannot bar the trial of the issue as against the defendants appellants who were not parties to the former suit, and the Court below was right in ordering a trial of that issue.

It is next urged that in view of Explanation VI to section 11 of the Code of Civil Procedure the former judgment must be held to be *res judicata*. This contention is in my judgment, equally untenable. The parties to the former suit did not litigate in respect of "a private right claimed in common for themselves and others." The defendants to that suit set up their own right to a part of the property and also alleged that another part of the property belonged to the appellants to this appeal, but they did not assert any right which was common to all of them. In order that the explanation may be applicable, there must be community of interest, such as is referred to in order 1, rule 8. In the present case there was no community of interest. It is admitted that if in the former suit a decree had been passed in favour of the plaintiff, it would not have been binding on the appellants. Why then should it be binding because the suit was dismissed? In my judgment Explanation VI has no application to a case like this.

For the above reasons I would dismiss the appeal with costs.

KARAMAT HUSAIN, J.—The plaintiff, on the 26th of September, 1906 sued the defendants, Bhagat Deo and Rabinath, father of Kinkin Deo, and Harbans Deo, in the court of an Assistant Collector of the first class for ejectment. The Assistant Collector held that the plaintiff was not the proprietress of the village and dismissed the suit on the 8th of March, 1906. That decision became final.

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The plaintiff then brought the suit out of which this appeal arose in the Court of the Subordinate Judge of Mirzapur, for a declaration that she was the owner of the village Jamvanwan. She, in addition to Bhagat Deo and the sons of Rabinath, made six others defendants. One of the pleas raised by all the defendants was that the suit was barred by *res judicata*.

[497] The Court of first instance found that it was so and dismissed the suit. The plaintiff appealed against all the defendants, and the learned District Judge holding that it was not barred against defendants Nos. 1, 2, 3, 4, 8 and 9, who were not parties to the suit of 1905, remanded the case under order XLI, rule 23. From the order of remand two appeals were preferred. One by the plaintiff (No. 67 of 1910) in which the contention was that the doctrine of *res judicata* was no bar to the suit against Bhagat Deo and the sons of Rabinath, and the other (No. 42 of 1910) by other defendants in which the contention was that the doctrine of *res judicata* barred the suit against them also.

Both appeals were heard by a Bench of three Judges. In F. A. f. O. No. 67 of 1910, this Bench, on the 7th of February, 1910, held that the suit against Bhagat Deo and the sons of Rabinath, was barred by the doctrine of *res judicata*.

After the delivery of judgment in F. A. f. O. No. 67 of 1910, F. A. f. O. No. 42 of 1910 was heard. The learned advocate for the appellants admitted that *res judicata* did not apply as the parties were not the same. He, however, pressed (1) that our decision in F. A. f. O. No. 67 of 1910, that the plaintiff was not the proprietress of Jamanwan, so far as Bhagat Deo and the sons of Rabinath were concerned, being in the one and the same suit must be deemed to be decision that she was not its proprietress against the appellants as well, for in the one and the same suit a plaintiff cannot be held to have no proprietary title against some of the defendants and to have it against the rest; (2) that Explanation VI of section 11 of the Civil Procedure Code applied to the case, and (3) that the appellants could plead a *jus tertii* and say that the ownership of the village in dispute belonged to other defendants and not to the plaintiff.

A fallacy lurks in the first contention and is the result of non-appreciation of the nature of the doctrine of *res judicata*. The doctrine with certain limitations *prohibits* a court of justice from deciding in a subsequent suit an issue which has been *decided* in a previous suit. When a Court with reference to an issue involved in a subsequent suit is of opinion that *res judicata* bars the trial of that issue, it *refrains* from *deciding* that issue [498] To call this action of the Court a *decision* of that issue in the subsequent suit is a misnomer and can in no way deprive it of the power of deciding that issue between the plaintiff and the rest of the defendants. It must be noticed that our judgment in F. A. f. O. No. 67 of 1910 is a judgment *in personam* and not a judgment *in rem*. So far, therefore, as the parties to the present case are concerned, it is *res inter alios judicata* and cannot bind them. The above principle is embodied in section 43 of the Indian Evidence Act (No. I of 1872) which is as follows:—" Judgments, orders or decrees other than those mentioned in sections 40, 41 and 42 are irrelevant, unless the existence of such judgments, orders or decrees is a fact in issue or is relevant under some other provision of this Act." There are no words in the section to indicate that a judgment, order or decree, for the purpose of being irrelevant must be in another suit. The words are wide enough to include a judgment, order or

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decree in the one and the same suit if the parties are different. *A*, a plaintiff, in the one and the same suit, may be held to be the owner of a village against *B* but not against *C*. Had the appellants in the case before us admitted that the plaintiff was the proprietress of the village, the Court would have been bound to declare her to be the owner of the village as against the appellants and to be no owner as against the others, and this would have been done in the one and the same suit.

The fallacy becomes clear if we suppose that the suit of 1905, instead of being dismissed, was decreed against Bhagat Deo and Rabinath and the plaintiff was held to be the owner of the village. In such case the court in F. A. f. O. No. 67 of 1910 would have come to the conclusion that, as the plaintiff had been found to be the owner of the village against Bhagat Deo and Rabinath, the retrial of her title against them was barred by the doctrine of *res judicata*. Could such a conclusion have entitled the plaintiff to contend that the court must hold her to be the owner of the village without giving the appellants an opportunity to prove otherwise, for a court in the one and the same suit could not hold that the one and the same plaintiff was the owner of the village against some defendants but not against the rest?

[499] Such a contention would have been deemed ridiculous, and the mere fact that it was raised in a converse case could not alter its nature.

As a matter of procedure the appellants in F. A. f. O. No. 42 of 1910 can rely upon our decree in F. A. f. O. No. 67 of 1910, as a piece of documentary evidence and cannot call it in aid of their case in any other way. It therefore follows that unless their case is *tried* and the question that the plaintiff has no title against them is *decided*, they can be entitled to no decree. They, however, ask us to take what they think ought to be decided in their favour to have already been so decided. This cannot be done, and the learned advocate has not referred us to any principle or precedent that might support him.

Explanation VI, section 11, Civil Procedure Code, has no application to the case before us. In the suit of 1905, in the court of the Assistant Collector of the first class, no private right was claimed by Bhagat Deo and Rabinath in common for themselves and the appellants in F. A. f. O. No. 42 of 1910, and therefore the appellants before us could not be deemed to be claiming under Bhagat and Rabinath. There is no substance in the plea of *jus tertii*. The effect of that plea, when permitted to be raised, is that the plaintiff is called upon to prove a better title. That plea does not shut out the plaintiff from proving a better title nor debar the court from deciding the question of title.

For the above reasons I would dismiss the appeal with costs.

KNOX, J.—I agree with my learned brothers in holding that the judgment in F.A. f. O. No. 67 of 1910 cannot operate as *res judicata* in bar of the suit out of which this appeal arises. The present appellants were no parties to the suit in which the judgment first named was passed. Explanation VI of section 11 of Act No. V of 1908, which the learned advocate for the appellants would have us apply, will not help the case. In the previous suit the right claimed was not a private right claimed by the parties to that suit in common for themselves and others. The appeal is dismissed with costs.

Appeal dismissed.

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[500] MATRIMONIAL JURISDICTION.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Griffin and Mr. Justice Tudball.

JOHN HENRY RHINE (*Respondent*) *v.* MABEL RHINE (*Petitioner*) AND JOHN HENRY RHINE (*Petitioner*) *v.* MABEL RHINE (*Respondent*).*
(*Two petitions consolidated*).

[23rd February, 1911.]

Act No. IV of 1869 (*Indian Divorce Act*), *section* 23—*Discretion of court—Petitioner's adultery a ground for refusing a decree for judicial separation.*

Where the petitioner (the wife) in a suit for divorce in the alternative for a judicial separation was found to have herself committed adultery, to which the conduct of the respondent had in no way conduced, it was *held* that this was a good ground for the refusal of a decree for judicial separation. *Otway* v. *Otway* (1) followed. *Constantinidi* v. *Constantiniai* (2) distinguished.

These were two appeals arising out of cross petitions under the Indian Divorce Act, 1869. The facts out of which they arose were as follows:—

The appellant, John Henry Rhine, an engine driver on the North-Western Railway, was married to the respondent, Mabel Rhine, in the Central Provinces, in the year 1897. The last residence of the parties was at Saharanpur. There has been no issue of the marriage. Mrs. Rhine left her husband in April, 1909, and went to her brother in the Punjab. She, on the 28th of May, 1909, instituted a suit in Lahore against her husband for dissolution of their marriage, or in the alternative for judicial separation. The plaint in this suit was returned to her to be filed in the proper court, the court at Lahore not having jurisdiction in the matter, and accordingly the plaint was filed in the court of the District Judge of Saharanpur, on the 30th of July, 1909. Meantime, Rhine filed a petition for divorce on the 22nd of July, 1909, on the ground of his wife's adultery with the co-respondent, Leonard A. Green, also an engine driver on the North-Western Railway.

By the agreement of the parties the two suits were heard together and one judgment was delivered in both suits. Mrs. Rhine alleged in her petition various acts of cruelty on the part of her husband and charged him with having committed at [501] various places carnal intercouse with her against the order of nature, forcibly and against her consent. The adultery of Mrs. Rhine with the co-respondent Green was established to the satisfaction of the learned District Judge, and his finding is not now in controversy. He also found that the misconduct of Rhine, alleged by his wife, was established by the evidence and dismissed Rhine's petition for dissolution of marriage, as also Mrs. Rhine's petition for dissolution of marriage, but he granted Mrs. Rhine's prayer for judicial separation.

The husband appealed.

Mr. *C. Ross Alston*, for the appellant.

No one appeared for the respondent.

STANLEY, C. J.—These appeals arise out of cross petitions for divorce under the Indian Divorce Act. The appellant, John Henry Rhine, who is

* First Appeal Nos. 206 and 207 of 1910 from decrees of E. O. E. Leggatt, District Judge of Saharanpur, dated the 4th of May, 1910.

(1) (1883) L. R. 13 P. D. 141. (2) [1903] P. D. 248.

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an engine driver on the North-Western Railway, was married to the respondent, Mabel Rhine, in the Central Provinces, in the year 1897. The last residence of the parties was at Saharanpur. There has been no issue of the marriage. Mrs. Rhine left her husband in April, 1909, and went to her brother in the Punjab. She, on the 28th of May, 1909, instituted a suit in Lahore against her husband for dissolution of their marriage, or in the alternative for judicial separation. The plaint in this suit was returned to her to be filed in the proper Court, the Court at Lahore not having jurisdiction in the matter, and accordingly the plaint was filed in the Court of the District Judge of Saharanpur, on the 30th of July, 1909. Meantime, Rhine filed a petition for divorce on the 22nd of July, 1909, on the ground of his wife's adultery with the co-respondent, Leonard A. Green, also an engine driver on the North-Western Railway.

By the agreement of the parties the two suits were heard together and one judgment was delivered in both suits. Mrs. Rhine alleged in her petition various acts of cruelty on the part of her husband and charged him with having committed at various places carnal intercourse with her against the order of nature, forcibly and against her consent. The adultery of Mrs. Rhine with the co-respondent Green was established to the satisfaction of the learned District Judge, and his finding is not [502] now in controversy. He also found that the misconduct of Rhine alleged by his wife was established by the evidence and dismissed Rhine's petition for dissolution of marriage as also Mrs. Rhine's petition for dissolution of marriage, but he granted Mrs. Rhine's prayer for judicial separation. In his judgment he remarks :—

"I have found that Rhine has been guilty of conduct which is not only criminal but which constitutes a high degree of cruelty of a most abominable kind, and I do not think that the idea can be tolerated that the wife should be obliged to live with her husband under such circumstances."

The present appeals were then preferred by the husband, and the grounds of appeal are that the evidence on the record did not justify the finding that the respondent was guilty of the criminal offence charged against him ; and that a decree for judicial separation ought not to have been passed having regard to the fact that Mrs. Rhine was proved to have been guilty of adultery, and further that a decree for dissolution of the marriage on the ground of his wife's adultery ought to have been passed in his favour. Mrs. Rhine does not resist the appeal and no one appears for her.

As to the observation of the learned District Judge that he did not think that the idea could be tolerated that the wife should be obliged to live with her husband under the circumstances of this case, I may observe that it does not necessarily follow if a decree for judicial separation be refused that she will be obliged to live with her husband. If he seeks restitution of conjugal rights it will be for the Court before which the case comes to say whether under the circumstances a decree should be passed in his favour.

The first question then for determination is whether or not the evidence satisfactorily establishes that the appellant Rhine was guilty of the misconduct charged against him. Mrs. Rhine gave evidence in support of her case and this evidence was corroborated by the evidence of Mrs. Tilbury, who is a diplomaed midwife and also by a Mrs. Burrowes. The former was called in on one occasion by Mrs. Burrowes to treat Mrs. Rhine, after she had been subjected, as she alleged, to the cruel treatment complained of. Mrs. Tilbury stated that she found Mrs. Rhine in

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[503] a condition indicating that the offence complained of had been committed, and that she had been treating her for the injuries sustained by her which she detailed. She further stated that for the same reason she was called in once or twice after this. Mrs. Burrowes, who was next door neighbour to Mrs. Rhine, stated that Mrs. Rhine often told her that her husband treated her unnaturally, and beat her because she would not submit to his ill-treatment. The learned District Judge believed these witnesses. He observes:—"I feel sure that these two ladies have not invented the incident which they relate. Their evidence was given in a simple, straightforward way and with the air of persons relating what they had actually seen." The learned Judge had better means of estimating the credit to be attached to the evidence than we possess. He came to the conclusion that the evidence of Mrs. Rhine and her witnesses was reliable. Against it there was the denial of Rhine himself. But there is on the record a most compromising letter which was addressed by him on the 11th of May, 1909, to a Mrs. Miller whom he addresses as his "dearest sister," and who, it is stated, lived with his brother-in-law, but was not married to him. In this letter he complains of his wife, and we find in it these statements: "whenever Mrs. Rhine has left home, or had any words with me, she always flies back to an old story of telling people that I committed the sin of sodomy. This originated through some friends of her at Sukkur, about 8 years ago. If I was guilty of such an action, why was not immediate action taken against me. I say to you, dear sister, under the circumstances of this accusation I am innocent. Any how she tries to tell this story of 8 years old to excite people's sympathy for her and hatred for me. Admitting for argument's sake this to be true, I'm a man after all, but for any woman to tell such a story year after year and disclose some of the bedroom secrets of our home, and when disclosed and known by the male people what would you think of such a woman." There is this further passage in the letter:—"I give you the assurance, my dear sister, that I am a reformed man and unblamable in every way." This does not appear to me to be the letter of an innocent man. Such a charge as was made against him would ordinarily be met by an indig-**[504]** nant denial, but in this case there is at most a qualified denial. He says:—"Under the circumstances of this accusation I am innocent." Then admitting for argument's sake the charge to be true he observes:—"I'm a man after all." This suggests that he excused himself on the ground that passion and lust got the better of him. He admits that there were 'bedroom secrets' which ought not to have been disclosed and that his wife had made the charge of misconduct against him long anterior to the divorce proceedings. Whatever be the full weight to be attached to this letter, it appears to me that it furnishes corroboration of the evidence of Mrs. Rhine and her witnesses. I am wholly unable under the circumstances to come to the conclusion that the Court below was wrong in regarding the charge made by Mrs. Rhine as proved. I also agree in the view taken by the Court below that as neither of the parties came into Court with clean hands, neither of them was entitled to a decree for dissolution of marriage.

It only remains to consider whether under the circumstances the Court below ought to have granted a judicial separation. It is only under exceptional circumstances that the Court will grant a decree for judicial separation to a petitioner who has been guilty of adultery. Section 23 of the Indian Divorce Act prescribes that in an application for judi-

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cial separation the court on being satisfied of the truth of the statements made in the petition and *that there is no legal ground why the application should not be granted* may decree judicial separation. This section closely corresponds with section 17 of the Matrimonial Causes Act, 20 and 21 Victoria, Chapter 85 as amended by 21 and 22 Victoria, Chapter 108, section 19. The Act does not define the legal grounds which justify the court in refusing to grant a decree to a petitioner for judicial separation. In the case of *Otway* v. *Otway* (1), it was held by the Court of Appeal in England that a judicial separation can only be granted where the petitioner comes to court with a pure character and is free from all matrimonial misconduct. In that case a husband and wife had both been found guilty of adultery, and the husband had also been found guilty of aggravated cruelty. It was held by the Court of **[505]** Appeal reversing the decision of BUTT, J., that the court had no jurisdiction to make a decree for judicial separation on the ground of such cruelty, however aggravated its character might be. COTTON, L. J., laid down the following as the true principle which should guide a court in a case of the kind. He observed :—"In my opinion the true principle is this, that a wife having been guilty of adultery has put herself in such a position that she cannot be considered as an innocent party in any proceedings which might have been taken in the old Ecclesiastical Courts, or which might now be taken in the Court of Divorce, and therefore on that ground she is not in a position to come to that court to give her any relief as to any matrimonial offence which the husband may have committed, or to put it on the ground of compensation, for a crime of the same nature." FRY, L. J., in the course of his judgment remarked :—"The case is one which it appears to me ought to be considered with great care, because it is impossible not to feel a strong sense of repulsion at continuing the marriage tie between an adulterous man and an adulterous woman, where the man has been guilty of cruelty of the description of which the respondent in this case has been guilty." He states his conclusion as follows :—"The conclusion I have arrived at is that the principles which formerly governed the old Ecclesiastical Courts ought to prevail now, one of which is not to pronounce a decree for a divorce *a mensa et thoro* in favour of an adulteress." LOPES, L.J., in his judgment observes: —"Now the authorities seem to me clearly to lay down that if a wife sued her husband for adultery and had herself been guilty of adultery, she was not entitled to any relief. That doctrine applies in this case unless it can be maintained that the fact of the husband having been found guilty of cruelty as well as adultery, entitles the wife to relief, when but for the cruelty she would have had no *locus standi*. I can find no authority for this proposition, and it is opposed to what I believe to be the principles on which the Ecclesiastical Courts have acted in granting decrees for a divorce *a mensa et thoro* viz. that a wife or husband seeking such relief must come to the court with a pure character and must be free from any matrimonial misconduct."

[506] To this ruling great weight necessarily attaches. It is no doubt true that in the later case of *Constantinidi* v. *Constantinidi* (2), JEUNE, P., granted a decree for dissolution of marriage in a case in which both the petitioner and respondent had been guilty of adultery. In that case it was held that, although the discretion conferred by section 31 of Act 20 and 21 Victoria, Chapter 85, is a judicial and not an arbitrary

(1) (1883) L. R. 13 P. D. 141.

(2) [1903] P. D. 246.

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discretion, the causes for and circumstances under which the court may exercise its discretion in favour of a guilty petitioner are to be taken in combination and according to their several degrees of force and also that the list of such causes is not a closed book and may be extended as occasion arises. The learned President in the course of his judgment, in treating of the principles which should guide the court in a matter of the kind, observes:—"I think, therefore, one can find guidance only by reference to the general principles of justice, and no principles of justice in regard to this matter seem to me clearer than these: first, that the petitioner who has been convicted of adultery should not be allowed to obtain a divorce, if such adultery, in any serious degree, contributed to the misconduct of the respondent; and secondly, that a respondent should not be allowed to avoid the consequences of proved misconduct by putting forward or acts of misconduct on the part of the petitioner for which the respondent was himself or herself in any serious degree responsible. To hold otherwise would be to allow a wrong-doer to profit by wrong doing. I have no doubt that the Legislature intended that the Court should act on these principles whether or no it intended that the court should act on any other principles." Finding in that case that the respondent's conduct conduced to the adultery committed by the petitioner, the learned President granted a decree *nisi*. This was a very different case from the one now before us. In this case Mrs. Rhine has been found guilty of deliberate adultery. It cannot rightly be said that her husband conduced to the adultery. The principle laid down in *Otway* v. *Otway* should, therefore, I think, be applied to this case, and accordingly applying it I would hold that, coming into court as she does with unclean hands, Mrs. Rhine is not entitled to any relief. I would, therefore, in [507] the circumstances of this case, set aside the decree of the Court below for a judicial separation and in other respects affirm the decree of that Court.

GRIFFIN, J.—I concur.

TUDBALL, J.—I concur.

BY THE COURT.—The order of the Court is that the decree of the Court below in so far as it granted the petition of Mrs. Rhine for judicial separation be set aside, and that her petition be dismissed *in toto*. In other respects the decree will stand affirmed, but without costs as no one appears on the part of the respondent.

Petition dismissed.

33 A. 507 (=8 A. L. J. 329=10 I. C. 846.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

KURYA SINGH AND ANOTHER (*Plaintiff*) v. CHHALLU (*Defendant*).*

[24th February, 1911.]

Act (Local) No II of 1901 (Agra Tenancy Act), sections 10, 202—Exchange of lands on partition—Exproprietary tenant—Suit for possession in Civil Court—Res judicata—Procedure.

By section 10 of the Agra Tenancy Act, 1901, where there is a transfer by private alienation, no rights of exproprietary tenants accrue if the alienation is by gift or by exchange between co-sharers.

*Second Appeal No 947 of 1910 from a decree of L. Johnston, additional Judge of Meerut, dated the 22nd of April, 1910, reversing a decree of Muhammad Hussain, additional Subordinate Judge of Meerut, dated the 30th of July, 1909.

Where circumstances exist to which section 202 of the same Act applies, the Court has no option, but is bound to adopt the procedure laid down in that section.

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APPELLATE CIVIL.

33 A. 507=
8 A. L. J. 329
=10 I.C. 845.

[Ref. 63 I. C. 310.]

THE facts of this case were as follows :—

One Duli Chand, now represented by the appellants, brought a suit for possession of certain agricultural lands. It appears that the parties were co-sharers in certain zamindari, and under an arbitration award the zamindari was partitioned. The lands in question fell to the share of Duli Chand. He brought a suit in the Civil Court for proprietary possession of those lands and for ejectment of the defendant. The Subordinate Judge, in whose court the suit was instituted, by his decree, dated the 10th of [508] November, 1902, granted to Duli Chand a decree for proprietary possession of the land. An appeal by the defendant was dismissed, and Duli Chand got possession. The defendant then brought a suit in the Revenue Court under section 79 of the Tenancy Act, and his suit was decreed. Whereupon the present suit was brought. The suit was decreed by the first court (Additional Subordinate Judge of Meerut), but was dismissed on appeal by the District Judge. The plaintiffs appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellants.

Pandit *Baldev Ram Dave* (for The Hon'ble Pandit *Sundar Lal*), for the respondent.

STANLEY, C. J. and BANERJI, J.—The suit out of which this appeal has arisen was brought by Duli Chand, now represented by the appellants, for possession of certain agricultural lands. It appears that the parties were co-sharers in certain zamindari, and under an arbitration award the zamindari was partitioned. The lands in question fell to the share of Duli Chand. He brought a suit in the Civil Court for proprietary possession of those lands and for ejectment of the defendant. The Subordinate Judge in whose court the suit was instituted, by his decree, dated the 10th of November, 1902, granted to Duli Chand a decree for proprietary possession of the land. The defendant appealed to the District Judge and contended that the land had been his *sir* land before partition, that he had acquired the rights of an ex-proprietary tenant in regard to it and that he could not be ejected from it by a decree of the Civil Court. The learned Judge was of opinion that the decree of the first court only granted to the plaintiff proprietary possession of the land, and that it could not be determined in that suit whether the defendant had acquired the rights of an ex-proprietary tenant. The learned Judge observed, however, in his judgment that, as there was an exchange between co-sharers, the defendant could not under any circumstances claim the rights of an ex-proprietary tenant. This view of the learned Judge was in our opinion right. By section 10 of the Tenancy Act where there is a transfer by private alienation no rights of ex-proprietary tenants accrue if the alienation is by gift or by exchange between co-sharers. Here there was [509] evidently an exchange between co-sharers, and therefore, under the provisions of section 10, no rights could accrue to the defendant, as an exproprietary tenant in respect of land held by him as *sir*. Holding the view which we have mentioned above, the learned Judge dismissed the appeal of the defendant. The decree obtained by Duli Chand was put into execution and he obtained possession of the property. It is admitted that he took actual possession of it ; whether he obtained it by execution of the decree or subsequently is immaterial. The

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defendant on being dispossessed brought a suit in the Revenue Court under section 79 of the Tenancy Act for recovery of possession alleging himself to be the ex-proprietary tenant of the land. His suit was decreed. Hence the present claim for possession.

The court of first instance decreed the claim, but the lower appellate court dismissed it, holding that the decision of the Civil Court in the former suit brought by the plaintiff operated as *res judicata*. This view of the learned Judge is, in our opinion, erroneous, and the learned vakil for the respondent has not tried to support it. In the former suit, as we have pointed out above, the appellate court clearly abstained from determining whether defendant was liable or not to be ejected from the land. Therefore the decision in the previous suit cannot operate as *res judicata* in this case.

As, however, the suit related to agricultural land and the defendant pleaded that he held such land as the tenant of the plaintiff, section 202 of the Agra Tenancy Act applied and the court in which the suit was brought was bound to require the defendant by order in writing to institute within three months a suit in the Revenue Court for the determination of the question whether defendant was the plaintiff's tenant or not. This the court of the first instance did not do.

Mr. *Baldev Ram*, for the respondent, contends that the decision of the Revenue Court in the suit brought by the defendant to recover possession is *res judicata* between the parties, and the procedure laid down by section 202 need not be adopted. We express no opinion on the question whether when a suit is brought in the Revenue Court by the defendant in accordance with the provisions of section 202, the decision in a former suit **[510]** brought in the Revenue Court would or would not have the effect of *res judicata*. We think the court of first instance was bound to follow the procedure laid down in section 202, and this must now be done. We accordingly discharge the decrees of both the courts below and remand the case to the court of first instance with directions to re-admit the suit under its original number in the register and adopt the procedure laid down in section 202 of the Agra Tenancy Act. The appellant will have the costs of this appeal. All other costs will follow the event.

Appeal allowed.

33 A. 510 (=8 A. L. J. 524=11 I. C. 253=12 Cr. L. J. 389).

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* ALAM AND OTHERS.*

[2nd March, 1911.]

Criminal Procedure Code, sections 408, 415—*Appeal—Sentence.*

Where certain persons were tried by a Magistrate of the first class, convicted of an offence under section 325, Indian Penal Code, and sentenced to a day's imprisonment and a fine of fifty rupees, *Held* that the circumstance that the accused were in fact neither sent to jail nor actually imprisoned would not prevent their being entitled to appeal to the Sessions Judge.

THE applicants in this case were tried by a Magistrate of the first class, convicted of an offence under section 325 of the Indian Penal Code,

* Criminal Revision No. 750 of 1910 from an order of G. A. Paterson, District Judge of Benares, dated the 12th of December, 1910.

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33 A. 510=8 A. L. J. 524 =11 I. C. 253 =12 Cr. L. J. 389.

and sentenced to a day's simple imprisonment each and to a fine of Rs. 50 each, in default of which they were to suffer a month's further imprisonment. In addition they were bound over to keep the peace. They appealed to the Sessions Judge, who, however, held that, inasmuch as in fact the appellants had neither been sent to jail nor actually imprisoned, no appeal would lie. The appellants then applied in revision to the High Court.

Mr. *G. P. Boys*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

TUDBALL, J.—This is an application in revision against the decision of the Sessions Judge of Benares, made on the 12th of December, 1910. The applicants were tried by a Magistrate of [511] the first class; convicted of an offence under section 325 of the Indian Penal Code and sentenced to a day's simple imprisonment each and also to a fine of Rs. 50 each, and in default of payment of fine they were to suffer a month's further imprisonment. In addition to this they were bound over to keep the peace. The learned Sessions Judge has held that, though the applicants were sentenced to one day's imprisonment, as a matter of fact they were neither sent to jail nor were they actually imprisoned, and that therefore there has been no such combination of the two classes of punishments mentioned in section 413 as is contemplated by the terms of section 415 of the Criminal Procedure Code. Section 308 of the Code distinctly lays down that any person convicted on a trial held by a Magistrate of the first class may appeal to the Court of Session. Section 413 is an exception to the general rule laid down in section 408. It is laid down in that section that "notwithstanding anything hereinbefore contained there shall be no appeal by a convicted person in cases in which a Magistrate of the first class passes a sentence of imprisonment not exceeding one month only 'or' fine not exceeding fifty rupees only, 'or' whipping only." It is quite clear that the present case does not fall within the exceptions set forth in section 413. Section 415 is explanatory, and apparently was entered in the Code to remove all possible doubts which might arise in the cases considered therein. It clearly lays down that an appeal may be brought against any sentence referred to in section 413 in which any two or more of the punishments therein mentioned are combined. It is quite clear that in the present case there has been a combination of the sentences of imprisonment and fine. It is immaterial for the purposes of that section whether the applicants actually suffered imprisonmment in jail or not. The learned Sessions Judge is clearly wrong in the view whch he has taken. I set aside his order. The appeal lies to his Court. He must hear and decide it according to law.

Order set aside.

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REVISIONAL CIVIL.

33 A. 512=9 I. C. 982=8 A. L. J. 429==12 Cr. L. J. 174.

33 A. 512 (=9 I. C. 982=8 A. L. J. 429=12 Cr. L. J. 174).

[512] REVISIONAL CIVIL.

Before Mr. Justice Richards.

BENI PRASAD AND OTHERS (*Petitioners*) *v.* SARJU PRASAD THAKURIA (*Opposite Party*).*

[3rd March, 1911.]

Civil Procedure Code (1908), *section* 115—*Criminal Procedure Code, section* 195 (6)—*Sanction to prosecute—Sanction granted by Munsif—Revisional powers of District Judge.*

One of the parties to a civil suit applied for sanction to prosecute the plaintiff, on the ground that he had instituted a false claim. The Munsif dismissed the application on technical grounds. The applicant applied to the District Judge under section 195 (6) of the Code of Criminal Procedure. The Judge remanded the case to the Munsif for trial of the application. *Held*, that the powers of revision exercisable by the District Judge were confined to those conferred by section 195, Criminal Procedure Code, and he had no jurisdiction to make the order of remand.

THE facts of this case were briefly as follows :—

One Sarju Prasad, who was a party to certain proceedings in a Munsif's Court, applied to the Munsif for sanction under section 195 of the Code of Criminal Procedure, to prosecute the applicants under section 209 of the Indian Penal Code. This application was rejected upon more or less technical grounds, and a further application for its re-hearing was also rejected. Sarju Prasad then went to the District Judge under section 195 (6) of the Code of Criminal Procedure who passed an order remanding the matter to the Munsif for trial on the merits. Against this order the applicants applied in revision to the High Court, under section 115 of the Code of Civil Procedure, 1908.

Mr. *C. C. Dillon*, for the applicants.

Babu *Satya Chandra Mukerji*, for the opposite party.

RICHARDS, J.—This is an application in revision. It appears that on the 31st March, 1910, the applicants obtained a compromise decree in the Munsif's Court. The suit in which this decree was granted was conversant with a claim by the applicants on two bonds, and the matter resulted in a compromise and a decree in accordance with that compromise. On the 28th September, 1910, that is to say, six months after, the opposite party applied for sanction under section 195 of the Code of Criminal Procedure to institute a prosecution under section 209 of the Indian [513] Penal Code, against the applicants, for having fraudulently or dishonestly or with intent to injure or annoy the opposite party, made a false claim. This application was made to the Munsif, who threw out the application on grounds more or less technical. On the 1st of October 1910, an application for the restoration of the application for sanction was made by the same party, and this was also thrown out. Thereupon the opposite party applied under clause (6) of section 195 of the Code of Criminal Procedure, that the sanction, which was refused by the Munsif, might be granted by the District Judge. The District Judge, on the 20th January 1911, made an order in the following terms :

"I set aside these refusals and remand the case to the Munsif of Bansgaon with directions to apply his mind to the facts and come to a decision—(*a*) whether any criminal offence has been committed.; (*b*) whether, if so, it is necessary in the interests

* Civil Revision, No. 16 of 1911.

of justice that there should be a prosecution; (c) if so, whether it is advisable to grant the sanction applied for or whether action under section 476 of the Code of Criminal Procedure would be a better course. It is because section 476 can be made use of by the Munsif and cannot by myself, that I do not decide the question in this Court."

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33 A. 512=9 I. C. 982=8 A. L. J. 429=12 Cr. L. J. 174.

It is contended on behalf of the applicants that the District Judge had no jurisdiction to make the order. It must be admitted that the powers of the learned District Judge, so far as the present application is concerned, are confined to the powers conferred on him by section 195 of the Code of Criminal Procedure. Clause (6) provides that "any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate," and the learned District Judge has neither revoked nor granted the sanction. His order, amongst other things, directs the Munsif to consider whether or not the latter should exercise the powers conferred on him by section 476 of the Code of Criminal Procedure—powers which the learned Judge admits that he himself has not got to exercise in the present case. Mr. *Satya Chandra*, on behalf of the respondent, relies on the Full Bench ruling of this Court, which decides that a Court exercising the powers conferred by section 195 is a Civil Court and not a Criminal Court, and that therefore the provisions of the Code of Civil Procedure enabling the Appellate Court to remand cases and send down issues apply. I am of course bound [514] by the ruling in the Full Bench case referred to, but in my opinion even assuming the Court to be a Civil Court, its powers in cases like the present are confined to powers conferred on it by section 195. In my opinion the learned District Judge had no jurisdiction to make the order in the present case. In any event after the parties had compromised, I hardly think it was a case for sanction. I therefore allow this application and set aside the order of the District Judge, dated the 20th January, 1911.

Application allowed.

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33 A. 514 (=10 I. C. 959=8 A. L. J. 525=12 Cr. L. J. 359).

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR v. KRISHNA NATH TIWARI.*

[3rd March, 1911.]

Criminal Procedure Code, sections 188, 227—Offence committed in Nepal territory—Certificate granted by political officer specifying a particular section of the Indian Penal Code—Trying Magistrate not debarred from convicting under another section if within the facts stated.

A certificate granted by a political officer under section 188 of the Code of Criminal Procedure in respect of a certain set of facts will cover every charge which the facts disclosed in the proceedings will suffice to sustain. The certificate is granted on the allegation of certain facts which constitute the charge against the accused, and the trying Magistrate is not restricted to the section which is mentioned in the certificate, but at the utmost to the facts.

THIS was an application for revision of an order passed by a Magistrate of the first class, convicting the applicant under section 355, read with section 109 of the Indian Penal Code, and sentencing him to a fine of Rs. 30. Part of the facts which led to the applicant being arrested and

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* Criminal Reversion No. 55 of 1911, from an order of C. W. Gwynne, Magistrate, first class, of Benares, dated the 7th of November, 1910.

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33 A. 514=10 I. C. 959=8 A. L. J. 525=12 Cr. L. J. 359.

charged occurred in Nepal, and the question raised in the present case was whether on a proper construction of the certificate granted under section 188 of the Code of Criminal Procedure by the resident of Nepal, which mentioned only section 363 of the Indian Penal Code, the applicant could under the circumstances be tried by a Magistrate in British India under a different section. The facts of the case are fully set forth in the order of the Court.

Babu *Satya Chandra Mukerji*, for the applicant.

[515] The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

TUDBALL, J.—One Kheru Lal, Bania, made a complaint against the applicant Krishna Nath Tiwari and certain other persons to the effect that he had been seized by the servants of Krishna Nath Tiwari in the village of Bhagwanpur, which is in British territory, and had been conveyed by them across the border to the village Bairibwa in Nepal territory, where, after he had been placed before Krishna Nath Tiwari, the latter ordered his servants to shoe-beat him. Krishna Nath Tiwari is a British subject, but in recent years has taken up his residence in the above mentioned village across the Nepal territory. According to Kheru Lal, the complainant, the kidnapping was aided and abetted by the accused Krishna Nath Tiwari. It will be seen that part of the transaction took place in British territory and part within Nepal territory. An application was made to the political officer in Nepal, who granted a certificate under section 188, Criminal Procedure Code, to the effect that the charge under section 363, Indian Penal Code, against Krishna Nath Tiwari, was one which ought to be inquired into in British India. The Magistrate who has tried the case, found that Kheru Lal was kidnapped as stated, held that there was nothing to show that that had been done with the knowledge and sanction of Krishna Nath Tiwari. He therefore acquitted him of the offence under section 363, read with section 109, Indian Penal Code. He found it proved that when Kheru Lal was placed before Krishna Nath Tiwari, the latter, as a matter of fact, had the man shoe-beaten. He therefore convicted him of the offence under section 355, read with section 109, Indian Penal Code, and sentenced him to a fine of Rs. 30. Krishna Nath Tiwari has now come in revision to this Court, and it is urged that inasmuch as the certificate granted by the resident in Nepal relates only to the offence under section 363 of the Code, the Magistrate had no jurisdiction to convict the accused of an offence under section 355, Indian Penal Code, which is not mentioned in the certificate. It is quite clear that the offence of kidnapping was committed within British India, and that really in respect to that offence no certificate was necessary. But, as in the course of the transaction of which [516] complaint was made, the applicant had committed an offence under section 355, Indian Penal Code, a certificate was certainly necessary, as he was a British subject who had committed the offence in the territory of a Native Prince. The facts disclosed in the complaint and in the proceedings which led up to the grant of the certificate clearly disclosed the offence of which the applicant has been convicted. It is true that the charge was one which was entered as an offence under section 363. But it seems to me quite clear that the certificate granted under section 188 was only necessary to enable the whole matter to be inquired into in British India. In my opinion it cannot prevent the Court making the inquiry or conducting the trial from taking action under section 227 of

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the Criminal Procedure Code. The mere circumstance that the offence under section 363 alone was entered in the certificate does not necessarily lead to the conclusion that that certificate was granted for the purpose of a trial only on that charge and not in respect to any other offence disclosed by the facts proved. In my opinion the certificate granted under section 188 in respect to a certain set of facts will cover every charge which the facts disclosed in the proceedings will suffice to sustain. In my opinion there is no force in the contention of the applicant. The certificate is granted on the allegation of certain facts which constitute the charge against the accused and the Magistrate is not restricted to the section which is mentioned in the certificate, but at the utmost to the facts. The conviction under section 355, read with section 109, Indian Penal Code, is perfectly legal. The application is, therefore, dismissed.

Application dismissed.

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33 A. 517 (=9 I. C. 817=8 A. L. J. 412).

[517] FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Griffin.

RAM SARUP (*Decree-holder*) *v.* DASRATH TIWARI AND ANOTHER (*Judgment-debtors*).*

[3rd March, 1911.]

Civil Procedure Code (1882), *sections* 230, 235—*Execution of decree—Limitation—Application for execution whether a fresh application or merely a continuance of a subsisting application.*

The subsequent application to execute the same decree mentioned in section 230 of the Code of Civil Procedure, 1882, means a substantive application for execution in the form prescribed by section 235 of the Code.

Hence, where an application for execution in accordance with section 235 of the Code has been made within the period of limitation prescribed by section 230 and has been granted, that is, execution has been ordered in accordance with the prayer of the decree-holder's application, the right of the decree-holder to obtain execution will not necessarily be defeated, if, by reason of objections on the part of the judgment-debtor or action taken by the court or other cause for which the decree-holder is not responsible, final completion of the proceedings in execution initiated by the application under section 235 cannot be obtained within the period limited by section 230. Further applications of the decree-holder to the court executing the decree to go on from the point where the execution proceedings had been arrested and complete execution of his decree would be applications merely ancillary to the substantive application under section 235 and would not be obnoxious to the bar of section 230. *Rahim Ali Khan* v. *Phul Chand* (1) followed.

[Ref : 64 I. C. 849=35 C. L. J. 135.]

THE facts of this case were as follows :—

In a suit for possession on a mortgage and for mesne profits a decree was obtained on the 15th of September, 1893. Application for execution was made on the 3rd of June, 1905. The Court struck off this application of its own motion on the 27th of September, 1905. An application for re-admission of that application was made on the 13th of August, 1906, and the application was re-admitted on the 15th of September, 1906. It

*Appeal No. 22 of 1910 under section 10 of the Letters Patent.

(1) (1896) I. L. R. 18 All. 482.

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was again struck off for non-payment of process fee on the 13th of November, 1907. On the 3rd of December, 1907, an application was made for restoration of the case, and, after sufficient cause being shown, it was again restored on the 14th of December, 1907.

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[518] Objections were filed by the judgment-debtor, the main ground being that the decree was barred by 12 years' limitation. The first court disallowed the objection, but the lower appellate court reversed the decree and held the application to be barred. On appeal to the High Court, PIGGOTT, J., upheld that decision in the following judgment:—

"This is a decree-holder's appeal. The decree is dated the 15th of September, 1893. It was admittedly still alive when, on the 3rd of June 1905, an application for execution was made. After giving rise to sundry proceedings in consequence of objections raised by the judgment-debtors, the application was finally dismissed on the 13th of November, 1907, for non-payment of process fees by the decree-holder. On the 3rd of December, 1907, the decree-holder applied that the application of the 3rd of June, 1905, might be restored and taken up again. He obtained an order restoring the said application to the file of the court on the 14th of December, 1907 and after this certain proceedings in execution were taken. The judgment-debtors object that these proceedings are all barred by section 230 of the Code of Civil Procedure (Act XIV of 1882). The case appears to be exactly covered by the ruling of this Court in *Ram Newaz* v. *Ram Charan* (1). I do not see that this case has been overruled either in *Rahim Ali Khan* v. *Phul Chand* (2) or in *Mujibullah* v. *Umed Koer* (3). The prohibition in section 230 of Act XIV of 1882 is directed to the granting of an application after the prescribed period of 12 years. I have been through the order sheet in this case, and I cannot find that in consequence of the application of the 3rd December, 1907, the Court was asked to take proceedings against any property already under attachment, or otherwise to take any steps in continuation of any proceedings initiated under the application of the 3rd of June, 1905. I accordingly concur in the view of the case taken by learned District Judge. I dismiss the appeal with costs."

The decree-holder appealed under section 10 of the Letters Patent, and the case was subsequently referred to a Full Bench.

Munshi *Govind Prasad*, for the appellant, submitted that the application was within time, inasmuch as the order of the 14th of December, 1907, continued the application of the 3rd of June, 1905. He cited *Rahim Ali Khan* v. *Phul Chand* (2).

Babu *Sital Prasad Ghose*, for the respondent, urged that the Court had no statutory authority to make the order of the 14th of December, 1907. The lower court did not treat the application before it as one for review of judgment; but it was a fresh application. It could not be one for review of judgment as there was no judgment to review. An order striking off an [519] application is not a judgment within the meaning of section 2 of the Civil Procedure Code. He relied on *Ram Newaz* v. *Ram Charan* (1), which had not been dissented from in the Full Bench case in 18 All. 482.

STANLEY, C. J.—This appeal arises out of proceedings taken in execution of a decree under section 230 of the Code of Civil Procedure of 1882. The decree is dated the 15th of September, 1893, and was a decree for possession of immoveable property and for mesne profits. On the 3rd of June, 1905, the decree-holder applied for execution of his decree. On the 27th of September, 1905, the application was struck off by the court on its own motion. Consequent on this an application for the re-admission of the application was made on the 30th of August, 1906, and on the 15th of September, 1907, the application was re-admitted. On the 13th of November, 1907, the application was again struck off on the ground that

(1) (1895) I. L. R. 18 All. 49.
(2) (1896) I. L. R. 18 All. 582.,
(3) (1908) I. L. R. 30 All. 499.

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33 A. 517=9 I. C. 517=8 A. L. J. 412.

insufficient process fee had been deposited by the decree-holder. He, on the 3rd of December, 1907, applied to the court for restoration of the application, setting out the circumstances under which he failed to pay the requisite amount of process fee. The court was satisfied with his explanation, and accordingly, on the 14th of December, 1907, restored the application to the file. This application, it is to be noted, was not in the nature of a fresh application for execution. It was simply an application for restoration of the previous application of 1905, and rightly or wrongly the court revised its previous order and passed the order for restoration. In proceedings in execution taken on the application of the 3rd of June, 1905, which had been so restored, objection was taken by the judgment-debtor that the proceedings were barred by limitation, the application of the 3rd of December, 1907, having been made after the lapse of twelve years from the date of the decree. The court of first instance held that limitation did not bar the proceedings, but the decision of this court was reversed on appeal and the appellate court's decree was affirmed by a learned Judge of this Court in second appeal. Hence this appeal under the Letters Patent.

[520] The contention on behalf of the appellant is that the order of the 14th of December, 1907, had the effect of restoring the prior application of the 3rd of June, 1905, and was not a fresh application for execution either in form or substance. It appears to me that this contention is well founded. It was open to the court to review the order which it had passed striking off the application for non-payment of a sufficient process fee : it was open to the court to reinstate this application. I am unable to find any substantial difference in the facts of this case from those which were the subject of consideration by a Full Bench of this Court in the case of *Rahim Ali Khan* v. *Phul Chand* (1). In that case it was held that the subsequent application to execute the same decree mentioned in section 230 of the Code of Civil Procedure means a substantive application for execution in the form prescribed by section 235 of the Code ; hence that where an application for execution in accordance with section 235 of the Code has been made within the period of limitation prescribed by section 230 and has been granted, that is, execution has been ordered in accordance with the prayer of the decree-holder's application, the right of the decree-holder to obtain execution will not necessarily be defeated, if by reason of objections on the part of the judgment-debtor, or action taken by the court, or other causes for which the decree-holder is not responsible, final completion of the proceedings in execution initiated by the application under section 235 cannot be obtained within the period limited by section 230. In the judgment of my brother KNOX I find this passage, in which I entirely concur. Referring to section 235 of the Code he observes :—" That section lays down in great detail the form which an application to execute a decree must take, the matters which it must contain, and the mode in which the court is asked to grant its assistance. Section 245 requires that such applications shall on receipt be examined, and, if found in accordance with the law, admitted, on a register. The court is after such admission to order execution of the decree according to the nature of [521] the application. So long as that order or any further order according to the nature of the application is in progress, provided it be an order which has been evolved from the application so registered, I would hold that the application for execution is in progress.

(1) (1896) I. L. R. 18 All. 482.

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33 A. 517=9 I. C. 817=8 A. L. J. 412.

If from some obstacle imposed by the judgment-debtor, or by the Court, that obstacle not being a final determination of the application, the progress of the order, or subsequent orders, to maturity is delayed and such obstacle is removed by an application of the decree-holder, I do not consider such latter application, unless it expressly takes the form of a new application under section 235 and be registered, as a subequent application, any more than I would consider a petition by a plaintiff in the course of a suit asking the court to re-consider an order to be a fresh plaint."

It is contended on behalf of the respondent that in this case the striking off of the application of the 13th of November, 1907, was due to the default of the decree-holder in not paying sufficient process fee. Whether or not he was in fault in this respect, the court which passed the order for restoration had all the facts before it and came to the conclusion that there was justifying cause for re-admitting the execution proceedings. We ought, I think, in view of this order, to regard the temporary default on the part of the decree-holder as satisfactorily explained and condoned.

For these reasons I would allow the appeal and set aside the decrees of this Court and also of the lower Appellate Court and restore the decree of the court of first instance.

BANERJI, J.—I agree. The question is whether the application of the 3rd of December, 1907, was an application for execution of the decree within the meaning of section 230 of Act XIV of 1882. If it can be deemed to be an application for execution, if having been presented after the expiry of 12 years from the date of the decree, would be time-barred. I agree with the learned Chief Justice that it was neither in form nor in substance an application for execution within the meaning of that section. It was an application to proceed with the execution proceedings which had been put an end to [522] by the order of the 13th November, 1907. Those proceedings were initiated by the application of the 3rd of June, 1905, which was within 12 years from the date of the decree. By reason of the decree-holder's delay in depositing the requisite amount of process fee the Court put in abeyance the carrying out of the execution proceedings. The decree-holder satisfied the Court that he had sufficient reasons for not depositing the requisite amount of process fees and asked the Court to set aside its order of the 13th of November, 1907, and to proceed with the execution proceedings. The last application was clearly one for a continuation of the execution proceedings already instituted and was not a fresh application for execution. I find it difficult to distinguish this case from the case of *Rahim Ali Khan* v. *Phul Chand* (1) decided by a Full Bench of this Court. I agree in the order proposed.

GRIFFIN, J.—I have nothing to add to what has been said by the learned Chief Justice, and I would allow the appeal.

BY THE COURT:—The order of the Court is that the appeal be allowed, the decrees of the learned Judge of this Court and of the lower appellate Court set aside and that of the Court of first instance restored with costs in all Courts.

Appeal allowed.

(1) (1896) I. L. R. 18 All. 482.

33 A. 523 (=8 A. L. J. 431=9 I. C. 1022).

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[523] APPELLATE CIVIL.

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice, Karamat Husain.

33 A. 523=8 A. L. J. 431 =9 I C. 1022.

NARAIN SINGH (*Defendant*) *v.* GOBIND RAM (*Plaintiff.*)*

[10th March, 1911.]

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 56—*Jurisdiction—Civil and Revenue Courts—Suit for ejectment of a tenant in Revenue Court—Subsequent suit in Civil Court against the same defendant as trespasser.*

Where the plaintiff had previously sought to eject the defendant by suit in the Revenue Court on the plea that he was the plaintiff's sub-tenant, but had failed, on the finding that the defendant was an occupancy tenant, it was *held* that the plaintiff could not thereafter sue the defendant in the Civil Court to evict him as a trespasser.

[Dist. 15 I. C. 303=10 A. L. J. 85; Ref; 17 A. L. J. 60=49 I. C. 118=41 All. 203=60 I. C. 613; 69 I. C. 799; Fol. 78 I. C. 628.]

THE facts of this case were as follows:—

In a previous litigation in the Revenue Courts the plaintiff Gobind Ram had sought to eject the defendant from a certain occupancy holding upon the ground that the defendant was the plaintiff's sub-tenant, but had been defeated on the finding that the defendant was an occupancy tenant. The plaintiff then brought the present suit in a Civil Court to evict the defendant from that part of the occupancy holding of which he was in possession. He alleged that the land held by Narain Singh, the defendant, had been sublet to him at a certain rent, but as the latter had in the Revenue Court pleaded that he was a partner and not a sub-tenant, he had by this act become a trespasser and should on that ground be ejected. The Court of first instance dismissed the suit, but on appeal the lower Appellate Court reversed the decree and remanded the case for trial on the merits. The defendant appealed.

Babu *Sarat Chandra Chaudhri* (with Babu *Jogindro Nath Chaudhri*) for the appellant.

Mr. *W. Wallach* (with him Munshi *Govind Prasad*), for the respondent.

KNOX and KARAMAT HUSAIN, JJ.—This appeal arises out of a dispute between two persons who are both of them subject to the provisions of Local Act No. II of 1901. The respondent, Gobind Ram, was plaintiff and claimed to be the sole tenant of a large occupancy holding. He first went to the Revenue Court [524] and filed an application in that Court for the ejectment of the appellant, Narain Singh, his nephew, alleging that Narain Singh was his sub-tenant of a part of a large holding. The application was dismissed. The Commissioner held that Narain Singh had made out his plea that he was an occupancy tenant and not a sub-tenant. This decision was confirmed by the Board of Revenue. Whether it was necessary or not to go so far as the Revenue Courts went, we need not consider. Gobind Ram then came to the Civil Court and filed the suit out of which the present appeal has arisen to eject the defendant from that part of the occupancy holding which is in his possession. He in the plaint alleged that the land held by Narain Singh had been sublet to him at a certain rent per annum, but as the latter had in the Revenue Court pleaded that he was a partner and

* First Appeal No. 119 of 1910 from an order of A. Sabonadiere, District Judge of Aligarh, dated the 9th of November, 1910.

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33 A. 523=8 A. L. J. 431 =9 I. C. 1022.

not a sub-tenant, he had by this very act become a trespasser and should on that ground be ejected. The Court below appears to have overlooked the provisions of section 56 of Act No. II of 1901, which provides that no tenant shall be ejected otherwise than under the provisions of the Act. Gobind Ram, according to his own showing, treated Narain Singh as a tenant whom he wished to be ejected by the Revenue Court, but having failed there he comes to the Civil Court to have him ejected. He cannot do so by coming to the Civil Court. We hold that the Civil Court has no jurisdiction in this case. We decree the appeal, set aside the order of the lower appellate Court with costs and restore the decree of the court of first instance.

Appeal decreed.

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33 A. 525 (=8 A. L. J. 385=9 I. C. 1017.)

[525] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

HARDWARI LAL AND ANOTHER (*Plaintiffs*) *v.* GOMI (*Defendant*).*

[11th March, 1911.]

Act No. IX of 1875 (*Indian Majority Act*), *sections* 2, 3—*Hindu law—Majority—Testamentary capacity of Hindus.*

Held that a Hindu domiciled in the United Provinces cannot execute a valid will until he has reached the age of majority as prescribed by the Indian Majority Act, 1875.

[Fol: 38 Mad. 166.]

THE facts of this case were as follows:—

One Lallu Mal died on the first of July, 1903, leaving him surviving his widow Jasodha and his mother Gomi, the respondent. Jasodha died on the 8th of May, 1903. Both Lallu Mal and Jasodha were, at the dates of their respective deaths, between sixteen and eighteen years of age. Lallu Mal had made a will of the 29th of June 1903, three days before his death, and Jasodha another, on the 5th of May, 1908, also three days previous to her death. Musammat Gomi claimed under these wills to be absolutely entitled to the estate of Lallu Mal, on the allegation that both the deceased were competent under the Hindu Law to have bequeathed property as they liked. This was a suit by the reversioners of Lallu Mal for a declaration that they were unaffected by the wills in question and that Gomi was entitled only to a life estate.

The Court of first instance (Subordinate Judge of Saharanpur) dismissed the suit. The plaintiffs appealed.

Mr. *W. Wallach* (with him Babu *Lalit Mohan Banerji*), for the appellant, submitted that the provisions of the Indian Majority Act, 1875, would apply. The acts of minors which had validity given them were enumerated there and testamentary capacity had not been conferred on them.

The Hon'ble Pandit *Sundar Lal* (with him the Hon'ble Pandit *Moti Lal Nehru*, Dr *Satish Chandra Banerji* and Mr. *J. L. Jaini*), for the respondent, contended that a minor could make a will under Hindu Law. A will was not a contract. The age of majority was nowhere fixed under the Hindu Law; Trevelyan on Minors, page 1. All that the

* First Appeal No. 346 of 1909 from a decree of Pramatha Nath Banerji, Subordinate Judge of Saharanpur, dated the 22nd of July, 1909.

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33 A. 525=8 A. L J. 385 =9 I. C. 1017.

[526] Hindu Law laid down was that having attained the age of 16 he was quite independent and quite competent to make a will. He might not, it is true, be able to make a gift, but if the Legislature had wished to prohibit his making a will, it would have done so specially. Only the analogy of the law of gift was applicable to wills, not the statute law of gifts. A number of requirements, *e. g.* registration and attestation, were to be complied with in the case of gifts. They were not necessary in the case of wills. The term minor was given a special meaning under the statute only for certain purposes.

Babu *Lalit Mohan Banerji*, in reply, referred to the Sacred Books of the East, Vol. XXXIII, page 52. A minor was a minor under the provisions of Act IX of 1875. Where an exception was made, as in cases of marriage, divorce, adoption and dower, it was said so in the Act. In all other transactions the provisions of the Act would have to be complied with. He referred to Mayne on Hindu Law, paragraph 407.

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit for a declaration that a will alleged to have been executed by one Lallu Mal in favour of his wife Jasodha on the 29th of June, 1903, as also a will made by Musammat Jasodha on the 5th of May, 1908, are void by reason of the fact, among others, that both Lallu Mal and Jasodha were under the age of eighteen years, at the date of the execution of the respective documents. It is admitted that both Lallu Mal and Musammat Jasodha were over the age of sixteen but under the age of eighteen years. The contention on behalf of the defendant respondent is, that both being Hindus and having attained the age of sixteen years, were capable of disposing of their property by will. The court below held that Lallu Mal and Jasodha were competent to execute the wills in question, and that having done so with full knowledge of their contents and being of full testamentary capacity, the wills were valid and the plaintiff's suit failed.

This appeal was then preferred, and the main contention on behalf of the appellants is that the question is concluded by the provisions of the Indian Majority Act No. IX of 1875. The argument addressed to us on behalf of the respondent is that both [527] Lallu Mal and Jasodha being upwards of sixteen years old, and so having attained full age, according to the Hindu Law they had power to make wills; that the capacity to make a will is not regulated by statute; and that the Hindu Law should be applied to the case.

We are of opinion that the question is concluded by the Indian Majority Act. That Act extends to the whole of British India and was intended to prolong the period of nonage in the case of Hindus as well as of other subjects of the Crown.

In the preamble it is stated that "it is expedient to prolong the period of nonage and to attain more uniformity and certainty respecting the age of majority than now exists." Section 2 is a saving clause and prescribes that nothing in the Act contained shall affect (*a*) the capacity of any person to act in the following matters, namely, marriage, dower, divorce and adoption; (*b*) the religion or religious rights and usages of any class of Her Majesty's subjects in India, or (*c*) the capacity of any person who before this Act comes into force has attained majority under the law applicable to him. Then section 3 prolongs the nonage of a minor, of whose person or property a guardian has been or shall be appointed, up to 21 years; and in the case of every other person domiciled in British India, prescribes that every such other person "shall be deemed to have

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attained his majority when he shall have completed his age of 18 years and not before."

It appears to us that this enactment extended the period of nonage in the case of Lallu Mal and Jasodha to their 21st year respectively, as a guardian was appointed for each of them, and overrides any rule of law as regards nonage which may have subsisted prior thereto. It will be observed that in section 2, clause (*a*), the only exception made in regard to the application of the provisions of the Act is in the cases of marriage, dower, divorce and adoption. The capacity to do any other act is not safeguarded. The only other exception is the capacity of any person who, before the Act came into force, had attained majority under the law applicable to such person. In the present case Lallu Mal and Jasodha had not attained majority before Act IX of 1875 came into force. Therefore clause (*c*) does not safeguard [528] their capacity to make a will. The Act was intended to attain uniformity and certainty respecting the age of majority, and we think it governs a case such as the present.

For these reasons the view taken by the learned Subordinate Judge is in our judgment erroneous. We accordingly allow the appeal, set aside the decree of the court below, and decree the plaintiff's claim with costs in both courts.

Appeal decreed.

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33 A. 528 (=8 A. L. J. 604=11 I. C. 517.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

NARAIN DAS AND OTHERS (*Plaintiffs*) *v.* BALGOBIND AND OTHERS (*Defendants*).*

[21st March, 1911.]

Partition—Appeal—Appeal against preliminary decree—Final decree, passed since the appeal—No appeal against final decree.

Held that an appeal against the preliminary decree in a suit for partition cannot be heard if after the filing of such appeal the final decree has been passed and no appeal is preferred against that decree. *Kuriya Mal* v. *Bishambhar Das* (1) referred to.

[Not Fol. 18 C. L. J. 214=20 I. C. 576 ; Diss: 13 M. L. T. 209=34 M. L. J. 190= 1913 M. W. N. 173 ; 34 All. 493 ; Fol: 37 Mad. 29.]

In this case a preliminary decree for partition had been passed, and the present appeal was against that decree. After the appeal was filed, the final decree in the suit was passed, and by the time this appeal came on for hearing no appeal had been filed against the final decree and the time for appealing had elapsed. A preliminary objection was therefore raised by the respondents that, in the absence of any appeal against the final decree in the suit, this appeal could not be heard.

Dr. *Tej Bahadur Sapru*, for the appellants.

Dr. *Satish Chandra Banerji*, Munshi *Datti Lal* and Munshi *Radha Mohan*, for the respondents.

STANLEY, C. J., and BANERJI, J.—A preliminary objection has been raised to the hearing of this appeal, to the effect that it cannot be entertained, in view of the decision in *Kuriya Mal* v. *Bishambhar Das* (1). The

* First Appeal No. 3 of 1910 from a decree of Srish Chandra Basu, Subordinate Judge of Allahabad, dated the 17th September, 1909.

(1) (1910) I. L. R. 32 All. 225.

suit was one for partition. A preliminary decree was passed on the 17th of September, 1909, and it is against this preliminary decree that the appeal has been preferred. A final decree was passed on the 27th of January, [529] 1910, and no appeal has been preferred against this decree, and the time for appealing has elapsed. According to the ruling above referred to, after the passing of a final decree in a suit for partition no appeal will lie, which does not challenge the final as well as the preliminary decree. The only difference in the case before us and the case of *Kuriya Mal* v. *Bishambhar Das* is that in that case, when the appeal was preferred, the final decree for partition had been passed. In the present case the final decree was not passed at the date of the filing of the appeal. It appears to us, however, that the principle of the decision in *Kuriya Mal* v. *Bishambhar Das* is applicable to this case, and that the appeal cannot be entertained. We accordingly dismiss it, but under the circumstances without costs. Objections have been filed, but as the appeal has failed they must also fail. We dismiss them without costs.

Appeal dismissed.

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APPELLATE CIVIL.
33 A. 523=8 A. L. J. 604 =11 I. C. 517.

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33 A. 529 (=8 A. L. J. 437=9 I.C. 1023.)

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

COLONEL LECKY (*Judgment-Debtor*) *v.* BANK OF UPPER INDIA, LIMITED (*Decree-Holder*).*

[22nd March, 1911.]

Civil Procedure Code (1908), *section* 60—"*Public officer*"—*Execution of decree*—*Limitation*—*Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, article* 182, *clause* (5)—*Attachment*—*Pay of officer of regular forces not attachable*—*Statute* 44 *and* 45 *Vict., Cap. LVIII, section* 136—*Statute* 58 *and* 59 *Vict., Cap. V, section* 4.

An officer of His Majesty's regular forces serving in India is not a "public officer" within the meaning of section 60 of the Code of Civil Procedure, 1908. The pay of such an officer, therefore, is not liable to be attached in execution of a decree of a court in British India. *Calcutta Trades Association* v. *Ryland* (1) and *Watson* v. *Lloyd* (2) referred to.

[Ref : 37 Bom. 26 ; 21 Bom. L. R. 143=50 I. C. 683.]

THE facts of this case were as follows: —

The Bank of Upper India, Limited, obtained a decree against Major Kuper, Captain (now Colonel) Lecky and Captain Vizard on the 24th December, 1900. The first application for execution was made on the 18th April, 1910, against Colonel Lecky. Certain payments, however, made from 17th January, 1902, to 18th February, 1910, by a judgment-debtor other than [530] Colonel Lecky had been certified to the court by the decree-holder under section 258 of the Code of Civil Procedure (1882). Colonel Lecky objected to execution on the ground that the application was beyond time, and also contended that under the terms of the decree the decree-holder was not entitled to add to the decretal amount certain sums of money which were paid to keep alive a policy of insurance which was security for the debt, and further that his pay as an officer of His Majesty's regular forces was not liable to attachment. The Subordinate Judge

* First Appeal No. 343 of 1910 from a decree of Soti Raghubansa Lal, Subordinate Judge of Meerut, dated the 6th of June, 1910.

(1) (1896) I. L. R. 24 Cal. 102. (2) (1901) I. L. R. 25 Mad. 402.

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33 A. 529=8 A. L J. 487 =9 I. C. 1023.

repelled the objection of Colonel Lecky regarding limitation, holding that, as the present application was within three years of the last certificate of payment filed by the decree-holder, the application was within time. He also held that the other objections had no force and ordered execution to proceed. The judgment-debtor appealed.

Mr. *W. Wallach* (with him Babu *Lalit Mohan Banerji*), for the appellant.

The decree is barred by time. No payments were made by Colonel Lecky, and as against him the decree can have no force. He referred to the Indian Limitation Act, 1908, schedule I, article 182, clause (5). The case of *Sujan Singh* v. *Hira Singh* (1) is distinguishable. In that case the certificate of payment was filed while an application for execution was pending, and so the certificate was clearly a step in aid of execution. But in the present case there was no application for execution of the decree before the court. The certificates therefore could not be in aid of any execution proceedings.

The second point relates to an item claimed by the decree-holder, which covers sums of money paid by the Bank after the decree as premia to keep alive a life insurance policy of Major Kuper which had been made over to the decree-holder as a security for the debt. In any case Colonel Lecky cannot be liable under the decree for payments made after it. The execution court had no power to saddle any one of the judgment-debtors with payments made after the decree. The decree says that the Bank is entitled to pay the premia until the decree is satisfied, but this does not mean that these payments can be [531] claimed in execution of the decree. There could be no decree for future payments by decree-holder. No court fee had been paid for the relief and no court fee could be paid.

The third question is whether any portion of the salary of Colonel Lecky, who is in the Royal Artillery and belongs to His Majesty's Regular Forces, is liable to attachment in execution of a decree. It is under section 60 of the Civil Procedure Code of 1908 that half of the salary of the appellant has been ordered to be attached. But clause (2), sub-clause (*b*) of section 60, provides that nothing in section 60 affects the provisions of the Army Act. Section 136 of the Army Act, 1881, 44 and 45 Vict , Cap. LVIII, provides that the pay of an officer or soldier of the Regular Forces shall be paid without any deduction other than those authorized by the Act or by any Royal warrant. There used to be in the same Act section 151, which authorized the Civil Courts in India to attach half of the salary of persons subject to military law, other than soldiers of the Regular Forces. But in 1895 by an amendment [58 and 59 Vict., Cap. V] of the Army Act, section 151, was repealed and the words—"or by any law passed by the Governor General of India in Council"—were added to section 136. The section so amended stands in the Army Act now in force. So, under the Army Act the salary of an officer of the Regular Forces is not liable to attachment, unless there is any law of the Indian Government to that effect ; and since the only law *i.e.*, section 60, Civil Procedure Code, which relates to the liability of properties to attachment, does not affect the provisions of the Army Act, no portion of the salary of an officer or soldier of His Majesty's Regular Forces is liable to attachment in execution of a decree of a Civil Court in India. The court

(1) (1889) I. L. R. 12 All. 399.

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33 A. 529=8 A. L. J. 487 =9 I. C. 1023.

below has referred to two cases *Calcutta Trades Association* v. *Ryland* (1) *Watson* v. *Lloyd* (2). Both these cases, however, so far as attachment of salaries is concerned, deal with officers of the Indian Army.

Even if the reasoning in the case of *Watson* v. *Lloyd* might apply here, I submit that it does not appear to be correct. The new Civil Procedure Code lays down that section 60 is not to affect the Army Act. There was a similar provision in the old [532] Act too, but it is not referred to in the judgment. *Bansi Lal* v. *Colonel Mercer* (3) and the "Manual of Military Law," at pages 104 and 105, were also referred to.

Mr. *B. E. O'Conor*, for the respondent.

I shall first show that the application is in time. My friend has mixed up the provisions of section 20 of the Limitation Act with article 182 of the Act. Section 20 deals with a case which is not before the Court. It does not deal with execution proceedings. The ruling in 27 All. 575, deals with a case under section 20. Section 20 contemplates cases where a long term has passed from the date of debt, and fresh payments are made which have the effect of keeping the liability alive—a liability which has not matured into a decree. In such cases the payments must be made by the judgment-debtor or his agent. Now to turn to article 182. It does not apply to a suit, but to a decree. It gives the limitation for a decree, and not for a suit. In the present case payments have been certified under section 258 of the old Civil Procedure Code and section 258 does not say that payments must be made by the judgment-debtor or his authorised agent. It has been held in many cases that a certificate under section 258 for payments made out of Court is a step in aid of execution. The judgment in 27 All. is a correct judgment, if it is, taken as applying to a case of acknowledgment. The case in 27 All. was not one in which payments were certified to the Court. It was a case of a payment outside Court and the attempt was to bring it under section 20 of the Limitation Act. Their Lordships were not considering a case under article 179 of the old Limitation Act [which corresponds to article 182 of the present Act] but under section 20. Article 182 makes it clear that when there are many judgment-debtors, you can take money from any one, and it will serve to keep the decree alive. If that were not so, there would be great complications for the decree-holders. The analogy of 27 All. should not mislead your Lordships. It did not purport to decide a case under article 182. It is well-established law that a certificate of payment is a step in aid of execution ; *Wasi Imam* v. *Pooni Singh* (4), *Ghansham* v. [533] *Mukha* (5), *Muhammad Husain Khan* v. *Ram Sarup* (6) and *Sujan Singh* v. *Hira Singh* (7).

I come now to the second point, *viz.*, about payments made to keep the insurance policy alive. This question cannot be raised in an execution court. If the decree was wrong, the judgment-debtor ought to have got it amended. But the decree provided that premia on the policy were to be paid by the judgment-debtor and he did it. This Court cannot interfere with the decree.

The third question is in regard to the liability of Colonel Lecky's pay to attachment. It is true that Colonel Lecky belongs to the British Army and not to the Indian Army, but while he is in service here, he is paid,

(1) (1896) I. L. R. 24 Cal. 102.
(2) (1901) I. L. R 25 Mad. 402.
(3) (1875) 7 N. W. P. H. C. Rep. 331.
(4) (1893) I. L. R. 20 Cal. 696.
(5) (1880) I. L R. 3 All. 320.
(6) (1886) I. L R. 9 All. 9.
(7) (1889) I. L. R. 12 All. 399.

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not by the British Exchequer but by the Government of India. He is a servant of the Government of India. Section 60, Civil Procedure Code, provides that salaries or allowances of 'public officers' can be attached. Section 2, sub-section (17) of the Civil Procedure Code, defines a 'public officer.' It includes all commissioned officers of His Majesty's Army or Navy while serving under the Government in India; *Calcutta Trades Association* v. *Ryland* (1).

Section 151 of the Army Act was a parallel to the provision in the Civil Procedure Code about the liability to attachment of half of an officer's salary. The words that were added to section 136 when section 151 was repealed especially guarded the authority of the Civil Procedure Code. If what had been meant was that no Civil Court in India could attach the pay of a British Officer, the new words would not have been added. And why should any sanctity attach to the pay of a British Officer of the regular forces? A British Magistrate, getting the same salary, will have his pay attached. Why should an exception have been made in the case of a military officer? The attachment now made is not under the Army Act, but under the law in force in British India for the time.

The Army Act deals with the relation of the members of the Army towards the Crown. That is its scope. A provision as to how Civil Courts in India were to attach salaries of officers would **[534]** be out of place in the Act. So, when dealing with the question of pay, the Act says that no deductions are to be made except those under the law, and in case of India, the law in British India. The Civil Procedure Code expressly says that the salaries of all public officers are liable to attachment. If there was any conflict between the Army Act and the Civil Procedure Code, the former would prevail. But there is no conflict between the two Acts, and where there is no conflict, the ordinary law prevailing in India would apply.

There is no authority for the proposition that the salary of an officer of the regular forces cannot be attached.

Mr. *W. Wallach*, in reply.

Colonel Lecky is not a public officer within the meaning of the expression, as defined in section 2 of the Civil Procedure Code, and his salary is not paid by the Indian Government. In 24 Cal. 102, at 105, the definition of 'public officer' was considered. The pay of a British officer in India is fixed by the Parliament. Whether a British officer is in India or Egypt or Africa, does not matter, he continues to be an officer paid by the Crown. But there is an adjustment of accounts. Eventually, it is true, the money comes out of the pocket of the Indian tax-payer, but it is paid to the officer indirectly. He is directly in the pay of the Crown. There must have been reasons for passing the Army Act and exempting the pay of the military officers from attachment. But we are to take the Act as it is and not to look at the reasons for passing it. Clearly the intention of the Legislature in amending the Army Act in 1895 was to take out from it anything which might concern India and to allow the Governor General to make his own rules. That is why the additional words were added to section 136 and section 151 was repealed. But the Government of India provides that the rule laid down in the Code of Civil Procedure is not to affect the Army Act. The intention of the Legislature in India, therefore, seems to be clear, *i. e.*, to exempt from the operation of section 60 the officers of the British Army. In regard to the ques-

(1) (1896) I. L. R. 24 Cal. 102.

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tion of the payment of premia. No decree was given or could be given for future payments. The decree-holder's remedy lies in a separate suit against such persons as may be liable. In regard to the question of [535] limitation I do not question the correctness of the decision in 12 All. If payment is made when there is no application for execution before the court, it cannot be a step in aid of execution.

KNOX and KARAMAT HUSAIN, JJ.—On the 24th day of December, 1900, the Bank of Upper India, Ld., obtained a money decree against three officers of His Majesty's Regular Forces. No application for execution of this decree, as the term is ordinarily understood, was made until the 8th of April, 1910, when the decree-holder applied to the Subordinate Judge for execution of the decree by attachment of half the salary of one of the said officers, Col. R. Lecky, appellant to this appeal.

The judgment-debtor, Col. R. Lecky, objected to the attachment proposed by the decree-holder on the grounds that—

(1) the application was barred ;
(2) his salary was not liable to attachment ;
(3) the decree does not empower the decree-holder to realize under it certain premia alleged by the decree-holder to have been paid in order to keep alive certain insurance policies held by the Bank as security for the moneys originally advanced by the said Bank.

Other objections were raised, but the present appeal is not concerned with them. The objections above-mentioned were overruled by the learned Subordinate Judge. The appellant raises them again before us.

As regards the first of these objections, the decree-holder certified to the court of the Subordinate Judge payments made by one of the judgment-debtors other than the appellant—

(1) on the 17th day of January, 1902 ;
(2) on the 9th day of June, 1904 ;
(3) on the 13th day of March, 1907 ;
(4) on the 22nd day of April, 1908 ;
(5) on the 18th day of February, 1910,

and it is contended on his behalf that the several acts of certifying by the decree-holder of these payments to the court are applications in accordance with law, to the proper court, to take some steps in aid of execution of the decree. This being the case, the application of the 8th day of April, 1910, is well within time.

[536] A Full Bench of this Court in *Sujan Singh* v. *Hira Singh* (1) held that applications by a decree-holder in accordance with law made under section 258 of the Code of Civil Procedure, 1882, were applications by a decree-holder to take some step in aid of execution within the meaning of clause 4 of column 3, article 179, of the Indian Limitation Act, 1877. This ruling would appear fatal to the objection raised by the appellant.

The learned counsel for the appellant seeks to distinguish the present appeal from the case of *Sujan Singh* v. *Hira Singh*, on the ground that in the latter case, the decree-holder had applied under section 235 of the Code of Civil Procedure, 1882, for execution of the decree held by him before he had certified payments to the court under section 258, while in the present case no similar applications had been made by the decree-holder.

We fail to see any force in this argument. Indeed to accept it as valid we should have to read into article 182 of the Indian Limitation Act, 1908,

(1) (1889) I. L. R. 12 All. 399

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after the words &c., "5. Where the words in a previously instituted application for execution of the same decree under section 235 of the Code of Civil Procedure, 1882." The application out of which this appeal has arisen was an application for the execution of a decree of Civil Court bearing date 24th December, 1900. The decree-holder had in the years 1902, 1904, 1907, 1908 and 1910, applied in accordance with law to the proper court to take a step in aid of execution of the decree, and the application now under consideration was made within three years of the 18th February, 1910. This objection therefore fails.

To take next in order the third objection.

Both sides admit that the answer rests upon what is the proper interpretation of the decree under execution. The portion of the decree which refers to this point runs as follows :—

" It is further ordered that the Bank, the plaintiff, is entitled to pay the premia until the decree is satisfied and the policy remains in force and to recover the same from the defendants with interest at Rs. 10 per cent per annum."

We are satisfied that the learned Subordinate Judge did intend and did grant only a declaration that the plaintiff Bank was entitled to pay the premia due on the policy until the [537] decree was satisfied. It did not give a decree for the realization of such future and unascertained sums against any of the defendants.

There remains the second objection. The Army Act, 1881 (44 and 45 Vict., Cap. LVIII) in section 136 enacted that the pay of an officer of Her Majesty's Regular Forces shall be paid without any deduction other than the deductions authorized by it or by any Royal warrant for the time being. This section was amended in 1895. By the Army (Annual) Act, 1895, section 4, to section 136 of the Army Act were added the words " or by any law passed by the Governor General of India in Council." The section so amended forms part of the Army (Annual) Act, 1910, now in force.

In the Army Act, 1881, there stood a section, *viz.*, section 151, which authorized Courts of Small Causes and Civil Courts in India upon adjudging payment of debt by a person subject to Military Law other than a soldier of the regular forces to direct specially that the amount named in the direction, being the whole or any part of the said sum, shall be paid by instalments or otherwise out of any pay or other public money payable to the debtor, and the amount named in the direction, not exceeding one half of such pay and public money, shall, while the debtor is in India, be stopped and paid in conformity with the direction.

Instalments so directed would be authorized deductions in the sense of the words used in section 136, and to order such instalments would be within the jurisdiction of the Subordinate Judge. But in 1895, the Army (Annual) Act, 1895, repealed section 151 of the Army Act (44 and 45 Vict., Cap. LVIII) and to direct in India any deduction from the pay of an officer of the Regular Forces, if legal, must rest upon the provisions of a law passed by the Governor General in Council.

Neither side has referred us to any law now extant and bearing upon the point save the Code of Civil Procedure, 1908, and we know of no other.

The only portion of the Code that has any application is section 60. This enacts that debts belonging to a judgment [538] debtor are liable to

attachment and sale in execution of a decree. Salary when due is such a debt, and would therefore be liable. But section 60 contains an important proviso, *viz* :—

(*a*) Provided that the following particulars shall not be liable to such attachment or sale, namely—

(*b*) Allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty ;

(i) The salary or allowances equal to salary of any such public officer or servant as is referred to in clause (*b*), while on duty, to the extent of—

(*i*) the whole of the salary, where the salary does not exceed twenty rupees monthly ;

(*ii*) twenty rupees monthly, where the salary exceeds twenty rupees and does not exceed forty rupees monthly ; and

(*iii*) one moiety of the salary in any other case.

Explanation.—The particulars mentioned in clauses (*g*), (*h*), (*i*) (*j*) (*l*) and (*o*) are exempt from attachment or sale whether before or after they are actually payable.

If this were all, there would be ample authority for the order passed by the lower Court. This was the view taken by the Calcutta High Court in *Calcutta Trades Association* v. *Ryland*, (1). In *Watson* v. *Lloyd* (2), the Madras High Court held that the case of *Calcutta Trades Association* v. *Ryland* was rightly decided and followed it.

In both of these cases, however, the judgment-debtor was a Military Officer in the Indian Staff Corps.

In *Calcutta Trades Association* v. *Ryland*, Mr. JUSTICE SALE draws a sharp distinction between an officer of the Indian Staff Corps and an officer of the Regular Forces.

Thus he says : —

"It would appear that while the pay of an officer of the regular forces is not liable to attachment the pay of an officer of the Indian Staff Corps is liable to attachmemt, the reason for the distinction between the two cases being that an officer of the Staff Corps is a Public Officer within the meaning of clause (*b*) of [539] section 266 of the Civil Procedure Code, read with the interpretation clause, whereas an officer of the regular forces is not."

He would appear to rest the distinction upon a note furnished by the Registrar of the Calcutta High Court which he considered as giving a correct view of the law then existing upon the subject. Whether it be a correct view or not, we are not in a position to say.

In neither case is any allusion made to the second proviso to section 266, reproduced as clause 2 (*b*) in section 60 of the Civil Procedure Code, 1908.

This proviso and clause lay down that nothing in section 266 of the Code of 1882, and section 60 of the Code of 1908 shall be deemed to affect the provisions of the Army Act or of any similar law for the time being in force.

It seems to us that this clause compels us to exclude section 60 of the Civil Procedure Code, 1908, from our consideration in the present case and to hold that no deductions have been pointed out to us as authorized by the Army Act, 1881, or any other Act, or by any law passed by the Governor-General of India in Council.

(1) (1896) I. L. R. 24 Cal. 102.

(2) (1901) I. L. R. 25 Mad. 402.

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We allow the fifth and sixth pleas taken in the memorandum of appeal; set aside the order of the Court below, and direct that the application made by the respondent do stand dismissed.

The costs of the appellant will be borne by the respondent.

Appeal allowed.

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33 A. 540 (=10 I. C. 1=8 A. L. J. 509).

[540] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

JUGAL KISHORE AND ANOTHER (*Plaintiffs*) *v.* JUGAL KISHORE (*Defendant*).*

[24th March, 1911.]

Act (Local) I of 1900 *(United Provinces Municipalities Act), section* 49—*Suit against a member of a Municipal Board for damages—Notice—Act purporting to be done in official capacity.*

A member of a Municipal Board, as such member, made a report to the Board which resulted in the prosecution of certain persons for a municipal offence. The persons prosecuted were acquitted, and thereafter filed a suit for damages for malicious prosecution against the maker of the report. *Held* that the defendant was entitled to the notice provided for by section 49 of the Municipalities Act, 1900. *Muhammad Saddiq Ahmed* v. *Panna Lal* (1) distinguished.

[Ref. 80 I. C. 72=22 A. L. J. 812.]

THIS was an appeal under section 10 of the Letters Patent from a judgment of KARAMAT HUSAIN, J. The facts of the case are stated in the judgment under appeal, which was as follows:—

"The facts are as follows:—Pandit Jugal Kishore was a Municipal Commissioner at Banda and was in charge of the supervision of the sanitation of the town. He submitted a report to the Municipal Secretary to the effect that dirty water was flowing from the house of Jugal Kishore and Bacha Lal and that they should be prosecuted under the provisions of the Municipal Act. They were prosecuted in the Court of the Tahsildar and were acquitted. They then brought the suit out of which this appeal has arisen for damages. The Court of first instance decreed their claim. The defendant appealed, and one of the points in the lower Appellate Court was, that in the absence of a notice required by section 49 of the N.-W. P. and Oudh Municipalities Act I of 1900, the suit was not maintainable. The lower Appellate Court accepted that plea and decreed the appeal. In its judgment that Court remarked as follows:—'The lower Court has found that no notice was required as the defendant acted on his own responsibility under the colour of law. The case of *Saddiq Muhammad Ahmad* v. *Panna Lal* (1) is referred to. The circumstances of that case appear to me to be very different from those of the present case. In this case a report was made by a member of the Municipal Board to the Secretary in regard to a matter, namely sanitation, which the Board had deputed that member to look after. In my opinion the act complained of, namely, the prosecution, purported to be done by the defendant in his capacity as member, and a notice under section 49 was required. For those reasons I must allow this appeal and order that the suit be dismissed. As it has been decided on a technical point, I order that the parties pay their own costs in both Courts.'

The plaintiffs have perferred a second appeal to this Court and the plea taken is that on the facts found no notice under section 49 of the N.-W. P. and Oudh [541] Municipalities Act was required, and that the lower Appellate Court should not have dismissed the suit. Objections have been filed on behalf of the defendant to the effect that he should have been allowed costs in both the Courts below. The learned advocate for the appellants in support of his contention cited the following authori-

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*Appeal No. 11 of 1911, under section 10 of the Letters Patent.

(1) (1903) I. L. R. 26 All. 220.

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ties :—*Theobald* v. *Crichmore* (1) ; *Attorney-General* v. *Hackney Local Board* (2) ; *Shahebzadee Shahunshah Begum* v. *Fergusson* (3); *Jogendra Nath Roy Bahadur* v. *J. C. Price* (4) ; *Collector of Bijnor* v. *Munuvar* (5) ; *Muhammad Saddiq Ahmad* v. *Panna Lal* (6). With reference to the above authorities he contends that it was not sufficient in order to entitle the defendant to a notice under section 49 of the Municipalities Act that he (defendant) should have been acting as a Municipal Commissioner. It was further necessary that he should have been acting in good faith in the discharge of his official duties. At first he contended that the defendant in order to be entitled to notice should have shown that he, in the exercise of his official functions, had no motive of gratifying a private grudge against the plaintiffs, but finding that no authority favoured this view, he contended that the defendant should have proved that he reported against the plaintiffs in his official capacity.

The case of *Shabedzadee Shahunshah Begum* v *Fergusson* (3) following the two English cases already mentioned, lays down the following rule :—'The cases in which a public officer is entitled to notice of suit under section 424 of the Code, are those in which he is sued for damages for some wrong inadvertently committed by him in the discharge of his official duties, and the object of giving notice is that if a public body or officer entrusted with powers happens to commit an inadvertence, irregularity or wrong before any one has a right to require payment in respect of that wrong, he shall have an opportunity of setting himself right, making amends, restoring what he has taken or paying for the damage he has done.' The above reason for giving notice is taken from the case of *Attorney-General* v. *Hackney Local Board* (2). SIR JAMES BACON, V. C., remarked :—' The policy of the law is that if these public bodies entrusted with powers for public purposes in the course of executing those powers shall happen to commit any inadvertence, irregularity, or wrong, then before anybody has right to require payment from them in respect of that wrong, they shall have an opportunity of setting themselves right; they shall have the period of one month for the purpose of making amends or for restoring if they have taken away anything, and for paying for if they have done any damage.'

"An opportunity to make amends being the reason of the rule for notice it follows that if a public servant does any act in the discharge of public duties and that act causes injury to some one, the injured person prior to the institution of a suit for damages against the public servant is bound to give him notice of his intention to sue. The remarks of BANERJI, in *Bakhtawar Mal* v. *Abdul Latif* (7) are to the same effect. The learned Judge says :—' The suit is therefore a suit against a public officer and in respect of an act purporting to have been done by him in his official capacity, and the defendant was entitled to a notice under [542] section 424 of the Code of Civil Procedure. This case is distinguishable from that of *Muhammad Saddiq Ahmad* v. *Panna Lal* (6), to which the learned vakil for the appellant referred. The circumstances of that case are quite different, the defendant having acted in that case, not in his capacity as a public officer, but illegally and in bad faith. The case more in point is that of *Jogendra Nath Roy* v. *Price* (4) in which it was held that a notice was necessary under similar circumstances.' The case of *Bakhtawar Mal* was under section 424 of the Code of Civil Procedure, but the principle is applicable to cases under section 49 of the Municipalities Act, I of 1900.

" In the case before me the finding of the lower appellate court is ' that the act complained of, namely, the prosecution, purported to be done by the defendant in his capacity as member,' and there is nothing on the record to show that the defendant, in reporting to the Secretary of the Municipal Board that the plaintiffs should be prosecuted, acted in any way in bad faith. I am, therefore, of opinion that the lower appellate court is right in holding that the defendant was entitled to notice under section 49 of the Municipalities Act. It is further contended that it is not the report only but also the looking after the case against the plaintiffs on behalf of the prosecution that caused damage to them and that such looking after not being his official duty, the defendant cannot be deemed to have acted in good faith in the discharge of his public duties. There is no force in this contention, inasmuch as the lower appellate court has found that the prosecution purported to be done by the defendant in his capacity as member.

The result is that the appeal fails and is dismissed with costs. The lower appellate court in my opinion was right in not allowing costs to the defendant. I therefore dismiss the objections with costs."

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(1) (1818) 1 B. & Ald. 227; 19 R. R. 297.
(2) (1875) L. R. 20 Eq. 626.
(3) (1881) I. L. R. 7 Cal. 499.
(4) (1897) I. L. R. 24 Cal. 584.
(5) (1880) I. L. R. 3 All. 20.
(6) (1903) I. L. R. 26 All. 220.
(7) (1907) I. L. R. 29 All. 567.

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8 A. L. J. 609.

The plaintiffs appealed.

Dr. *Tej Bhadur Sapru*, for the appellants.

The principle on which notice could be claimed was explained in *Shahebzadee Shahunshah Begum* v. *Fergusson* (1) and that was followed in *Muhammad Saddiq Ahmad* v. *Panna Lal* (2). The case relied on by the defendant— *Bakhtawar Mal* v. *Abdul Latif* (3)—was distinguishable, and came within the exception enumerated by CUNNINGHAM, J., in the case in 7 Calcutta. Where the defendant acted merely under colour of his office to satisfy some private grudge against the plaintiff, he could not claim the protection of section 49 of the Municipalities Act. There must be good faith on his part. He cited *Attorney-General* v. *Hackney Local Board* (4).

Babu *Piyari Lal Banerji* and Pandit *Uman Shankar Bajpai*. for the respondent, were not called upon.

[543] STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for damages for alleged malicious prosecution. The defendant is one of two members of the Municipal Board of Banda who were charged with the supervision of the sanitation of the town. He made a report to the Secretary of the Municipal Board to the effect that dirty water was found by him to be issuing from the house of the plaintiffs, thereby causing danger to public health. The Secretary of the Board directed the prosecution of the plaintiffs, with the result that the Tahsildar, before whom the case was heard acquitted the accused. They thereupon instituted the suit out of which this appeal has arisen. The first court gave a decree in the plaintiffs' favour and awarded them damages. Upon appeal the learned District Judge held that the defendant was entitled to the notice prescribed by section 49 of the Municipalities Act (I of 1900), and that no such notice was served, and accordingly dismissed the suit. Section 49 of the Municipalities Act prescribes that "no suit shall be instituted against a Board or against any member, officer or servant of a Board in respect of any act purporting to be done in its, or his, official capacity until after the expiration of two months next after notice in writing has been, in the case of the Board, left at its office, and in the case of a member, officer or servant, delivered to him." In this case the lower appellate court has found that the defendant was a member of the Municipal Board, and that he reported to the Secretary of the Board that dirty water was allowed to flow from the plaintiffs' house into a public road. This was a matter of sanitation which the Board had deputed the defendant and another member of the Board to look after. The learned District Judge finds that the defendant purported to act in his capacity as member of the Board and that the notice prescribed ought to have been served.

We are of opinion that the District Judge was right in the view which he took. It is clear on the facts that defendant purported to act in his official capacity. He merely gave notice to the Secretary of the Board of what he considered a nuisance, or objectionable, affecting the sanitation of the town ; upon this report the Secretary of the Board took action.

Whether or not the plaintiffs were rightly acquitted on the charge brought against them, it is not for us to consider. We have **[544]** only to decide whether or not the defendant purported to act in his capacity as municipal officer, and if we find that he did so purport to act, then it appears to us that he was clearly entitled to the notice prescribed by

(1) (1881) I. L. R. 7 Cal. 459 (502).
(2) (1903) I. L. R., 26 All. 220.
(3) (1903) I. L. R. 29 All. 567.
(4) (1875) L. R. 20 Eq. 626.

section 49. We are not called upon to decide whether or not the defendant rendered himself liable to damages for malicious prosecution, if he acted with malice or without reasonable or probable cause. All that we decide is that he was entitled to the notice prescribed by the Act and not having received that notice the suit is not maintainable. The case is unlike the case which has been relied upon by the learned advocate for the appellants, namely, that of *Muhammad Saddiq Ahmad* v. *Panna Lal* (1) In that case the defendant did not purport to act in good faith in pursuance of the law, but he took advantage of his position as a police officer to commit illegal and tortious acts maliciously and without cause. That is a different case from the one now under consideration. In this case undoubtedly the defendant did purport to act as member of the Municipal Board charged with the supervision of the sanitation of the town of Banda. The case is more like the case of *Bakhtawar Mal* v. *Abdul Latif* (2). We therefore dismiss the appeal with costs.

Appeal dismissed.

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33 A. 544 (=8 A. L. J. 543=10 I. C. 122).

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Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

GREAT INDIAN PENINSULA RAILWAY COMPANY (*Defendant*) *v.* GANPATRAI (*Plaintiff*).*

[31st March, 1911.]

Act No. IX of 1890 (*Indian Railways Act*), *section* 77—*Suit against railway company—Notice—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, article* 31—*Waiver of notice.*

Certain goods were despatched on the 26th of March, 1908, from Bombay to Ghazipur. The goods were lost in transit while in possession of the Great Indian Peninsula Railway Company. The consignee made a claim against the East Indian Railway Company, as the result of which he was offered a certain sum as compensation by the Assistant Traffic Manager of that Company, who stated that he did so with the authority of the Deputy Traffic Manager of the Great Indian Peninsula Railway Company. There was, however, no proof that any such authority had been given, and the offer was refused. On the 9th [545] August, 1909, the consignee brought a suit against the Great Indian Peninsula Railway Company for damages, for the loss of his goods, but did not give the notice required by section 77 of the Indian Railways Act, 1890. He claimed that certain conditions printed on the back of the railway receipt relieved him of the necessity of giving notice under section 77. *Held* that this was not so; nor did the action of the Assistant Traffic Manager of the East Indian Railway Company amount to a waiver of notice. The suit was also barred by limitation under article 31 of the first schedule to the Indian Limitation Act, 1908.

[Ref. 42 All. 390=18 A. L. J. 377=53 I. C. 547; 66 I. C. 578=20 A. L. J. 664; Dist. 68 I. C. 981=20 A. L. J. 792; Ref. 69 I. C. 59=14 L. W. 681=42 M. L. J. 202=45 Mad. 135=1921 M. W. N. 878; Foll. 71 I. C. 614=21 A. L. J. 223=45 All. 353.]

THE facts of this case were shortly as follows:—

The plaintiff's agent at Bombay sent some goods to him at Ghazipur. The goods never reached their destination, and ultimately it was found

* Second Appeal No 938 of 1910 from a decree of Sri Lal, District Judge of Ghazipur, dated the 2nd of August, 1910 reversing a decree of Baij Nath Das, Munsif of Ghazipur, dated the 24th of February, 1910.

(1) (1903) I. L. R. 26 All. 220.

(2) (1907) I. L. R. 29 All. 567.

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33 A. 544=8 A. L. J. 543=10 I. C. 122.

that they had been stolen while in the custody of the defendant company on the 1st of April, 1908.

On the 9th of August, 1909, the plaintiff filed this suit against the company for the price of the goods lost and for damages. The suit was defended on the grounds that no proper notice had been given and that the suit was barred by limitation. The Munsif dismissed the suit holding that under section 77 of the Railways Act, IX of 1890, no notice had been served of the defendants. The Judge decreed a part of the claim, holding that a letter of the Acting Traffic Manager of the East Indian Railway, saying that he had been authorized by the Deputy Traffic Superintendent of the appellant company to pay the plaintiff the actual value of the goods, was a sufficient acknowledgment of notice and that the suit could not be contested on that ground. The defendants appealed.

Pandit *Ladli Prasad Zutshi*, for the appellant.

The suit should have been filed within the period prescribed by articles 30 and 31 of the Limitation Act. The lower Court decided this issue against the appellant relying on *The British India Steam Navigation Co., Ld*, v. *Hajee Mahomed Esack & Co.* (1), *Hassaji* v. *The East Indian Railway Company* (2), *Mohansing Chawan* v. *Henry Conder, General Traffic Manager, G. I. P. Railway Company* (3) and *Dan Mull* v. *British India Steam Navigation Company* (4). Articles 30 and 31 were amended by Act IX of 1908, and the rulings referred to were no longer applicable. Further, there was no acknowledgment which took the case out of the statute of **[546]** limitation. The acknowledgment relied was a letter from the Assistant Traffic Manager, East Indian Railway, in which he stated that he was authorized by the Deputy Traffic Manager of the Great Indian Peninsula Railway, to offer to the plaintiff Rs 499-7-3, being the amount which "he (the plaintiff) was actually entitled according to the sender's *bijak*." The Deputy Traffic Manager, Great Indian Peninsula Railway, " emphatically denied" this fact. There was no evidence on the record to show that the Assistant Traffic Manager had any authority to make this offer. Even if it be assumed that the Assistant Traffic Manager had authority from the Great Indian Peninsula Railway to make an offer, such an offer would be without prejudice to their right to notice, and the offer not having been accepted, the plaintiff was not entitled to rely upon this letter as an acknowledgement. It was admitted that no notice was given to the agent of the Great Indian Peninsula Railway, under section 77 of the Railways Act within six months from the date of the delivery of the goods for carriage by the railway. The learned District Judge held that under paragraph 4 of the printed notice at the back of the railway receipt, the claim was to be made to the superintendent of the receiving station, and therefore the railway was to be deemed to have waived its right under section 77 of the Railways Act. Condition 5 of the railway receipt drew attention to section 77 of the Railways Act. Paragraph 4 must be read with paragraph 5, and reading the two paragraphs together it was obvious that it was not intended by paragraph 4 to relieve the plaintiff of his liability of giving notice required by section 77 of the Railways Act ; *G. I. P. Ry. Co.* v. *Chandra Bai* (5).

Mr. *Ahmad Karim*, for the respondent, submitted that the suit was not barred by limitation, as the perion should be computed from the last

(1) (1881) I. L. R. 3 Mad. 107.
(2) (1882) I. L. R. 5 Mad., 388.
(3) (1883) I. L. R. 7 Bom. 478.
(4) (1886) I. L. R. 12 Cal. 477.
(5) (1906) I. L. R. 28 All. 552.

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letter sent by the East Indian Railway after consultation with the Great Indian Peninsula Railway, the letter in which the latter company expressed their willingness to pay the actual price of the goods sent but not the damages claimed. He referred to section 19 of the Limitation Act. Further that it was inequitable that the suit having been delayed by the admission of liability by the Company, the latter should [547] now be allowed to set up the defence of limitation. As regards the rulings cited on the question of notice, he submitted that in none of them was the question of admission by the railway Company or the directions printed at the back of the railway receipt brought to the notice of the Court. The 4th paragraph of these directions had been put in to facilitate the work of the agent by allowing notice to be given to the Assistant Traffic Manager. There was a clear distinction between this paragraph and the next, which reproduced the wording of the Railways Act. He submitted that the right of an agent to receive notice had been delegated by him to the subordinate staff, and this form had the sanction of the Government of India. Therefore, if the notice came to the knowledge of the Assistant Traffic Superintendent, it was sufficient notice within the Act. Acknowledgment amounted to a waiver of notice—*Periannan Chetti* v. *South Indian Railway Co.*, (1)—and also saved limitation. Besides it had not been shown that the appellants had been prejudiced in any way.

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit for damages for non-delivery of a bale of goods consisting of gauze which was consigned by the plaintiff's agents in Bombay to him at Ghazipur on the 26th of March, 1908. The goods were lost on the Great Indian Peninsula Railway, and it is stated that they were stolen in transit and that the thief was tried and convicted of the theft. Amongst the defences filed by the Great Indian Peninsula Railway Company was one based on section 77 of the Indian Railways Act, namely, that no notice of action as required by law was given to that Company.

The Court of first instance found that no notice was given and dismissed the plaintiff's suit.

An appeal was preferred by the plaintiff, with the result that the lower Appellate Court held that the notice required by the Act had been waived by the defendant Company; and also in view of the fact that an offer had been made to the plaintiffs for payment of a sum of Rs. 499-7-3 in satisfaction of his claim, the Company could not now be allowed to go behind this offer and set up the technical ground of defence that no notice of the claim had been served within the meaning of the section above [548] referred to. Accordingly that Court reversed the decision of the Court below so far as regards the Great Indian Peninsula Railway Company, and allowed the plaintiff's claim as against that Company but dismissed it as regards the East Indian Railway Company.

From the decree of this Court the present appeal has been preferred, and the main grounds of appeal are two: first, that no notice having been served within the meaning of section 77 of the Indian Railways Act, the suit was bound to fail as against the Great Indian Peninsula Railway; that there was no waiver of the requisite notice, and that the Court below was therefore wrong in allowing the plaintiffs' claim. There is a further ground of appeal, namely, that the suit is barred by limitation, not having been brought within one year from the date on which the goods ought to have been delivered.

(1) (1899) I. L. R. 22 Mad. 137.

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As regards the first question it is not disputed that notice was not served upon the Great Indian Peninsula Railway Company pursuant to the provisions of section 77 of the Indian Railways Act. That section provides that "a person shall not be entitled to compensation for the loss of goods delivered to be carried by railway unless his claim to compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the goods for carriage by railway." Under section 140 of the same Act a notice or other document required, or authorized by the Act to be served on a railway administration " may be served in the case of a railway administered by a Railway Company, as is the Great Indian Peninsula Railway Company, on the agent in India of the Railway Company, by delivering the notice or other document to the agent; or by leaving it at his office; or by forwarding it by post in a prepaid letter addressed to the agent at his office and registered under part III of the Indian Post Office Act of 1866." The mode of service upon the Great Indian Peninsula Railway Company would ordinarily in the absence of a provision such as this, be effected by service upon the Company at their head office in London. This mode of service had been prescribed, no doubt, for the purpose of saving the delay and the expense which would attend service in London. In this [549] case no service either under section 140 or directly upon the defendant company in London was effected. Consequently it would seem that the learned Munsif was right in holding that the suit could not be maintained. The learned District Judge, however, was of opinion that section 140 was not exhaustive and that a mode of service was prescribed by a condition which appears on the back of the receipt form in use on the Great Indian Peninsula Railway on the consignment of goods to them for carriage. The condition runs as follows:—

"That all claims against the railway for loss or damage to goods must be made to the clerk in charge of the station to which they have been booked before delivery is taken, and that a written statement of the description and contents of the articles missing, or of the damage received must be sent forthwith to the Traffic Superintendent of the district, or goods superintendent at Bombay, Wadi Bundar, in which the forwarding or receiving station is situated otherwise the railway will be freed from responsibility."

The learned Judge observes that "this paragraph lays down the procedure to be followed by consignors in case of the loss of goods and it forms part of the legal contract between the Great Indian Peninsula Railway Company and the consignor." He held that where a consignor sends in a claim in accordance with the provisions of the said paragraph, the Railway Company is bound to treat it as a proper notification of his claim to compensation within the meaning of section 77, and that it is not then necessary to serve a notice in any of the ways mentioned in section 140 or otherwise. He found upon the evidence that the plaintiff did prefer his claim in writing to the Traffic Superintendent of the district in which the receiving station is situate, and that the Assistant to the Traffic Manager, East Indian Railway, after communicating with the Great Indian Peninsula Railway, entertained the plaintiffs' claim and offered to pay him Rs. 499-7-3, the value of the goods lost. He therefore held that the notice which was given by the plaintiff was sufficient notice within the meaning of section 77. He further found that by the offer of the Assistant Traffic Manager of the East Indian Railway to pay Rs. 499 odd damages, the Great Indian Peninsula Railway must be taken to have waived their right to the notice required by law. We are unable to agree with the lear-

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ed District Judge in the view which he formed. If the learned Judge had read the [550] condition on the receipt from following the one upon which he relied, he would have found that it was not the intention of the company that the provision upon which he relied should relieve the plaintiff from the necessity of complying with section 77 of the Indian Railways Act. Condition 5 provides that by section 77 of the Indian Railways Act, 1890, "a person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway, or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway company within six months from the date of the delivery of the animals or goods or carriage by the railway."

This condition gave notice to the consignors that section 77 of the Railways Act must be complied with. Paragraph 4 must be read in connection with it, and reading the two conditions together, it is obvious that it was not intended by condition 4 to get rid of the obligation which lay upon the plaintiff of giving notice of action as required by section 77 of the Indian Railways Act. This was expressly decided in the case of *Great Indian Peninsula Railway Company* v. *Chandra Bai* (1) by a Bench of which one of us was a member. In that case the provisions of section 77 were considered, and also of section 140. It was pointed out that the notification of a claim prescribed by section 77 may be given either to the railway administration as defined in section 3, sub-section (6) or in any of the ways mentioned in section 140; that it was necessary for the plaintiff to prove service of notice of his claim upon the Great Indian Peninsula Railway Company at their office in London or else in any of the ways prescribed in section 140, and that there having been no proof of any such service, and the time of such service having expired, the suit was not maintainable. The learned District Judge, referring to this and other rulings, observes that these rulings were in his opinion not applicable to the present case, as in none of the cases which resulted in those rulings, did the defendant railway company ever admit the claim of the plaintiff or offer to settle it out of court. "Moreover, the question whether compliance with the directions contained in para- [551] graph 4 of the notice mentioned hereinbefore meets the requirements of section 77 and renders the service of notice under section 140 unnecessary was never raised in those cases." As we have pointed out, the directions contained in paragraph 4 obviously do not avail the plaintiff in view of the fact that in the subsequent paragraph the necessity for the observance of section 77 is expressly stated. It appears to us that the learned District Judge must have overlooked paragraph 5 which succeeds the paragraph upon which he relied.

Then as to waiver, it is said that the assistant traffic manager of the East Indian Railway stated that he had authority from the deputy traffic manager of the Great Indian Peninsula Railway Company to offer to the plaintiff Rs. 499-7-3 compensation, and it is contended that this amounted to a waiver of notice on the part of the Great Indian Peninsula Railway Company. We are unable to hold that there was any waiver. In the first place the district traffic manager of the Great Indian Peninsula Railway Company repudiated the allegation that he gave any authority for the making of any offer to the plaintiff. The assistant traffic manager was not

(1) (1906) I. L. R. 28 All. 552.

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summoned to prove the letter of authority which he alleged he had received. There is nothing to show that the Great Indian Peninsula Railway Company ever waived their right to notice of the claim. On the contrary, they in their written statement relied upon the absence of notice, and there is nothing upon the record to justify us in holding that they waived their rights in this respect. Even if it be assumed that the Great Indian Peninsula Railway Company authorized the assistant traffic superintendent of the East Indian Railway Company to make an offer, such an offer would be without prejudice to their rights, and the offer not having been accepted, it could not be held that they were not entitled to rely upon the pleas which they had set up in their defence. Upon this point, therefore we think that the learned District Judge was wrong in reversing the decision of the court of first instance.

There is besides this another ground of defence which appears to us to be fatal to the plaintiffs' claim, and that is the plea based on the statute of limitation. Article 31 of the Limitation Act (Act No. IX of 1908) prescribes the period of limitation for a [552] suit for compensation for non-delivery of goods. In this article the former article of limitation was modified and certain words introduced, so as to adapt the article to the case of a claim such as the present one for damages or compensation for non-delivery of goods. The article is as follows:—"Against a carrier for compensation for non delivery of or delay in delivering goods, one year from the time when the goods ought to be delivered." The goods, as we have said, were consigned to the plaintiffs on the 26th of March, 1908, and the suit was not instituted until the 9th of August, 1909. The period within which the goods in this case ought to have been delivered would not exceed a fortnight, or at the outside three weeks from the time when the goods were consigned at Bombay. Several months over and above one year from this time, therefore, had elapsed before the suit was instituted. As an answer to this plea, it is contended that there was an acknowledgment which took the case out of the statute of limitation. That acknowledgment is the letter from the assistant traffic superintendent of the East Indian Railway Company offering to pay the sum of Rs. 499-7-3, in full satisfaction of the plaintiffs' claim. There is no evidence before the court which would justify us in holding that the Great Indian Peninsula Railway Company ever gave authority to the assistant traffic superintendent of the East Indian Railway to make this offer. There is no evidence that the Great Indian Peninsula Railway Company ever admitted liability in respect of this sum. We, therefore, are unable to say that there was any such acknowledgment by the Great Indian Peninsula Railway Company such as would prevent the operation in their favour of the Statute of limitation.

Upon these two main points which have been taken by the learned vakil for the defendant railway company, we think that the appeal should be allowed, and we must set aside the decree of the lower appellate court so far as regards the Great Indian Peninsula Railway Company. We, accordingly, allow the appeal of the company, set aside the decree of the lower appellate court and restore the decree of the court of first instance. Under the circumstances we make no order as to the costs of this appeal, or as to the costs in the lower appellate court.

Appeal decreed.

33 A 553 (=8 A. L. J. 539=11 I. C. 514).

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33 A. 553=8 A. L. J. 539 =11 I. C. 514.

[553] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Cheif Justice, and Mr. Justice Banerji.

SUNDAR SINGH AND OTHERS (*Defendants*) *v.* THE COLLECTOR OF SHAHJAHANPUR (*Plaintiff*).*

[1st April, 1911].

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 158—*Definition*—"*Successor*"—*Transferee of a rent-free grantee.*

Held that a transferee from a rent-free grantee is a successor of the grantee within the meaning of section 158 of the Agra Tenancy Act, 1901.

[Fol: 29 I. C. 710 ; Ref. 60 I. C. 641 ; 71 I. C. 773=21 A L J. 189=45 All 336.]

THE material facts of this case appear from the following order of BANERJI, J :—

"The suit out of which this appeal arises was brought under sections 150 and 156 of the Agra Tenancy Act, for the resumption of a rent-free grant and for assessment of rent. The defence was that the grant was held by the grantee and by three successors of the original grantee for ninety years and that the defendant had thus acquired proprietary title to the land in question. The Court of first instance found that the land was held rent-free by the defendants and their predecessors in title for eighty years, and that the defendants had thus acquired proprietary title. It, accordingly, dismissed the suit. An appeal was preferred to the District Judge, and the first ground of appeal was that the defendants had not acquired any proprietary right in respect of the land in suit. The learned Judge entertained the appeal and held that the land had not been in the possession of the original grantee and of two successors of such grantee. He was of opinion that section 158 of the Agra Tenancy Act did not apply and that the land was liable to resumption and to assessment of rent. He made a decree for resumption and assessed the land with a rent of Rs. 4 per acre The first contention in this appeal is that the lower Court had no jurisdiction to entertain the appeal, inasmuch as the suit was one of the description of suits mentioned in group C of Schedule IV of the Act, and an appeal lay to the Commissioner. This contention is not well founded, inasmuch as the question of proprietary title was in issue in the Court of first instance and was also a matter in issue in appeal. Under section 177, clause (c) of the Act, an appeal lies to the District Judge from a decree of the Assistant Collector of the first class in all suits in which a question of proprietary title has been so in issue The learned Judge, therefore, had jurisdiction to entertain the appeal. It is next urged that, even if an appeal lay to the District Judge, he was not competent to assess the land to rent, as it was the exclusive jurisdiction of the Revenue Court to make such assessment. There is no force in this contention. As the appeal in the suit lay to the District Judge, he had full power to make such decree as the Court of first instance, namely, the Revenue Court, could make and ought to have made. It is next urged on behalf of the appellants that there is no evidence on the record to support the finding of the lower Court that the original grantee was Chatar Singh and that the names of the appellants were recorded against the land in dispute only two years ago. The learned Judge says in his judgment that the original [554] grantee was Chatar Singh, father of Niwazi, whose sons are the defendants, and that the names of the defendants had been entered two years ago. The Court of first instance framed only two issues, the second of which related to the amount of rent to which the land in question might be assessed. The first issue did not lay down any question as to who the original grantee was and how many successors of the said grantee had held possession of the land in question. It framed no issue as to the defendants' title and how the defendants acquired it, nor whether the defendants' names had been entered only nominally or as real transferees from Niwazi Singh The parties, therefore, had no opportunity of adducing evidence on these points, and on the record as it stands there appears to be no evidence except that of the patwari and two extracts from the khataunt and settlement register. I think it is essential for the right determination of this appeal to have clear findings from the Court below on the following issues, which I refer to that Court under the provisions of order XLI, rule 25, of the Code of Civil Procedure :—

(1) Who was the original grantee of the land in question ?

* Second Appeal No. 706 of 1909 from a decree of B. J. Dalal, District Judge of Shahjahanpur, dated the 9th of February, 1909, reversing a decree of Jagmohan Nath, Assistant Collector, first class, of Shahjahanpur, dated the 31st of August, 1908.

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(2) How many successors to the said grantee have held the land in question rent-free and for what length of time?

(3) Have the defendants acquired the land in question, and, if so, when and by what title?

"The Court below will take such additional evidence as the parties may adduce. On receipt of its findings ten days will be allowed for objections."

The Court below found on the issues as follows:—

"1. The original grantee appears to have been one Lalji.

"2. The evidence on the record leads me to believe that Niwazi Singh succeeded Lalji. Niwazi gives a long list of successors, Lalji's brother, their mother, and finally himself. His witnesses talk by rote and are not to be depended upon. Niwazi married Lalji's daughter, so the likelihood is that he was given the land either at the time of his marriage or on Lalji's death. I hold that Niwazi succeeded Lalji. It is not clear at what particular time the proprietor agreed not to collect rent from Lalji. Any way, it is fairly certain, that at least more than fifty years prior to the institution of the suit, the holding became a rent free grant.

"3. Since 1901 (1311 Hijri) the defendants have been in possession of the land and their names have been recorded as tenants in the village papers. Niwazi has stated that he gave the land to his sons, the defendants. There was a transfer, though not evidence in the manner required by law. The proprietor has sued the defendants, thereby showing that he has accepted them as their father's successors. The defendants have acquired the land by consent of the actual owner and by mutation of names in the village papers in 1903. Practically, Niwazi is the only person who can obtain possession back from them. Whether the defendants are such successors of Niwazi as is contemplated by section 158, remains to be decided. As the proprietor has accepted them as rent free grantees, I am of opinion that they should be considered Niwazi's successors within the meaning of section 158.

"I may point out that, even if the defendants were declared proprietors they cannot escape payment; they must pay revenue, in place of rent."

[555] On receipt of the findings the following order was passed:—

BANERJI, J.—In this as well as in the connected appeal No. 707 of 1909, the question arises whether a transferee from a rent-free grantee can be regarded as a successor of the grantee within the meaning of section 158 of the Agra Tenancy Act. The question does not seem to be covered by any authority and is one of some importance. I, therefore, refer this and the connected appeal No. 707 of 1909 to a Bench of two Judges.

Munsh, *Gulzari Lal* (for Babu *Benode Behari*), for the appellants.

Mr. *A. E. Ryves*, for the respondent.

STANLEY, C. J., and BANERJI, J.—The suit out of which this appeal has arisen was brought by the respondent for the resumption of a rent-free grant. The defence was that under section 158 of the Agra Tenancy Act the defendants had acquired proprietary title by reason of the land having been held rent-free by the original grantee and by two successors to the grantee for a period of upwards of 50 years. It has been found that the grant was made to one Lalji more than 50 years ago, that upon Lalji's death his son, Niwazi made a gift of it to the defendants. It is contended that by the expression "successors to the original grantee", in section 150 of the Agra Tenancy Act, it was intended that the grant must be in the possession of lineal descendants of the original grantee. It may be that the intention of the Legislature was that this should be so, but the word used is "successors," and that word is wide enough to include not only an heir but a transferee also. We have to construe the section as it stands, and we are not competent to place any limitation on the language used by holding that the word 'successors' does not mean successors of every description, including a transferee, but only successors by right of inheritance. The same view was taken by our brother RICHARDS in Second

Appeal No. 175 of 1910, decided on the 14th of February, 1911, which has not yet been reported. Accordingly we allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts.

Appeal allowed.

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33 A. 553=8 A. L. J. 539=10 I. C. 514.

33 A. 556 (=8 A. L. J. 534=10 I. C. 144).

[556] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Griffin.

BENI MADHO AND ANOTHER (*Plaintiffs*) v. BHAGWAN PRASAD AND OTHERS (*Defendants*).*

[3rd April, 1911.]

Act (Local) No III of 1901 (*United Provinces Land Revenue Act*), *sections* 51, 52 *and* 99—*Assignment of Government Revenue—Right of Government to enhance or remit revenue.*

An assignee of Government revenue takes the assignment subject to all the rights of Government to assess, enhance, reduce, remit or suspend the revenue.

THIS was a suit brought by certain assignees of Government revenue to recover arrears of revenue payable by the defendants. During the period in respect of which the arrears were claimed a portion of the revenue had been remitted by the Government on account of famine, and the defendants claimed a deduction on account of the portion so remitted. This plea was accepted by the Courts below and the amount decreed to the plaintiffs was reduced accordingly. The plaintiffs appealed to the High Court, urging that the Government having assigned the revenue was not competent to grant a remission, and that such remission could not deprive the plaintiffs of their right to the revenue assigned to them.

Pandit *Mohan Lal Sandal*, for the appellants.

Babu *Girdhari Lal Agarwala*, for the respondents.

BANERJI and GRIFFIN, JJ.—This appeal arises out of a suit brought by the plaintiffs appellants, who are assignees of Government revenue, to recover from the defendants, who are land-holders, arrears of revenue payable by them. It appears that during the period in respect of which arrears of revenue are claimed, a portion of the revenue was remitted by Government on account of famine. The defendants claimed a deduction of this amount of the arrears claimed. The Courts below have granted the deduction prayed for. Hence this appeal. The contention on the part of the appellants is that the Government having assigned the revenue was not competent to grant a remission, and that such remission could not deprive the plaintiffs of their right to the revenue assigned to them. It appears that the assignment in favour of the plaintiffs was originally made by the Maharaja Scindia and was continued by the British [557] Government. There is nothing to show that under the terms of the assignment it was agreed between the Government and the assignees that there should be no alteration in the amount of the revenue assigned. In the absence of any such agreement, we must hold that the assignees took the assignment subject to the ordinary rights of the Government to assess or reduce, or in seasons of calamity to remit, the whole or a part of

*Second Appeal No. 468 of 1910 from a decree of H. W. Lyle, District Judge of Agra, dated the 21st of February, 1910, modifying a decree of B. W. Wahl, Assistant Collector, first class of Muttra, dated the 6th of September, 1909.

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the revenue. This is manifest from the provisions of section 52, sub-section (2) of Act No. III of 1901. That sub-section provides that "revenue may be assessed on land, notwithstanding that the revenue, by reason of its having been assigned, released, compounded for or redeemed, is not payable to the Govrnment." Again, in the case of fluvial action the Government has the power under section 99, sub-section (2), to revise the assessment, and the rules framed by the Board of Revenue for such revision contain a distinct provision to the effect that assessment of mahals of which the revenue has been wholly assigned will be liable to revision in the same manner and to the same extent as mahals which pay full revenue, (see rule 56, printed on page 158 of Mr. Agarwala's Edition of the Land Revenue Act). Any other view would cause immense hardship both to landholders and tenants. Under section 51 of the Agra Tenancy Act, where remission of revenue is granted, the land-holder is bound to grant a remission of rent to the extent of twice the amount of the revenue remitted. If the contention of the appellants is right, although under section 51 the land-holder would be bound to grant a remission to his tenants, he himself would be liable, notwithstanding the remission, to pay the full amount of revenue to the assignees of it. It is urged on behalf of the appellants that it is only in the case of revenue payable to Government that a remission can be granted to tenants under section 51, and that therefore land-holders will not be prejudiced. Assuming this contention to be valid, tenants would have no remedy in times of calamity, if the land occupied by them happens to be situated in a locality the revenue of which has been assigned by the Government to a third party. Such surely could not be the intention of the Legislature. In our opinion an assignee of Government revenue takes the assignment subject to all the rights of Government to assess, enhance, reduce, [558] remit or suspend the revenue. The defendants, land-holders, are therefore entitled to the benefit of the remission granted by Government. In this view the Courts below were right, and this appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

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33 A. 558 (=8 A. L. J. 577=11 I. C. 516).

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

BILASO (*Defendant*) *v.* MUNNI LAL AND ANOTHER (*Plaintiffs*) AND ISHRI PRASAD (*Defendant*).*

[13th April, 1911.]

Will—Construction of document—Bequest to take effect after death of testator and his wife—Legatee surviving testator but predeceasing wife—Vested or contingent interest.

One *S* executed a will whereby he gave all his property after the death of himself and his wife *M* to his daughter *B* and his nephew *D* survived the testator but predeceased *M*. *Held* that *D* took vested interest in the property which was transmissible to his sons. *Bhagabati Burmanya* v. *Kali Charan Singh* (1) followed.

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* Second Appeal No. 1000 of 1910 from a decree of E. M. Nanavutty, Additional Judge of Bareilly, dated the 23rd of June, 1910, confirming a decree of Srish Chandra Basu, Subordinate Judge of Bareilly, dated the 7th of March 1910.

(1) (1911) I. L. R. 38 Cal. 468 : 8 A. L. J. 433.

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APRIL 13.
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33 A. 558=8 A. L. J. 577=11 I. C. 516.

THE facts of this case are as follows :—

One Sewa Ram, being the owner of certain property, executed a will whereby he gave all his property, after the death of himself and his wife Musammat Mendu, to his daughter Bilaso and his nephew Duli Chand. Duli Chand survived the testator, but predeceased Musammat Mendu. The present suit was brought by the heirs of Duli Chand to recover his share of the property of Sewa Ram from Musammat Bilaso. The court of first instance (Subordinate Judge of Bareilly) decreed the claim, and this decree was on appeal confirmed by the Additional District Judge. The defendant Bilaso appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba* for the appellant.

Dr. *Satish Chandra Banerji* and Dr. *Tej Bahadur Sapru* for the respondents.

STANLEY, C. J. and BANERJI, J.—The sole question raised in this appeal depends upon the true construction of the will of one Sewa Ram. Sewa Ram being the owner of certain property [559] executed his will on the 4th of April, 1881, and thereby gave all his property, after the death of himself and his wife Musammat Mendu, to his daughter Bilaso and his nephew Duli Chand. Duli Chand survived the testator, but predeceased Musammat Mendu. The contention in the appeal is that Duli Chand did not take a vested interest in the property disposed of by the will, but merely a contingent interest, and that he having died before his aunt, his sons are not entitled to succeed to the property. We think that the courts below were right in holding that Duli Chand took a vested interest in the property which was transmissible to his heirs. The point was the subject of decision by their Lordships of the Privy Council in the case of *Bhagabati Barmanya* v. *Kali Charan Singh* (1). In that case a will provided that the testator's mother and his wife were to succeed to his property for life, and on their death the sons of his sisters G and A, "that is to say, their sons who are now in existence as also those who may be born hereafter, shall in equal shares hold the said properties in possession and enjoyment by right of inheritance." It was held that the nephews were intended to take vested and transmissible interest on the death of the testator, though their possession and enjoyment was postponed. This decision appears to us to govern the present case. The appeal is therefore devoid of force. We dismiss it with costs.

Appeal dismissed.

(1) (1911) I. L. R. 38 Cal. 468; 8 A. L. J. 433.

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APRIL 13.

FULL BENCH.

33 A. 560=8 A. L. J. 612 =10 I. C. 313.

33 A. 560 (=8 A. L. J. 612=10 I. C. 313.)

[560] FULL BENCH.

Before Mr. Justice Sir George Knox, Mr. Justice Banerji and Mr. Justice Karamat Husain.

DEBI SAHAI (*Plaintiff*) *v.* SARASWATI AND OTHERS (*Defendants*).*

[13th April, 1911]

Civil Procedure Code (1882), *sections* 10, 102 *and* 103—*Suit dismissed for default of appearance—Date fixed, not for hearing of case but for appointment of a guardian to a minor defendant only—Order of dismissal* ultra vires.

Consequent on the death of one of the defendants to a suit, the plaintiff applied to bring the heirs of the deceased defendant on to the record, and, as one of them was a minor, nominated as his guardian his elder brother. The brother declined to act as guardian, and the court fixed a date upon which the plaintiff was to appear and nominate another person as guardian. Upon the date so fixed the plaintiff failed to appear, and the court dismissed the entire suit, subsequently also rejecting an application for its restoration.

Held that the court had no jurisdiction to dismiss the whole suit, as the only matter then before it was the appointment of a guardian to the minor defendant.

IN this case, on the death of one of the defendants to the suit the plaintiff applied to bring upon the record the heirs of the deceased defendant, and, as one of them was a minor, nominated his elder brother as his guardian. The elder brother refused to act as guardian, and the court thereupon fixed a date upon which the plaintiff was directed to suggest some other person as guardian. Upon the date so fixed neither the plaintiff nor any one on his behalf appeared, and the court, purporting to act under section 102 of the Code of Civil Procedure, 1882, dismissed the entire suit. An application for restoration made by the plaintiff was also rejected. The plaintiff thereupon appealed to the High Court. The appeal, originally coming before KNOX and KARAMAT HUSAIN, JJ., was, at their recommendation, laid before a full Bench by order of the Chief Justice of the 4th March, 1911.

The Hon'ble Pandit *Sundar Lal* (with him The Hon'ble Pandit *Madan Mohan Malaviya* and Babu *Girdhari Lal Agarwala*), for the appellant:—

The only matter that was before the court on 16th July, 1907, was the appointment of a guardian. On that date the suit was [561] not up for hearing at all. The Court could have disposed of the matter of appointment of a guardian in any way on that day, but of nothing else. The order dismissing the whole suit is illegal. Even under section 158 of the Civil Procedure Code (Act XIV of 1882) the court could not have dismissed the suit on that date.

Munshi *Gokul Prasad* (with him Mr. *W. Wallach*, Mr. *B. E. O'Conor*, The Hon'ble Pandit *Moti Lal Nehru*, Dr. *Satish Chandar Banerji*, and Babu *Sital Prasad Ghose*), for the respondent:

The question for decision is whether the lower court rightly or wrongly refused the application for restoration, and not whether the order dismissing the suit was a proper order. The plaintiff has not alleged or proved any sufficient cause for not appearing on the 16th July. The affidavit filed in support of the application for restoration says nothing more than that neither the plaintiff nor his pleader was present when the case

* First Appeal No. 46 of 1909 from an order of Girraj Kishore Datt, Subordinate Judge of Bareilly, dated the 6th of February, 1909.

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was called on. It does not give any reason for the non-attendance. The lower court was therefore justified in rejecting the application for restoration. Besides, the order dismissing the suit fell within the purview of section 158 of the old Code. It is doubtful whether any application for restoration under section 103 could be made in this case; for the order dismissing the suit was, properly speaking, not one under section 102, as an order of dismissal for default could not be made before the date fixed for hearing. The plaintiff's remedy, therefore, was by way of appeal or revision against the order of dismissal. As to section 151 of the new Code of Civil Procedure, the court's powers are, no doubt, very wide; but they should be exercised where there is no other remedy open to the party.

Babu *Surendra Nath Sen*, for another respondent:—

Section 151 contemplates cases in which no other remedy is provided by the Code by way of appeal or revision, &c. The plaintiff had a specific remedy, namely, an appeal from the decree which was framed after dismissal of the suit.

The Hon'ble Pandit *Sundar Lal*, was not heard in reply.

KNOX, BANERJI and KARAMAT HUSAIN, JJ.—The suit in which the order was passed from which this appeal has been filed was a suit for recovery of property of considerable value. The [562] number of persons arrayed as defendants was originally 245. Upon the institution of the suit the court decided to fix a date for settlement of issues. Owing to the great number of defendants the date originally fixed for settlement of issues expired before the parties had been served. While the case was thus pending, one of the defendants, Dularia, died. In lieu of the date originally fixed for the settlement of issues the court fixed the 25th of July, 1907, for the same purpose. In consequence of the death of Dularia an application was made to bring her heirs on the record. It so happened that one of the heirs was a minor, and it was necessary to appoint a guardian for the suit. The plaintiff, thereupon, suggested that the minor's brother, a co-defendant in the suit, should be made guardian. Upon notice going to the said brother, he appears to have noted on the summons that he did not want to act as guardian This fact of his refusing to be guardian was brought before the court on the 12th of July, 1907, and the court then ordered the plaintiff to suggest some one else as a guardian. It granted three days for the plaintiff to decide what course to take and directed the case to be put up for this purpose on the 16th of July, 1907. On the 16th of July, 1907, neither the plaintiff nor any pleader on his behalf appeared in court, and the learned Judge, apparently over-looking the fact that the only matter which he had before him on that day was the appointment of a guardian, treated the absence of the plaintiff as absence on the day fixed for the case, and although that day had not arrived, the court dismissed the case for want of prosecution on behalf of the plaintiff. The same day the plaintiff's pleader filed an application asking that the order passed might be re-considered and the case re-admitted under its original number. This application, was supported by two so-called affidavits. Neither of the affidavits deserves the name of an affidavit. They are mere pieces of waste paper. Be that as it may, the court dismissed the application on the ground that the applicant had failed to show any sufficient cause for his non-appearance. From this order the present appeal has been filed. While it is true that neither the application nor the affidavits disclosed any sufficient cause, sufficient cause was amply manifest on the face of the record, and the court should have taken note

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[563] of it. The date on which the plaintiff did not appear was not the date for the hearing of the suit itself, and the farthest the court could go was to decide the application which had been put before the court and for the hearing of which the 16th of July, 1907, had been fixed. It is contended that the application was not an application under section 103 of Act XIV of 1882. The order of the learned Subordinate Judge answers that contention fully. He evidently considered it, as his judgment shows, a case to be dealt with under section 102. We allow the appeal; set aside the order passed on the 6th of February, 1909; allow the application for restoration of the case, and direct the court below to restore the suit under its original number and proceed to hear it according to law. The costs will abide the event.

Appeal allowed.

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33 A. 563 (=8 A. L. J. 616=11 I. C. 517.)

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox Mr. Justice Banerji and Mr. Justice Richards.

KESRI AND OTHERS (*Plaintiffs*) *v.* GANGA SAHAI AND OTHERS (*Defendants*).

[13th April, 1911.]

Execution of decree—Joint decree-holders—Application for execution by one on behalf of himself and others—Leave to bid obtained for himself—Purchase by the applicant alone—Rights of co-decree-holders in respect of property so purchased.

One of several joint decree-holders made an application for execution on his own behalf and on behalf of his co-decree-holders, and then alone obtained leave to bid for the property, and purchased it, the purchase money being equal to the amount of his share of the decree. *Held*, in a suit by the co-decree-holders to recover their shares of the property so purchased, that they were entitled to recover, the equity being on the side of the plaintiffs.

[Ref. 25 I. C. 735.]

THIS was a re-hearing, on an application for review of judgment, of First Appeal No. 58 of 1907, decided by the same Bench on the 9th of April, 1910, and reported in I. L. R. 33 All. 541.

The facts, so far as they are material to the present decision, were as follows :—A mortgage deed was executed in favour of Debi Din and Bahadur, jointly. Their shares in the mortgage money were, approximately, two-thirds and one-third respectively. The mortgagees obtained a decree for sale. The respondent No. 1, heir of Debi Din, alone applied for execution of the decree; the heirs of Bahadur did not join in the application. It was [564] prayed that the decree might be executed subject to the rights of the heirs of Bahadur. Subsequently, leave was asked for and obtained by the respondent No. 1, to bid at the auction sale of the mortgaged property and he purchased two villages for the sum of Rs. 26,000. This sum was approximately two-thirds of the amount then due upon the decree. The heirs of Bahadur then sued him for possession of their one-third share of the villages ; his defence was that he had purchased the villages for himself, and all that the plaintiffs could get was a one-third share of the purchase money. This was the matter for determination at the re-hearing of the appeal upon an application by the respondent No. 1 for review of judgment.

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APPELLATE CIVIL.

33 A. 563=8 A. L. J. 616=11 I. C. 517.

Babu *Jogindro Nath Chaudhri* (with him Mr. *W. Wallach* and Pandit *Mohan Lal Nehru*), for the respondent No. 1 :—

The purchase by Ganga Sahai, the respondent No. 1, of the villages for Rs. 26,000 just satisfied his two-thirds share of the decretal amount. The decree was, no doubt, executed by him subject to the rights of the other decree-holders but the question is how far the "benefit" of that execution extends under section 231 of the old Code. It extends only to the recovery by them of the money due to them. They cannot follow the property, but they are, of course, entitled to their share of the purchase money. Before Ganga Sahai obtained leave to bid at the auction sale, all steps which had up to that time been taken by him for execution of the decree must be deemed to have been for the decree as a whole, that is, for them all. But his character as a decree-holder executing the decree for himself and his co-decree-holders altered when he obtained leave to bid. Thenceforth his character was the same as that of a stranger purchasing the property. There was no relation of agent or trustee. There are certain relations in which the benefit must be deemed to enure for them all ; for example, the case of a member of a joint Hindu family purchasing with the joint family funds. But the analogy does not apply to this case; for although the money was advanced by Debi Din and Bahadur jointly, there was a clear specification of their respective shares both in the mortgage-deed and in the decree for sale.

[565] The Hon'ble Pandit *Sundar Lal* (with him the Hon'ble Pandit *Madan Mohan Malaviya*), for the plaintiffs appellants, was not called upon.

KNOX, BANERJI and RICHARDS, JJ.— On the 9th of April, 1910, we allowed the appeal in this case, and, setting aside the decree of the Court below, decreed the plaintiffs' suit with costs. After we had made our decree, Ganga Sahai, one of the respondents, asked us to review our judgment of the 9th of April, 1910, on the ground that the only question which had been argued before us was the pure question of law that arose in the case, and that other questions arising in the case had not been heard and decided. We issued notice to the appellants to show cause why this application should not be granted. No cause having been shown, we allowed the application and directed that the appeal be put up for hearing. To-day the learned advocate for Ganga Sahai, respondent, tried to support the decree of the Court below on the ground that the property in suit was purchased by Ganga Sahai for himself, and the plaintiffs had no title to the same. We find that the issue thus raised was dealt with by the learned Subordinate Judge and his judgment on this point will be found at page 12 of the paper book in F. A. No. 57 of 1907. We agree entirely with what the learned Subordinate Judge there held and adopt the view taken by him. There is no question whatever that the equity in this case lies on the side of the plaintiffs.

A further plea was raised based on section 317 of Act XIV of 1882. This plea was not taken in the Court below and in our opinion is entirely without substance. This is not the case of a *benami* purchaser.

No other point was pressed before us.

The appeal is allowed, the decree of the Court below is set aside and the plaintiff's suit is decreed with costs in both Courts.

Appeal allowed.

1911
APRIL 13.

REVISIONAL CIVIL.

33 A. 566=8 A. L. J. 584 =10 I. C. 244.

33 A. 566 (=8 A. L. J. 584=10 I. C. 244.)

[566] REVISIONAL CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Banerji.

RAM LAL (*Petitioner*) *v.* KALKA PRASAD AND ANOTHER (*Opposite Parties*).*

[13th April, 1911.]

Civil Procedure Code (1908), *order XLVII rule* 1—*Review of judgment—Decisions after judgment sought to be reviewed—"New and important matter."*

The plaintiff instituted a suit for ejectment. The defendants pleaded that they were tenants of the plaintiff. The Munsif ordered the defendants to get a declaration of their tenancy. The Assistant Collector declared them to be tenants and the Munsif thereupon dismissed the suit. On appeal, however, the Commissioner set aside the order of the Assistant Collector and this decision was upheld by the Board of Revenue. The plaintiff then applied within 90 days of the decision of the Board of Revenue for review of the Munsif's judgment Held that the judgments of the Commissioner and the Board were "new and important matters" within the meaning of order XLVII, rule 1, of the Code of Civil Procedure. *Waghela Raisangji Shivsangji* v. *Shaik Masludin* (1) and *Waman Hari* v. *Hari Vithal* (2) referred to.

[Rel. 13 M. L. T. 225=19 I. C. 214; Ref. 78 I. C. 993; Not fol. 70 I. C. 741=15 L. W; 593=43 M. L. J. 33=1922 M. W. N. 304].

THIS was an application for revision of an order of a Munsif refusing to entertain an application for review of judgment. The facts out of which the application arose appear from the following order of KARAMAT HUSAIN, J. referring the case to a Bench of two Judges :—

"The facts are these :—Ram Lal brought an action against Kalka Prasad and Nathu Singh in ejectment. The defendants pleaded that they were the tenants of plaintiff. The learned Munsif, acting under section 202 of the Agra Tenancy Act, required the defendants to institute within three months a suit in the Revenue Courts for the determination of that question. The Assistant Collector, on the 31st of March, 1909, decided that they were the plaintiff's tenants. The learned Munsif, on the 29th of April, 1909, dismissed the plaintiff's suit. On appeal to the Commissioner it was held on the 17th of July, 1909, that they were not the tenants of the plaintiff, and this decision of the Commissioner was upheld by the Board of Revenue on the 7th of March, 1910. The plaintiff then, on the 2nd of June, 1910, applied to the learned Munsif for the review of his order. He came to the conclusion that there was no sufficient ground for filing the petition of review after ninety days and that the application ought to have been made to the Munsif who dismissed the suit on the 29th of April, 1909. The plaintiff has applied to this Court in revision, and it is urged on his behalf that the learned Munsif failed to exercise the jurisdiction vested in him, and that there was sufficient cause for not filing an application for review within ninety days. In the course of argument it is said that the reversal of the decision of the Assistant Collector by the Commissioner and the Board [567] of Revenue was 'new and important matter' within the meaning of order 47. rule 1 of the Civil Procedure Code of 1908, and in support of his contention the learned vakil relies on *Waghela Raisangji Shivsangji* v. *Shaikh Masludin* (1), and *Akbar Khan* v. *Mahammad Ali Khan* (3). The learned vakil for the opposite party says that the setting aside of the decree of the Assistant Collector by the Commissioner is not a ground for revision, and he relies on *Amrita Lal* v. *Madho Das* (4), and the remarks of their Lordships in 7 Moore's Indian Appeals at p. 304."

"The point is an important one, and it is desirable to have a ruling of a Bench of two Judges on this point. I therefore refer this case to a Bench of two Judges.

The case was laid before KNOX and BANERJI, JJ.

Munshi *Lakshmi Narain* (with him Munshi *Govind Prasad*), for the petitioner.

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* Civil Revision No. 78 of 1910.

(1) (1888) I. L. R. 13 Bom. 330.
(2) (1906) I. L. R. 31 Bom. 128.
(3) (1909) I. L. R. 31 All. 610.
(4) (1884) I. L. R. 6 All. 292.

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APRIL 18.

REVISIONAL CIVIL.

33 A. 566=8 A. L. J. 585=10 I. C 244.

Babu *Jogindro Nath Chaudhri*, for the opposite party.

KNOX and BANERJI, JJ.—The applicant in the case before us, Ram Lal, was plaintiff in the Court below. He instituted a suit in the civil Court for the ejectment of the defendants second party, as trespassers. They met the suit by a plea that they were tenants of the plaintiff. The learned Munsif very properly stayed his hand and required the defendants to institute a suit in the Revenue Court for a determination of the question raised by them. The defendants then went to the Assistant Collector and got from him a decision that they were the tenants of the plaintiff. In accordance with this decision the Munsif dismissed the suit on the 29th of the April, 1909. At the time when he passed this order, an appeal was pending in the Court of the Commissioner from the order of the Assistant Collector. The Commissioner decided that the defendants were not tenants and this decision was upheld by the Board of Revenue. The Munsif ought to have waited until the final decision of the Revenue Court, and on hearing that the order of the Assistant Collector was under appeal, he should have waited still further. The plaintiff, armed with the decisions in his favour, applied to the successor of the Munsif for review of the order passed on the 29th of April 1909. We do not understand why the plaintiff waited so long before he went to the Munsif. It is true that he came within **[568]** ninety days of the decision of the Board of Revenue, but in matters of this kind applications for review should be put in as early as possible. The Munsif before whom the application came refused to entertain it, and we are asked to set aside his order on the ground that he failed to exercise the jurisdiction vested in him. The question before us turns upon one point, namely, whether the decisions of the Commissioner and Board of Revenue can properly be held to be new and important matter within the meaning of order XLVII, rule 1. No judgment of this Court which is exactly in point has been placed before us. There is, however, a judgment of the Bombay High Court in *Waghela Raisangji Shivsangji* v. *Shaik Masludin* (1), which was approved of in the subsequent case of *Waman Hari* v. *Hari Vithal* (2). We cannot find that the view taken by the Bombay High Court has been disapproved of or dissented from by any of the other High Courts. The case before us is one in which we think that for the ends of justice we ought to allow a review, and acting upon the precedents quoted above, we allow the application, set aside the order of the Munsif, and send back the case to him with directions to readmit the suit under its original number and to dispose of it according to law. We make no order as to costs.

Application allowed.

(1) (1888) I. L. R. 13 Bom. 330.

(2) (1906) I. L. R. 31 Bom. 128.

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APRIL 18.

APPELLATE CIVIL.

33 A. 568=8 A. L. J. 578 =10 I. C. 282

33 A. 568 (=8 A. L. J. 578=10 I. C. 282.)

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

HAMID-UL-LAH KHAN AND OTHERS (*Defendants*) *v.* NAJJO (*Plaintiff*).*

[18th April, 1911.]

Act No. XV of 1877 (*Indian Limitation Act*), *schedule II, article* 104—*Muhammadan law—Dower—Wife put into possession of husband's property in his lifetime and subsequently dispossessed—Suit by her heir for balance of dower debt—Limitation.*

Held that article 104 of schedule II of the Indian Limitation Act, 1877, (article 104, schedule I, Act IX of 1908) does not apply to a suit by one of the heirs of a Muhammadan widow, who, having been put into possession of her husband's property during his life-time in lieu of her dower is dispossessed thereof subsequently to his death.

[569] THIS was a suit for recovery of the plaintiff's share of the dower debt due to one Musammat Waziran at the time of the death of her husband, Faiz ullah Khan. The facts are these:—Faiz-ullah Khan died childless in December, 1895, leaving his widow, Musammat Waziran, him surviving. Prior to his death, Faiz-ullah put his widow into possession of his estate in order that she might satisfy her dower debt, stated to be Rs. 5,000, thereout. In 1906, before the dower debt was discharged, Waziran made a transfer of the estate which led to litigation between her and the other heirs of Faiz-ullah. During this litigation Waziran, died, and the other heirs of Faiz-ullah Khan took possession of three-fourths of the estate and obtained a decree declaring them entitled to pre-empt Waziran's one-fourth share. The plaintiff, Musammat Najjo, is one of two sisters of Musammat Waziran, and she instituted the suit out of which this appeal has arisen for recovery of her share of the balance of the dower debt remaining due to Musammat Waziran at the time of her death.

The Court of first instance (Subordinate Judge of Saharanpur) decreed the claim, and this decision was upheld on appeal by the District Judge. The defendants appealed to the High Court.

Babu *Durga Charan Banerji* and Maulvi *Ghulam Mujtaba*, for the appellants.

Maulvi *Muhammed Ishaq*, for the respondents.

STANLEY, C. J., and BANERJI, J.—This was a suit for recovery of the plaintiff's share of the dower debt due to one Musammat Waziran at the time of the death of her husband, Faiz-ullah Khan. The facts are these:—Faiz-ullah Khan died childless in December, 1895, leaving his widow, Musammat Waziran, him surviving. Prior to his death, Faiz-ullah put his widow into possession of his estate in order that she might satisfy her dower debt, stated to be Rs. 5,000, thereout. In 1906, before the dower debt was discharged, Waziran made a transfer of the estate which led to litigation between her and the other heirs of Faiz-ullah. During this litigation Waziran died and the other heirs of Faiz-ullah Khan took possession of three-fourths of the estate and obtained a decree declaring them entitled to pre-empt Waziran's one-fourth share. The plaintiff, Musammat Najjo, is one of two sisters of Musammat Waziran, and she instituted the [570] suit out of which this appeal has arisen for recovery of her share of the balance of the dower debt remaining due to Musammat Waziran at the time of her death.

* Second Appeal No. 844 of 1910 from a decree of E. O. E. Leggatt, District Judge of Saharanpur, dated the 4th of May, 1910, confirming a decree of Maula Bakhsh, Subordinate Judge of Saharanpur, dated the 11th of June, 1908.

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APRIL 18.

APPELLATE CIVIL.

33 A. 568=8 A. L. J 578=10 I. C. 282.

Both the lower Courts have decreed her claim. Hence this appeal. The principal ground of appeal is based upon the Indian Limitation Act. The contention of the defendants appellants is that Waziran's dower became pavable in December, 1895, when Faiz-ullah died, and that the suit should have been brought within three years from that date under article 104 of schedule II to the Limitation Act. We are not prepared to accept this plea. It is found by the Courts below that Musammat Waziran was put into possession of her husband's estate by her husband for satisfaction of her dower debt. She and her heirs were therefore entitled to remain in possession until the dower debt was satisfied. Despite the agreement between Faiz-ullah Khan and his wife, the defendants appellants wrongfully took possession of the estate of Faizullah, and thereby committed a breach of the agreement entered into between him and Waziran. Having thus lost the property which was appropriated by Faiz-ullah to the payment of his wife's dower, it appears to us that the plaintiff was entitled to maintain this suit for recovery of her share of the dower remaining due to Musammat Waziran at the time of her death out of the assets of Faiz-ullah Khan in the hands of the defendants. The balance of the dower due to Waziran was a debt payable out of the estate of Faiz-ullah Khan and the defendants having wrongfully appropriated the estate which was liable to discharge this debt cannot be permitted to hold the estate without discharging the liabilities attaching to it. Wrongful possession was only taken in 1906. This suit was brought in 1907. Consequently it is not barred by any article of limitation. The suit is not in our opinion governed by article 104 of schedule II to the limitation Act, but is a suit, the right to bring which accrued when the defendants took possession of the estate of Faiz-ullah Khan and refused to pay the amount due to the plaintiff in respect of her share of Waziran's dower. We therefore dismiss the appeal with costs.

Appeal dismissed.

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33 A. 571 (=10 I. C. 247=8 A. L. J. 556).

[571] APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Griffin.

AMINA BEGAM AND OTHERS (DEFENDANTS) *v.* H. H. THE NAWAB OF RAMPUR (*Plaintiff*).*

[19th April, 1911.]

Evidence—Promissory note—Unstamped promissory note executed in Rampur in favour of the Nawab of Rampur—Suit on such note in British India—Lex loci contractus—*Rampur Stamp Law, sections* 52, *proviso* (c), *and* 53.

Certain moneys having been advanced by the Nawab of Rampur, a promissory note was accepted as security in favour of "The Nawab of Rampur" and bearing no stamp. The Nawab, being examined on commission stated :—"This debt is due to me personally, and, ordinarily speaking, a debt which is due to me is due to the State, and a debt which is due to the State is due to me: but the said amount I advanced from my own funds." According to the Stamp law of Rampur a document executed in favour of the State did not require to be stamped. *Held* that the *lex loci contractus* had to be applied and that the note in question not being drawn in favour of the Nawab in his private capacity did not require to be stamped.

* First Appeal No 109 of 1909 from a decree of Pandit Girraj Kishore Datt, Subordinate Judge of Bareilly, dated the 21st of December, 1908.

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APRIL 19.

APPELLATE [CIVIL.

38 A. 571 = 10 I. C. 257 = 8 A. L. J. 566.

THIS was an appeal arising out of a suit on a promissory note for Rs. 45,000 executed on the 13th of July, 1906, by one Abdul Ghafur then prime minister of the Rampur State in favour of "the Nawab of Rampur." The promissory note was executed in Rampur, and no stamp was put upon it at the time. When the present suit, which was brought against the heirs of the debtor, was instituted at Bareilly, the vakil for the plaintiff stamped it with a one-anna stamp and filed it in Court.

The Subordinate Judge decreed the suit, holding that so long as the note bore the stamp required by the law of British India, it was immaterial whether the provisions of the Stamp Law at Rampur had been complied with.

The defendants appealed.

Dr. *Satish Chandra Banerji*, for the appellants, produced a copy of the Stamp Act of Rampur, which he said was a public document and could be admitted under section 74 of the Indian Evidence Act, and could be admitted as proof of the actual law of the State under sections 78 and 84 of that Act.

(Mr. *B. E. O'Conor*, for the respondent, objected to the admission of this book in evidence here).

The point for decision was, whether a promissory note, which was not a valid instrument according to the law of Rampur when it was executed, could be stamped subsequently in British [572] India and support a suit brought for the recovery of money alleged to be due under it. He submitted that the law of the place of contract should be taken into consideration and cited Story, *Conflict of Laws*, Ed. 4, sections 260, 392; Foote *Private International Jurisprudence*, Ed. 3, 374; Dicey, *Conflict of Laws*, Ed. 1, rule 147, page 549; *Alves* v. *Hodgson* (1). *Clegg* v. *Levy* (2), *Bristow Sequeville* (3). The Court below had relied on the case of *In the goods of McAdam* (4). That was a case of a power of attorney which was executed in England to operate in India, and was not stamped there, but was admitted in India. A power of attorney stood on a different footing from a promissory note. Unless the note was a good promissory note in Rampur, it could not be validated by subsequent stamping in British India.

Mr. *B. E. O'Conor* (Babu *Jagindro Nath Chaudhri* and Babu *Lalit Mohan Banerji* with him) for the respondent :—

Before a suit relating to a foreign note can be dismissed, the Court must satisfy itself that the document on which it is based is *void* according to the law of that foreign State and not merely inadmissible in evidence; Chitty, *Contracts*, Ed. 14, 99. The persons sued on the note were residents of British India; they had property situate in British India, and it was a resident of Rampur who was seeking to enforce a contract against them. Under such circumstances the lower Court was right in disregarding the law of Rampur.

STANLEY, C. J., and GRIFFIN, J.—This appeal arises out of a suit on a promissory note executed on the 13th of July, 1906, by Nawab Abdul Ghafur, the then prime minister of the Rampur State, in favour of His Highness the Nawab of Rampur. The document was executed at Rampur on an unstamped paper. The present suit was instituted on the 5th of March, 1908, against the heirs of Abdul Ghafur, who are residents of British India. The document in question, before being put in Court, was

(1) (1797) 7 T. R. 241.
(2) (1812) 3 Campbell, 166.
(3) (1850) 5 Ex. 275.
(4) (1895) I. L. R. 23 Cal. 187.

stamped by the pleader who appeared for the plaintiff with a one anna British India stamp. One of the pleas taken by the defendants in the court below was that the document was void by reason of its not being stamped at the time of execution [573] and therefore could not be made the basis of a suit. The court below overruled this plea, holding that it was immaterial whether or not the promissory note in suit complied with the provisions of the Stamp Law of the Rampur State, and that it was enough if it be stamped according to the Indian Stamp Act. The learned Subordinate Judge quoted in support of his view the ruling of *In the goods of McAdam* (1). That case related to a power of attorney which was executed in England and which was stamped in British India. The court held that the power of attorney which was stamped according to the provisions of the Indian Stamp Act was valid for the purposes it was intended to meet. The court below has decreed the plaintiff's suit in full against the property left by the deceased Abdul Ghafur. The defendants appeal. We do not think we can dispose of this appeal satisfactorily without a finding on the issues which we shall state later on. We are not disposed to accept the view taken by the learned Subordinate Judge as to the immateriality of the Stamp Law of the Rampur State applying to the promissory note in suit. There is a considerable current of authority to the contrary, and various authorities have been cited to us by the learned advocate on behalf of the appellants, e.g., Story on the Conflict of Laws, 4th edition, page 392 ; Foote on Private International Jurisprudence, 3rd edition, page 374 ; Dicey on the Conflict of Laws, 1st edition, rule 147, page 349.

We, therefore, under the provisions of order 41, rule 25, refer the following issues :—

(1) Whether according to the law of the Rampur State binding on the parties to the suit a promissory note requires to be stamped to give it legal effect? (2) If not so stamped, is it absolutely void? (3) If not absolutely void, what is its force and effect according to the law in force in the Rampur State?

Such further evidence as may be necessary for the determination of these issues may be taken. Ten days will be allowed for objections after the return of the findings.

On receipt of the findings, which were in favour of the defendants appellants.

[574] Babu *Jogindro Nath Chaudhri*, (with him Mr. *B. E. O'Conor* and Babu *Lalit Mohan Banerji*), for the respondent, submitted that the loan was advanced by and the note was executed in favour of the Nawab of Rampur and not Sir Muhammad Hamid Ali Khan Bahadur, G. C. S. I. It was a note executed in favour of the State and did not require any stamp, as provided by proviso (*c*) to section 52, Rampur Stamp Law. If the money had been advanced from the Treasury, the note would have been in exactly this form. It was on the face of it in favour of the plaintiff as Nawab of Rampur and not in favour of him in any capacity other than that of the ruler of Rampur. He cited *Bristow* v. *Sequeville* (2). Section 14 of the Rampur Stamp Law authorized the Nawab to remit the duty on any instrument. It must be assumed that he did remit the duty, if any was required, on the instrument the subject-matter of the present suit. Further, section 53 of the Rampur law provided that when a document which required a stamp but was not stamped, was received in

(1) (1895) I. L. R. 23 Calc. 187.

(2) (1850) 5 Ex. 275.

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33 A. 571=10 I. C. 247=8 A. L. J. 566.

evidence, the admission could not be challenged in appeal. The promissory note here was so received and the defendants could not challenge that admission in appeal.

Dr. *Satish Chandra Banerji*, for the appellant, argued that the money having been advanced from the private funds of the plaintiff, as admitted by him, the promissory note required a stamp. The Nawab held a dual capacity, one that of the ruler of the State, and the other that of private person. Section 52, proviso (*c*), of the Rampur Stamp Law exempted all documents which were executed in favour of the State. Here the note was not executed in favour of the State but in favour of the Nawab in his personal capacity, and the money was not advanced from the public treasury. It was, therefore, not merely inadmissible in evidence, not having been stamped in accordance with Rampur law, but absolutely void. Section 52, Rampur Stamp Law, enacts that the instrument shall not be *acted upon*. It is not a rule of evidence merely. The promissory note was therefore for all purposes void. The reference to section 14 was an after-thought, it not having been either alleged or proved in the lower court that the duty was remitted under any order of the [575] Nawab. Section 53 could not help the plaintiff because the note was never received in evidence by any court in Rampur. The definition of "duly stamped" in section 2, clause (10) of the Indian Act showed that section 36 of that Act could have no application.

STANLEY, C. J. and GRIFFIN, J.—The subject-matter of this litigation is a promissory note executed on the 13th of July, 1906, by Nawab Abdul Ghafur, the then prime minister of Rampur State, in favour of His Highness the Nawab of Rampur. The note was executed at Rampur and was on unstamped paper. Nawab Abdul Ghafur having died, the suit out of which this appeal has arisen was instituted on the 5th of March, 1908, against his heirs, who are residents of British India. Before the promissory note was filed in court, it was stamped by the pleader for the plaintiff with a one anna stamp of British India. One of the defences set up by the defendants was that the document was void by reason of its not having been stamped at the date on which it was signed, and therefore could not be made the basis of a suit.

The Court below overruled this plea, holding that it was immaterial whether or not the promissory note complied with the provisions of the Stamp Law of the Rampur State, and that it was a valid document being stamped according to the Indian Stamp Act.

We were not disposed to take this view and therefore referred several issues to the court below for determination. They were as follows:—

(1) Whether according to the law of the Rampur State, binding on the parties to the suit, a promissory note must be stamped in order to have legal effect?

(2) If not so stamped, is it absolutely void, and

(3) If not absolutely void, what was its force in the Rampur State?

It was contended before the court below that the promissory note in question was not admissible in evidence not having been stamped in accordance with the law of the Rampur State. Section 52 of the Rampur Stamp Act prescribes that any "instrument chargeable with duty but not duly stamped, shall not be [576] admitted in evidence for any purpose by any person having by law, or consent of the parties, authority to receive evidence or shall be acted

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upon, registered or authenticated by any such person unless such instrument is duly stamped." There are several provisos to this section and amongst others the following, (*c*) " When any instrument is completed by or in favour of the State, or if it bears a certificate under section 46, then it will be admitted in evidence," &c. It was contended on behalf of the plaintiff that the promissory note having been executed in favour of his Highness the Nawab of Rampur, it was admissible in evidence according to the aforesaid proviso. The Court below held that the note was given to the Nawab in his private capacity for money lent from his private purse and not from the State Treasury and that therefore the proviso above referred to did not apply. It further held under the law of the Rampur State binding on the parties, a promissory note requires to be stamped to have legal effect, and that the promissory note sued on not having been stamped was for all practical purpose absolutely void.

Objections have been taken to these findings under order XLI, rule 26. It is contended on behalf of the plaintiff that the note was completed in favour of the Rampur State and was admissible in evidence and that the Court below was wrong in holding that the plaintiff was not entitled to the benefit of the aforesaid proviso to section 52.

His Highness the Nawab was examined on commission and he deposed to the circumstances under which the note was executed. In answer to the question whether the debt was due to the State or to himself he said:—"This debt is due to me personally, and, ordinarily speaking, a debt which is due to me is due to the State and the debt which is due to the State is due to me. But the said amount I advanced from my own funds." The note is in the following terms:—"I promise to pay to His Highness the Nawab of Rampur on demand the sum of Rs. 45,000, value received, " and is signed by Abdul Ghafur and dated the 13th July, 1906. The argument addressed to us, on behalf of the defendants is that the Nawab occupies a dual capacity, namely, that of ruler of the State of Rampur [577] and that of a private individual independent of the State, and that the money not having been advanced from the funds in the treasury but from money which His Highness had by him at the time the note cannot be regarded as having been completed in favour of the State. We are unable to accede to this contention. The note was drawn in favour of the Nawab of Rampur, and it is not suggested that if the loan had been a loan from the State, the promissory note would have assumed a different form. But it is said that the money was not taken from the treasury but from moneys in the hands of His Highness, and that therefore the note cannot be regarded as having been made in favour of the State. We think that this is too narrow a view of the case. As His Highness in his evidence stated "the debt which is due to me is due to the State, and the debt which is due to the State is due to me." If the note was completed in favour of the State, then the proviso to section 52 is applicable, and the note was in our judgment, admissible in evidence, it being a note in accordance with the law in existence at the place of contract.

The instrument, it is to be observed, is drawn in favour of the Nawab of Rampur, not in favour of Nawab Sir Muhammad Hamid Ali Khan Bahadur, G. C. S. I. It is on the face of it in favour of the plaintiff as Nawab of Rampur and not in favour of him in any capacity other than that of the ruler of Rampur State. For these reasons we think that the claim of the plaintiff was rightly decreed. It was contended on behalf of

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the plaintiff that, even if the instrument required a stamp, inasmuch as it was received in evidence in the Courts below, its admission as material evidence cannot be called in question in appeal on the ground that the instrument was not duly stamped (see section 53 of the Rampur Stamp Act). It was also contended that under section 14 of the Rampur Stamp Act His Highness the Nawab has power to remit the duty on any instrument, and that under the circumstances of this case it must be assumed that His Highness in accepting an unstamped promissory note remitted the duty payable in respect of it. In view of our finding on the main issue it is unnecessary to determine the two last mentioned points.

[578] We think that there is no force in the fifth ground of appeal. The second, third and fourth grounds of appeal were not pressed.

For the foregoing reasons the plaintiff is in our judgment entitled to hold the decree which he has obtained. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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33 A. 578 (=8 A. L. J. 630=11 I. C. 585=12 Cr. L. J. 401.)

REVISIONAL CRIMINAL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Tudball.

EMPEROR *v.* MAHABIR AND OTHERS.*

[22nd April, 1911.]

Jurisdiction—Offence committed in British India—Appeal from conviction—Transfer pending appeal of place where offence was committed to a native state.

An offence was committed within British India. Certain persons were convicted thereof and appealed against their conviction to the appropriate Court in British India. Pending the hearing of their appeal, however, the place where the offence had been committed was constituted part of an independent native State. *Held* that this subsequent transfer of territory did not deprive the Court in which the appeal had been filed of its jurisdiction to hear it.

[Fol. 34 All. 118; Ref. 34 All. 451.]

IN this case three persons had been convicted and sentenced under section 325, of the Indian Penal Code, by a Magistrate of the Mirzapur district. They appealed against their convictions and sentences to the Sessions Judge of Mirzapur. Pending the appeal, however, the place where the offences had been committed, which had been at the time British territory, was transferred to the newly-created State of Benares. The Sessions Judge therefore returned the memorandum of appeal to be presented to the proper Court of that State. Against this order the appellants applied in revision to the High Court.

Mr. *E. A. Howard*, for the applicants.

No one appeared for the Crown.

RICHARDS, C. J. and TUDBALL, J. :—The facts of the matter out of which this application in revision has arisen are shortly as follows:—The three applicants were charged under section 325, Indian Penal Code. Applicants Nos. 1 and 3 were sentenced to [579] two years' rigorous imprisonment and Rs. 100 fine, and applicant No. 2 to one year's rigorous imprisonment. The particular place where the offence was alleged to have

* Criminal Revision No. 148 of 1911, from an order of W. R. G. Moir, Sessions Judge of Mirzapur, dated the 8th of April, 1911.

been committed was then in British India, but by virtue of a notification of the Government of India certain territory, including the place where the alleged offence was committed, has been constituted an independent Native State. The applicants appealed from the conviction to the learned Sessions Judge prior to the constitution of the Native State, as already mentioned. Before, however, the appeal came on for hearing, the transfer of the territory had been actually carried into effect. The learned Sessions Judge, thereupon, by an order, dated the 8th April, 1911, returned the memorandum of appeal to the applicants for presentation in the proper Court in the Benares State, holding that in the events that had happened, he had no jurisdiction to entertain the appeal. The present application is for the revision of this order. In our opinion the learned Sessions Judge is wrong. The offence was committed in British India, the appeal was presented to the proper Court, the appellants are at present confined in a jail in British India. Under these circumstances we consider that the learned Sessions Judge had jurisdiction to entertain the appeal. The learned Sessions Judge says, "it" (that is, the Court of Sessions Judge of Mirzapur) "is no longer a Court of appeal for which persons convicted of offences committed outside British India can ordinarily come." The learned Sessions Judge has overlooked the fact that the alleged offence in the present case was committed in British India. We do not think that the mere fact that the particular locality has ceased to be British India before the appeal has been determined, takes away the jurisdiction of the learned Sessions Judge. We accordingly allow the application, and set aside the order of the learned Sessions Judge with directions to re-admit the appeal and proceed to hear the same.

Application allowed.

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REVISIONAL CRIMINAL.

33 A. 578=8 A. L. J. 630 =11 I. C. 585 =12 Cr. L. J. 401.

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33 A. 580 (=8 A. L. J. 692=10 I. C. 353.)

[580] APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

MANNU LAL (*Plaintiff*) *v.* FAZAL IMAM AND OTHERS (*Defendants*).*

[27th April, 1911.]

Act No. XXI of 1871 (*Pensions Act*), *sections* 3, 4, 6 *and* 8—*Pension—Definition—Grant of village by Government revenue free*—Wajib-ul-arz—*Construction of document—Condition purporting to restrain alienation.*

Held that a grant of zamindari the revenue of which is remitted by the Government is not a pension within the meaning of section 3 of the Pensions Act, 1871, and no certificate is necessary under section 6 to institute a suit with respect to it. Nor can an entry in the *wajib-ul-arz* to the effect that "no co-sharer is competent to transfer property" standing by itself, have the effect of making such property untransferable.

Ganpat Rao v. *Anand Rao* (1) and *Lachmi Narain* v. *Mckund Singh* (2) referred to.

[Ref. 12 M. L. T. 541=23 M. L. J. 687=15 I. C. 871=1913 M. W. N. 255; 36 Mad. 559; Fol. 16 M. L. J. 239=27 M. L. J. 618=26 I. C. 87.]

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* First Appeal No. 442 of 1909 from a decree of Achal Behari, Subordinate Judge of Banda, dated the 1st of December, 1909.

(1) (1905) I. L. R. 28 All. 104; (1909) 32 All. 148.

(3) (1904) I. L. R. 26 All. 617.

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APPELLATE CIVIL.

33 A. 580=8 A. L. J. 692 =10 I. C. 353.

THE facts of this case were briefly as follows:—

Fazal Imam and others executed a mortgage on the 18th of February 1896, hypothecating their *muafi* and zamindari property in a certain village in favour of Mannu Lal. The plaintiff sued on foot of his mortgage; the defence was that the property mortgaged was a pension and the suit was not maintainable without obtaining a certificate from the Collector, and that according to the conditions of the *wajib-ul-arz* the land could not be transferred. The lower Court held that under sections 4, 6 and 11 of the Pensions Act, the Civil Court had no jurisdiction to entertain the suit regarding the property, which was a *muafi* without a certificate from the Collector of the district and dismissed the suit. The plaintiff appealed.

The Hon'ble Pandit *Sundar Lal*, (with him Babu *Piari Lal Banerji* and Pandit *Uman Shankar Bajpai*), for the appellant, contended that the property mortgaged was not a pension within the meaning of section 3 of the Pensions Act. The mere fact that the Government has remitted the revenue does not make the zamindari a pension. He cited *Babaji Hari* v. *Rajaram Ballal* (1), *Ravji Narayan Mondlik* v. *Dadaji Bapuji Desai* (2), *Balvant Ramchandra Natu* v. *The Secretary of State* (3), [581] *Panchanadayyan* v. *Nilakandayyan* (4), *Lachmi Narain* v. *Makund Singh* (5) and *Ganpat Rao* v. *Anand Rao* (6).

The entry in the *wajib-ul-arz* was a mere surplusage, there being no condition about inalienability in the original grant.

The Hon'ble Nawab *Muhammad Abdul Majid*, for the respondents, submitted that the land revenue of the property being remitted, the property motgaged came within the definition of pension. The *wajib-ul arz* clearly prohibited all transfers of property.

The Hon'ble Pandit *Sundar Lal*, replied.

RICHARDS, C. J. and BANERJI, J.:—This appeal arises out of a suit on foot of a mortgage. The amount due to the plaintiff was a very large sum, namely, Rs. 27,000 odd. He abandoned part of his claim and only sought to recover Rs. 10,000. The property which is the subject of the mortgage is referred to in a document called "proceedings in the Revenue Court, district Banda, dated the 4th of December, 1840." This document will be found printed at page 1 of the respondents' book. The document recites the history of the village, and some ancient *sanads* would appear to have been produced at the time. It seems that a grant of the village was first made by one Raja Chattar Lal in favour of one Pahari *Bhand*, who was the ancestor of the defendants. This *sanad* was succeeded by others, long prior to the establishment of British rule. The document, we referred to, concludes with the following remarks:—"The *sanads* which have been produced were also taken into consideration.*** Therefore, under section 9 of the Circular Letter as also under other sections of the said letter, this village seems fit to be held as a *muafi* from generation to generation as heretofore. I therefore concur in the opinion of the Deputy Sahib as to the maintenance of the *muafi*." Then follows the order "that this village be maintained as *muafi* as before." The village has been held as a *muafi* village up to the present day. It is admitted that the mortgage was made and executed; but the defendants,

(1) (1875) I. L. R. 1 Bom. 75.
(2) (1875) I. L. R. 1 Bom. 523.
(3) (1905) I. L. R. 29 Bom. 440.
(4) (1882) I. L. R. 7 Mad. 191.
(5) (1904) I. L. R. 26 All. 671.
(6) (1905) I. L. R. 28 All. 104; (1909) 32 All. 148.

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33 A. 580=8 A. L. J. 692 =10 I. C. 353.

mortgagors, plead that a suit could not be maintained without a certificate under section 6 of the Pensions Act, XXIII [582] of 1871, and secondly, that it was not competent for the co-sharers to transfer the property at all.

An extract from the *wajib-ul-arz* of 1880 was given in evidence by the defendants. There the entry is to the following effect:—The *jama* of this mahal was remitted for the support of the zamindars. It is still remitted by the Government. No co-sharer is competent to transfer property. The learned Subordinate Judge considered that a certificate was necessary under the provisions of the Pensions Act. In our opinion he was wrong. Section 4 provides that no Civil Court shall entertain any suit relating to any pension or grant of money, or land revenue, conferred or made by the British or any former Government. It seems to us clear that the grant of the land was not a "pension." The expression "grant of money" or "land revenue" is defined in section 3 of the Act as including anything payable on the part of the Government in respect of any right, privilege, perquisite or office. Section 8 of the Act throws some light upon what was meant by pensions and grants by Government of money or land revenue, because it is there provided that they are to be paid by the Collector, Deputy Commissioner or other authorized officer. The grant of these villages was certainly not a grant of land revenue within the ordinary meaning of that expression. It is contended, however, that inasmuch as Government remitted the revenue, they must be said to have granted it. We do not think that this is the true meaning of the expression in the Act. If it were, all *muafi* holdings would fall within the purview of the Act. It is, however, conceded that ordinary *muafi* can be and is daily trasferred both by way of sale and mortgage, and that the Pensions Act does not apply to ordinary *muafi*. A Bench of this Court held in the case of *Ganpat Rao* v. *Anand Rao* (1) that a grant of land revenue free was not a grant of land revenue within the meaning of the Act. On appeal their Lordships of the Privy Council did not differ from the finding of this Court. The same view was taken in the case of *Lachmi Narain* v. *Makund Singh* (2).

[583] The only question which remains is the effect of the entry in the *wajib-ul-arz*. It seems to us that this entry standing by itself cannot have the effect of making property which *prima facie* is transferable, untransferable. We do not know under what circumstances the entry was made. In the proceedings of 1840, to which we have referred, there is not the smallest reference to any restraint upon alienation on the grantees. In our opinion the decision of the Court below was wrong.

We, therefore, allow the appeal; set aside the decree of the Court below, and decree the plaintiff's claim with costs in both Courts. We fix six months from this date for payment and direct that the decree be drawn up in the terms of order XXXIV, rule 4, of the Code of Civil Procedure.

Appeal allowed.

(1) (1905) I. L. R. 28 All. 104; (1909) 32. All. 148.

(2) (1904) I. L. R. 26 All. 617.

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MISCEL-
LANEOUS
CRIMINAL.

33 A. 583=12
I. C. 652=12
Cr. L. J. 564.

33 A. 583 (=12 I. C. 652=12 Cr. L. J. 564.)

MISCELLANEOUS CRIMINAL.

Before Mr Justice Tudball.

EMPEROR *v.* HARGOBIND AND OTHERS. *

[28th April, 1911.]

Criminal Procedure Code, section 526—Transfer—Riot—Cross cases before same Court—Opinion expressed by Court on evidence in one case no ground for considering it incompetent to try the other.

The fact that a Court before which there are pending two cross cases of riot has, on the trial of the first case, expressed opinions to some extent unfavourable to the accused in the second case is no good ground for holding that the Court is incompetent to try the second case. *Asimaddi* v. *Gobinda Baidya* (1) referred to.

[Ref. 23 I. C. 205=15 Cr. L. J. 353 ; Fol : 1 Pat. L. J. 399=37 I. C. 159.]

THE facts of this case are, briefly, as follows:—Two cross cases of riot were sent for trial before the Joint Magistrate of Benares—one faction, Adit Narain, Baij Nath and Prag Dat Singh, on charges under sections 147 and 304, and the other, Hargobind and others, on a charge under section 147. The case of Adit Narain and others was taken up first. The Magistrate committed one member of this party to the Court of Sessions and discharged two of the accused. In his order of discharge the Joint Magistrate observed: —" The aggressors in this case were undoubtedly Hargobind and his party." On the strength of this remark Hargobind and others applied to the High Court for the transfer of the case against them.

[584] Mr. *W. Wallach*, for the applicants.

The Government Advocate (*A. E. Ryves*), for the Crown.

TUDBALL, J. : —This is an application for transfer. The case is on all fours with Miscellaneous Case No. 141 of 1909. † The latter case, if anything, is much stronger than the present case. As in that case, so in the present, two parties have been put upon their trial for offences of rioting. The Magistrate has on the trial of one of the parties expressed a certain opinion on the evidence that was before him and has committed one member of the party to the Court of Sessions for trial. The trial of the opposite party is now before him. The basis of the present application is that the Magistrate has already expressed an opinion that the present applicants were the aggressors.

The matter is similar to the case of *Asimaddi* v. *Gobinda Baidya* (1). Sufficient reason, therefore, for granting this application has not been shown. The Magistrate will keep in mind the fact that he must act simply and solely on the evidence which is laid before him in the course of this trial The application is rejected.

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* Miscellaneous No. 60 of 1911.

† The order in this case was as follows :—

RICHARDS, J :—

This is an application for transfer. The ground for transfer is that the learned Magistrate has already heard a cross case against the other party to an alleged riot. It is said that the learned Magistrate already discharged the other party holding that the present applicants or their party were the aggressors and that the other party merely acted in self-defence. If this application were granted, it would amount to a decision that in no case should any Magistrate decide a case of riot to which there are two parties.

(1) (1897) 1 C. W. N. 426.

33 A. 585 (=8 A. L. J. 389=9 I. C. 1013.)

[585] APPELLATE CIVIL.

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APPELLATE CIVIL.

33 A. 585=8 A. L. J. 389 =9 I. C. 1013.

Before Mr. Justice Richards, Mr. Justice Griffin and Mr. Justice Tudball.

JHANDA SINGH (*Plaintiff*) *v.* WAHID-UD-DIN AND OTHERS (*Defendants*).*

[11th March, 1911.]

Construction of document—Deed of sale followed after an interval by an agreement for repurchase—Sale—Mortgage by conditional sale.

A document purporting to be an out and out sale-deed was executed on a certain date and seven days later a second document was executed by the vendee whereby he covenanted to reconvey the property sold if the vendors paid back the purchase-money after the lapse of nine or ten years from the date of that sale deed. The two deeds were separately stamped and were registered on different dates. *Held*, in view of the delay intervening between the two deeds and other circumstances attending their execution, that the two deeds were not intended to be parts of one and the same transaction so as together to constitute a mortgage by conditional sale, but must be construed separately, and were merely what they purported to be. *Bhagwan Sahai* v *Bhagwan Din* (1) followed. *Balkishen Das* v. *Legge* (2) distinguished.

[Dist. 14 M. L. T. 579=1914 M. W. N. 222; Ref. 9 L. W. 365=50 I. C. 205=42 Mad. 407=1919 M. W. N. 393=36 M. L. J. 385; 70 I. C. 132=20 A. L. J. 810=45 A. 72.]

THIS was an appeal under section 10 of the Letters Patent from the judgment of STANLEY, C. J., in F. A. No. 177 of 1908.

The first appeal was heard by a Bench consisting of STANLEY, C.J., and BANERJI, J., who delivered the following judgments: —

STANLEY, C. J.—This appeal arises out of a suit for redemption of what is alleged to be a mortgage, dated the 29th of August, 1852, executed by the predecessors in title of the plaintiffs against the representatives of the alleged mortgagees.

The Court below dismissed the plaintiff's suit finding the document in question was an out and out sale deed and not a mortgage. Against this decision the present appeal has been preferred on the ground that upon a true construction of the document in question and another document of the 8th of September, 1852, the transaction evidenced by them was a mortgage by way of conditional sale.

In the document of the 29th August, 1852, the entire zamindari of a village called Murlipur Phul, which is stated therein to belong to the executants by right of inheritance, was conveyed [586] to Ilahi Bakhsh and others in consideration of a sum of Rs. 5,500. The operative part of the document runs as follows :—

" We have now sold the entire 20 biswas zamindari property aforesaid together with all the rights and interests appertaining thereto . . . for a sum of Rs. 5,500, to Ilahi Bakhsh, Abdul Rahim, Abdul Karim and Abdul Hakim . . . . . and the aforesaid vendees purchased the aforesaid property from us in consideration of the aforesaid amount. The sale is valid, legal, lawful and enforceable. Accordingly the proposal and acceptance have taken place between the parties. We have received

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I see no sufficient reason for granting this application for transfer.

At the same time the Magistrate will bear in mind when hearing the case against the applicants that the case is to be decided on evidence produced in Court before him and not upon anything he may have heard outside Court or on any opinion he may have formed in the course of the other case.

I reject the application.

* Appeal No. 48 of 1910 under section 10 of the Letters Patent.

(1) (1890) I. L. R. 12 All. 367.

(2) (1899) I. L. R. 22 All. 149.

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the whole of the consideration in respect of the property sold from the aforesaid vendees and have brought the same to our use. We have put the vendees into possession and enjoyment of the aforesaid property together with all the cesses and revenue."

This document was presented for registration on the 18th of May, 1853, by the executants, or persons representing them, and the receipt of the consideration was admitted before the registering officer.

On the 5th of September following an agreement was entered into between Ilahi Bakhsh, Abdul Rahim, Abdul Karim and Abdul Hakim, with the executants of the document of the 29th of August, 1852, in which that document is recited as being a purchase of the village in question, and then an agreement for resale is stated in the following terms:—

"As, we, the executants, are now willing to help and treat with kindness the vendors, we the executants of our own free will do hereby covenant and give in writing that if the aforesaid vendors after the lapse of 9 to 10 years from the date of the execution of the aforesaid sale-deed, do pay to us the purchase money as entered in the sale-deed, *i. e.*, the sum of Rs. 5,500 out of their own pocket without mortgaging or selling their property to other persons, we shall forthwith execute a fresh sale deed on receipt of the sale consideration entered in this document and get mutation of names effected in the revenue papers, we shall never deviate from what we have agreed upon. In the event of our refusal they have power to deposit into the treasury attached to the Court the amount of consideration entered in the sale-deed, and after the institution of suit in Court to purchase their property anew. Further, if the aforesaid persons be not ready to purchase the property and to pay the purchase money *within the aforesaid time*, they shall have no claim to the aforesaid property *after the expiry of the period of ten years.*"

This agreement was presented for registration by the executants on the 19th of May, 1853, that is, the day after the date of registration of the earlier document. I may observe the documents of the kind were not at this time compulsorily registrable.

[587] The learned Judge after a review of the authorities held that the document of the 29th August, 1852, was not a mortgage but an out and out sale, and that any claim on foot of the subsequent document of the 5th of September, 1852, was barred by limitation.

This appeal has been preferred, and the contention of the learned advocate for the appellants is that the two documents must be read together, and that, being so read, they are evidence of a mortgage by way of conditional sale, and that the case is governed by the ruling of their Lordships of the Privy Council in *Balkishen* v. *Legge* (1). If his contention be well-founded, then the plaintiffs appellants are entitled to redeem and to have an account from the defendants of the rents and profits of the property from the year 1852 up to the present time.

On the other hand, it is contended that the two documents are evidence of two different transactions, one being an out and out sale, the other an agreement to resell within a limited time, and that the case is governed by the ruling of their Lordships of the Privy Council in *Bhagwan Sahai* v. *Bhagwan Din* (2).

In my opinion this last contention is well founded. I am unable to distinguish the case from that of *Bhagwan Sahai* v. *Bhagwan Din*. In that case the two documents were contemporaneous, being dated the 20th February 1835. By the first document Alam Singh and others, who professed to be the proprietors of certain property, declared that they had of their own accord absolutely sold the entire property to Ganga Din in consideration of a sum of Rs. 4,000 Then on the same day another document was executed by which Ganga Din after the recital of the deed of

(1) (1899) I. L. R. 22 All. 149. (2) (1890) I L. R. 12 All. 387.

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purchase added :—" I have, as a matter of favour, mercy, kindness and indulgence, executed this deed, and do hereby stipulate that if all these vendors will, within a period of ten years from the date of this deed pay in a lump sum and without interest the whole amount specified above, I shall accept the same and cancel this valid sale. During the aforesaid term I shall remain in possession, collect the rents, enjoy the profits and be liable for loss ; the vendors shall have no concern [588] whatever. I shall not claim interest from the vendors. Nor will they demand profits from me after the expiry of the term. In case the whole of the principal is not paid the vendors shall not be able to cancel the sale by payment of the principal." Sir BARNES PEACOCK, who delivered the judgment of their Lordships of the Privy Council, held, reversing the decisions of the Courts below, that it was clear that "this case was not one of the mortgagor and mortgagee but one of an absolute sale with a right to repurchase within a period of ten years." In that case, it will be observed, both the documents were executed on the same day, which lent colour to the contention that the two transactions were really one transaction. In the case before us there was an interval of 7 days between the execution of the two documents, and the registration of the first document was effected on the 18th of May, 1853, while the registration of the agreement was on the following day. From this it may reasonably be inferred that the parties intended that the transactions should be kept separate and distinct. The documents taken together do not on the face of them constitute a mortgage; and assuming that they are to be read together, there is nothing in them to indicate that they represented a mortgage transaction. *Prima facie* an absolute conveyance containing nothing to show that the relationship of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance merely because the vendor stipulates that he shall have a right to repurchase. But there was in this case no stipulation on the part of the vendor that he should have a right to repurchase. It was the executants who undertook to reconvey out of kindness to the vendors, just as in *Bhagwan Sahai* v. *Bhagwan Din*, the vendees " as a matter of favour, mercy, kindness and indulgence " stipulated that their vendors should have that right.

The learned advocate for the appellants strongly relied upon a passage contained in the agreement of the 5th of September, 1852, which runs as follows: —

"In the event of our refusal (*i.e.*, the refusal of the vendees to reconvey) they (the vendors) shall have power to deposit into the treasury attached to the Court the amount of consideration entered in the sale deed and after the institution of a suit in Court to purchase their property again."

[589] His contention is that this provision is a strong indication that the transaction was one coming within the purview of Bengal Regulation I of 1798, a Regulation to prevent fraud and injustice in conditional sales of land under deeds of *bai-bil-wafa* or other deeds of the same nature. By that Regulation the mortgagor under deeds of this description was empowered to deposit the amount due on or before the stipulated date in the Diwani Adawlat of the city or zillah in which the land might be situate and redeem the property.

Reliance was placed on the language in question in view of the decision of their Lordships of the Privy Council in the case of *Balkishen Das* v. *Legge*. In that case Legge executed in favour of Balkishen Das and another, a firm of bankers in Benares, a deed of sale of his estate, the

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price stated being Rs. 1,50,000. The consideration was not paid in cash, but consisted in part of money unpaid upon a previous mortgage to the banking firm effected on the 8th of April, 1872, and the rest of the consideration was a balance, retained by the banking firm, of the amount then due on an estimate of expenses for conducting certain factories which they financed for the plaintiff. A second document was executed by the banking firm to the plaintiff on the same day whereby the firm agreed to resell the property to Legge if he paid on the 1st of March, 1876, the sum of Rs. 1,65,000, and it was agreed that if the buyers or their heirs should raise any objection to receive the money and relinquish the property, the vendor should be competent to deposit the amount in cash in the treasury by virtue of the agreement and obtain possession of the property. It was further stipulated that if the estimate of the expenditure on the indigo factories should be varied by consent from year to year, then the vendor should be liable to pay along with the sum specified above whatever sum may be found to be due by him at this time. Their Lordships held that there were contained in the two documents indications that the parties intended to effect a mortgage by conditional sale, and that redemption had been rightly decreed in the Courts below. Lord DAVEY, who delivered the judgment of their Lordships, in the course of his judgment, pointed out that mortgages by conditional sale under various names were a [590] common form of mortgage in India, and that this form was introduced to enable Muhammadans contrary to the precepts of their religion, to lend money at interest and obtain security for principal and interest, and that therefore one would expect to find that the transaction would be made to assume the appearance of a sale. Referring to the case of *Bhagwan Sahai* v. *Bhagwan Din*, he observed :—"Their Lordships decided that case on the language of the deeds in question, which they evidently considered showed that the transaction was not such a transaction as is described in the Regulation of 1806, and there was therefore no right of redemption after the expiry of the date fixed." He then later on observes that "the documents in question contain important indications of the intention of the parties. The second deed or *ikrarnama* provides that if the bankers object to receive the money and relinquish the property, the vendor may deposit the amount in the treasury" by virtue of this agreement "and obtain possession over the *ilaqa*." "This provision" he said "at once suggests a reference to Regulation I of 1798 as being in the opinion of the parties applicable to the case. It was not suggested that there was any other statutory provision or practice by which such deposit could be made by virtue of the agreement alone without the intervention of the Court in a suit for the purpose, while on the other hand the words exactly describe the procedure under the Regulation." Again he observed :—"The estate was made redeemable only on payment as well of the amount which should be found due at the time of redemption on account of the Basharatpur concern as of the stipulated sum of Rs. 1,65,000. "The practical effect of this was," he held, "to consolidate the debt on the factories' account with the principal sum mentioned in the deed and to give the bankers a security on the *taluqa* for the debt of the factories. This gives the transaction the character of a mortgage so far as the factory accounts are concerned and if it is to some extent a mortgage, it may well be held to be so entirely."

The facts of that case are unlike those of the present. Here the agreement for repurchase was at the price originally paid for the property,

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and there was no consolidation of the sum representing the price with a debt on any account such as would give the [591] transaction the character of a mortgage to any extent. The words in the agreement whereby the vendors were empowered to deposit into the treasury the amount of the consideration mentioned in the sale-deed are vague and little weight can be attached to them. Unintelligent draughtsmanship would account for them. The subsequent words "after the institution of a suit in Court" seem to indicate the course which the vendors were to adopt in the event of the vendee's refusal to fulfil his agreement to resell, namely, a suit for specific performance of the agreement. If this be so, the reference to a deposit in Court pointed to a deposit of the purchase money in the Court having seisin of the suit for specific performance. Whatever be the meaning of this passage, it is too obscure and vague in my opinion to justify us in holding that the two documents are to be read together, and that being so read, they constitute a mortgage by way of conditional sale. This is the main plank upon which the learned advocate for the appellants based his argument in support of his contention that this case comes within the ruling in *Balkishen Das* v. *Legge*. The best general test of the intention of the parties in cases such as the one before us is the existence or non-existence of a power in the original purchaser to recover the sum named as the price of the repurchase. If there is no such power there is no mortgage [see *Williams* v. *Owen* (1).] Lord MANNERS in *Goodman* v. *Grierson* (2) adopted a somewhat similar test. He observed:—"The fair criterion by which the Court is to decide whether this deed be a mortgage or not I apprehend to be this:—Are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to?" Tried by this test there can be no doubt that the transactions before us did not constitute a mortgage. A sale with a provision for repurchase is not common either in this country or in England, but there is nothing illegal or objectionable in such a transaction. The document of the 29th of August, 1852, purports in clear and unambiguous language to be a sale-deed. The document of the 8th of September, 1852, likewise in explicit terms purports to be an agreement for resale [592] within a limited period. There is nothing in them to indicate that the parties did not intend that these documents should operate according to their tenor. There is nothing illegal in a transaction of sale with an agreement for resale within a limited time, and I fail to see why these documents should be interpreted differently from any other document. I would point out that no qualms of conscience in regard to the lending of money at interest and obtaining security for principal and interest could have had any influence on the parties to these transactions inasmuch as we find that a simple mortgage securing principal and interest was given and taken by the same parties on the day of the sale of Murulipur Pnul, that is, the 29th of August, 1852. This mortgage is No. 123C of the record. In it we find an admission by the Mortgagors of the receipt of Rs. 2,500 the consideration for the bond, as also of the receipt of the Rs. 5,500, the consideration for the purchase of Murulipur Phul. By this mortgage another property of the mortgagor was hypothecated in the ordinary form, the mortgagors agreeing to pay principal and interest. It cannot, therefore, be said that it was to avoid the interest question

(1) (1840) 5 My. and Cr. 303; 48 R. R. 322.

(2) (1813) 12 R. R. 82.

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that the other transaction was carried out in the form of a sale and agreement for resale. I am at a loss to understand on what principle of equity or good conscience the plaintiff's appellants can justly claim a right now to redeem or repurchase the property. They or their predecessors in title allowed the period for repurchase to elapse, and now after a lapse of more than half a century seek to convert a sale with an option of repurchase within a limited period into a mortgage by way of conditional sale. The Court below in my opinion rightly dismissed their suit. I would therefore dismiss the appeal.

BANERJI, J.—The question in this appeal is whether the two documents of 1852 together constituted a mortgage known as a *bai-bil-wafa* mortgage, that is, a mortgage by way of conditional sale, or an out-and-out sale with a contract for repurchase. The test in these cases is what was the intention of the parties. This is to be gathered from the documents themselves and from surrounding circumstances. The first circumstance to which I would refer is, as pointed out by Dr. Rash Behari Ghose in his well-known work on mortgages, 3rd Edition, p. 114, that "a [593] *bona fide* sale with a condition for repurchase is very rare in this country, while it is a very common practice with mortgagees to take a conveyance of the property from the mortgagor with a condition for repurchase as security for the loan, the mortgagee either taking the rents in lieu of interest or allowing the mortgagor to remain in occupation paying interest on the mortgage money under the name of rent." The next circumstance I would refer to is the fact that in these provinces the Muhamadan forms of conveyancing were followed for a long time, specially in cases in which one of the parties to the transaction was a Muhammadan. [See the observations of EDGE, C. J., in *Ali Ahmad* v. *Rahmat-ullah* (1)]. Another circumstance which I may mention is that as Muhammadans are prohibited from taking interest they resort to the device of obtaining an absolute sale with a stipulation for repurchase in order to evade the prohibition as to interest. This is the origin of *bai-bil-wafa* transactions, under which in the garb of a sale, the creditor enjoys the usufruct of the property in lieu of interest, the transaction being in reality a mortgage. Such mortgages were very common in earlier times and were effected sometimes by the execution of a deed of absolute sale containing a contract for repurchase and often by the execution of two documents one of which purported to be a deed of sale out and out and the other an agreement by the ostensible purchaser to reconvey the property to the apparent vendor. Such transactions have always been regarded as mortgages by way of conditional sale. Among Muhammadan lawyers a long term for repurchase "denotes a mortgage or security for a loan". (See Ghose on Mortgages, p. 77, 3rd edition).

Bearing these circumstances in mind, if we look at the transaction in question; it seems to me to be clear that it was a *bai-bil wafa* mortgage, that is, a conditional sale, and not an absolute sale with a right of repurchase. The persons who purported to be purchasers were Muhammadans and they were to take possession and enjoy the usufruct They executed, a document by which they agreed to reconvey the property "after the expiry of the term of 9 to 10 years," enjoying in the meantime the usufruct in lieu of the use of their money. It is true the two documents bear [594] different dates, but they were presented for registration about the same time, the one on the 18th and the other on the 19th of May, 1853,

(1) (1892) I. L. R. 14 All. 195 (199).

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and neither of them was delivered before registration, as the endorsement of the registering officer shows. They were, therefore, in fact contemporaneous documents, as in ordinary cases of *bai-bil-wafa* mortgages. The long term of ten years is another indication that the transaction was a mortgage. Further, the agreement provides that in the event of the executants of it refusing to execute a sale-deed on receipt of the amount mentioned in the document, the nominal vendors would "have power to deposit in the Treasury attached to the court the amount of consideration entered in the sale-deed." This clause, in my opinion, refers to a deposit under Regulation I of 1798, as in the case of *Balkishen Das* v. *Legge* (1), and shows that the parties regarded the transaction as one of mortgage to which the Regulation applied. The absence of the words "by virtue of this agreement" seems to me to be immaterial, and I do not agree with the court below that a suit for specific performance was contemplated. This case is in many respects similar to that of *Balkishen Das* v. *Legge* referred to above and is distinguishable from that of *Bhagwan Sahai* v. *Bhagwan Din* (2) relied on by the court below. The transaction in question was, in my judgment, one of a mortgage by way of conditional sale. I would therefore allow the appeal, set aside the decree of the court below and remand the case to that court for trial on the merits.

The appeal was therefore dismissed in accordance with the judgment of the Chief Justice, and from this judgment the plaintiff appealed.

The Hon'ble Pandit *Sundar Lal* (with him Pandit *Mohan Lal Sandal*), for the appellant :—

The deed is, in form, no doubt a sale-deed. But we have to look at the real intention of the parties. It is the characteristic of a mortgage by conditional sale that it is ostensibly a sale, *vide* section 58, clause (*c*) of the Transfer of Property Act. In India the origin of the mortgage by conditional sale is traceable to the desire to get round the prohibition of taking interest by the [595] Muhammadan religion. It was a device by which any mention of interest as such was obviated, and the mortgagee in possession was in receipt of profits in lieu of interest. The forms of Indian conveyancing follow more or less Muhammadan usages. So, a deed which is ostensibly a sale-deed but in reality a mortgage has come to be a common mode of conveyancing, even in cases where the parties may have had no objection to the taking or mentioning of interest as such. There is a presumption, therefore, in India, that a deed like the one in dispute is a mortgage rather than a sale-deed. The document itself clearly indicates that it has been drawn up according to Muhammadan modes of conveyancing. The two documents are to be read together, the second being merely supplementary to the first. If there was only one document, the first part of which was ostensibly a sale, but in the second part there was a condition for return of the party on repayment of the money, then undoubtedly it would be deemed to be a mortgage by conditional sale. The fact that the second part of the document was contained in a separate deed would make no difference in principle.

The intention of the parties is to be gathered from the circumstances. The document was presented for registration by the "vendors." This shows that it remained with them and not with the vendees after execution. Had the transaction as embodied in the first document been intended to be complete by itself, the document would have been made

(1) (1899) I. L. R. 22 All. 149.

(2) (1890) I. L. R. 12 All. 387.

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over to the vendees at once. The venders did not part with it before getting the second deed executed in their favour. Registration was delayed for a long time. But the fact is significant that when the parties did register, they registered both documents at the same time. Then, the terms of the agreement contained in the second document as to reconveyance, and especially the stipulations as to deposit in court and *subsequent* suit, &c., follow closely the provisions as to the mode of redemption and foreclosure of a mortgage which are laid down by Regulation I of 1798, section 2 and the Preamble, and Regulation XVII of 1806, section 7. The case in this respect is very similar to that of *Balkrishen Das* v. *Lepu* (1). Redemption of a mortgage is the only case in [596] which a deposit in court previous to the institution of a suit is, or has ever been, allowed; never where the subject-matter is a contract to reconvey. The absence of a covenant to repay the money (the "price") does not necessarily prevent the transaction from being a mortgage. Under the English Law, no doubt, every mortgage must imply a covenant to repay. But that is not so in India. Here, in a mortgage by conditional sale there is no covenant to repay. The test, according to the English law, of the existence in every mortgage of a recoverable debt is the basis upon which the decision in *Ghulam Nabi Khan* v. *Niaz-un-nissa* (2) has been rested. The case of *Wajid Ali Khan* v. *Shafakat Husain* (3) is in my favour.

The Hon'ble Pandit *Moti Lal Nehru* (with him Maulvi *Ghulam Mujtaba*), for the respondents:—

In order to find out what, in this case, the effect of the transaction was intended to be, the real point for consideration is whether the two documents were under contemplation simultaneously; whether the one formed the consideration for the other. Even if the two deeds were executed on the same day, that fact by itself would not necessarily make the transaction a mortgage. If the agreement to reconvey on repayment be a condition of the "sale," then the transaction is a mortgage. But if the sale be absolute and not dependent on any condition, then any subsequent and separate agreement between the parties will not have the effect of making the transaction any the less a sale. The words "on condition" in section 58, clause (*c*) of the Transfer of Property Act are important. It may be that the parties originally intended *and effected* a sale out and out; but that subsequently they desire to make the transaction a mortgage by conditional sale. But the sale when once effected created an absolute title; and any subsequent transaction could not derogate from that title and change the sale into a mortgage. It is open to parties to effect a sale out and out and couple it with an agreement that on the money being repaid within a certain time the property would be reconveyed, without there being any idea of a mortgage. Parties are free to enter into such a transaction, and the law will not make it a mortgage. In a sale with a right to repurchase [597] an absolute title at once passes to the vendee who, however, agree to put it at an end if the vendor accomplishes a certain thing within a certain time. In a mortgage by conditional sale the title passing to the "vendee" is not absolute but becomes absolute if the "vendor" fails to accomplish a certain thing within a time fixed by the law.

(1) (1889) I. L. R. 22 All. 149
(2) (1910) I. L. R. 33 All. 387.
(3) (1910) I. L. R. 33 All. 122.

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Had the two deeds been intended together to create only one transaction, namely, a mortgage by conditional sale, the stamp duty would not have been paid twice over. Under Act X of 1829 a deed which was merely collateral to a principal deed was chargeable with the maximum duty of Rs. 8 only. Avoidance of mention of interest could have been no motive for not executing a mortgage in the ordinary way. There was a simple mortgage executed between the parties on the same date in which interest was stipulated for. Again, a few years later the same vendors executed an unambiguous and clear deed of mortgage by conditional sale in respect of another property. This shows that if they intended to make the deed in suit one of mortgage by conditional sale they could easily have done so in a straightforward manner. Registration was not compulsory at that time. So it could not have been with any intention of postponing the effect of the first deed that registration was delayed and ultimately effected nearly simultaneously with that of the second deed. As to the custody of the deed the vendor himself admits that the deed after execution was delivered to the vendees. It is common for a deed to be handed over by the person in whose favour it is to the executant just before the registration so that it may be presented for registration by the executant. There is nothing in the terms of the first deed to show that any condition was imposed or contemplated. This case is therefore different from that of *Wajid Ali Khan* v. *Shafakat Husain* (1). In the second deed the vendees do not talk of "returning the property" but of "executing a fresh sale-deed," treating it as an entirely new transaction. And the execution of a fresh sale-deed, or indeed, any document is nowhere required by the Regulations for the purpose of freeing a property from a mortgage and returning it to the mortgagor. To sum up:—The long interval of seven [598] days is very much against the appellant. On a correct interpretation of the terms of the second deed it appears that there is no provision for a deposit in Court previous to the institution of any suit.

The appellant never put forward any claim to being a mortgagor till now, which is just before the expiry of 60 years. There is no indication whatever that the parties in any way contemplated the existence of a debt which was to be repaid. There must be a debt before there can be a mortgage; *Ghulam Nabi Khan* v. *Niaz-un-nissa* (2). The case of *Bhagwan Sahai* v. *Bhagwan Din* (3) is in my favour.

The Hon'ble Pandit *Sundar Lal* replied.

RICHARDS, J.—This appeal arises out of a suit for redemption of an alleged mortgage. The Court of first instance dismissed the suit. The plaintiff appealed and the appeal coming before a bench of this Court, consisting of the Hon'ble the Chief Justice and the Hon'ble Mr. Justice Banerji, the learned Judges differed, hence the present appeal under the Letters Patent.

The facts appear very fully from the judgments of our learned brothers, and it is only necessary very shortly to refer to them.

On the 29th of August, 1852, the predecessors in title of the plaintiff executed a deed in favour of the predecessors in title of the defendants. The document on the face of it was an out-and-out transfer by way of sale of the properties now sought to be redeemed.

On the 5th of September, 1852, another deed was entered into

(1) (1910) I. L. R. 33 All. 122.
(2) (1910) I. L. R. 33 All. 337.
(3) (1890) I. L. R. 12 All. 387.

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between the same parties. This document recites the sale-deed of the 29th August and proceeds as follows:—

"As we, the executants, are now willing to help and treat with kindness the vendors, we, the executants, with our own free will, do hereby covenant and give it in writing that if the aforesaid vendors after the lapse of 9 or 10 years from the date of the aforesaid sale-deed do pay to us the purchase money, &c., we shall forthwith execute a fresh sale-deed on receipt of the sale-consideration entered in this document and get mutation of names effected in the revenue papers."

The deed goes on to provide that in default of payment at the end of 10 years the grantors shall have no further claim to the property.

[599] The plaintiff contends that those documents must be read together, and if they are read together they constitute a mortgage by conditional sale within the meaning of section 58 of the Transfer of Property Act, clause (*e*); that the plaintiff notwithstanding the time that has elapsed has still a right to redeem, and that therefore his suit ought not to have been dismissed.

The Transfer of Property Act was not, of course, in force when the document of the 29th August, 1850, was executed, but it is not contended that the Act introduced any change in the law as to what constituted a mortgage by conditional sale. The defendants contend that the deed of the 29th of August was what, on the face of it, it purports to be, namely, an out-and-out sale, and the subsequent document of the 5th of September was also what it purports to be, namely, an act of grace, and that assuming it conferred on the plaintiff or his predecessors in title any rights at all, such rights could only be exercised according to the actual terms of the deed and ceased and determined on the expiration of the period of ten years mentioned in the latter deed.

The plaintiff argues that the form of mortgage by conditional sale is very common, particularly where the mortgagees are Muhammadans, that although a mortgage by conditional sale is more frequently carried out by a single deed, nevertheless such a mortgage carried out by two deeds is not uncommon and was still less uncommon in the year 1852. He lays great stress on the improbability of the grantees in the deed of 29th August, 1852, if in fact they were absolute vendees, foregoing their rights as such and becoming mortgagees in possession for a term of ten years.

The defendants rely on the unexplained, as they contend, interval of seven days between the execution of the two deeds, the express language of the latter deed and certain other facts and circumstances to which I shall refer hereafter, as demonstrating that the two deeds were quite independent and ought to be given effect to accordingly.

It seems to me that if we held that at the time of the execution of the first deed the parties intended that the second deed also should be executed, we ought to hold that the two deeds **[600]** constituted a mortgage by conditional sale and that the plaintiff has a right to redeem. On the other hand if, at the time of the execution of the sale-deed, there was no intention of executing the second deed, the defendants are entitled to have the latter construed strictly and quite independent of the provisions of the Transfer of Property Act and the law of mortgages.

There can, in my opinion, be no doubt that if the two deeds were of even date, an almost irresistible presumption would arise in favour of the transaction being a mortgage. I shall now very shortly refer to a few facts and circumstances relied upon by the parties.

The sale-deed was not registered until the 18th of May, 1853, and it

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appears from the registration certificate to have been presented for registration by the ostensible vendors.

The deed of the 5th of September was registered on the 19th of May, 1853, and was presented for registration by the ostensible vendees.

The plaintiff contends that the presentation of the ostensible sale-deed for registration shows that the so-called sale-deed must in the interval have remained undelivered in the hands of the vendors. I do not think that this inference can be drawn. It is a very common practice for the deed to be presented by the party against whose interest it is, so as to make repudiation thereafter more difficult.

If we can believe the plaintiff's own witness, Narain, the sale-deed was given over to the ostensible vendees on execution.

The parties entered into another transaction on the 29th August, 1852. This was a simple mortgage. It recites the sale of mauza Murlipur Phul, as a sale, not as a mortgage, nor as a mortgage by conditional sale. The interest is at a low rate, but it shows that the grantees in the first mentioned deed of 29th of August, 1852, though Muhammadans, had no scruple in lending money on a mortgage which expressly provided for the payment of interest. On the 17th July, 1863, the parties entered into another transaction which was on the face of it a clear mortgage by way of conditional sale. This deed, no doubt, was executed some ten years after the first transactions, but it cannot be left altogether out of consideration. It shows that in the year 1863 the parties **[601]** when they wanted to have a mortgage by conditional sale, adopted the more usual form of one single deed instead of two.

The deeds of the 29th of August, 1852 (ostensible sale-deed) and 5th September, 1852, each bears a stamp of Rs. 32. If the transaction had been a mortgage, stamp of Rs. 32 (or if carried out by two deeds Rs. 38) would have been sufficient. Lastly, it seems to me that no explanation has been given of the interval of 7 days between the execution of the two deeds. If the two deeds were all along dependent one on the other and constituted a mortgage by conditional sale, why were both deeds not ready and executed the same day? As already mentioned, there was a simple mortgage executed on the 29th August. The plaintiff's advocate referred us to the evidence of Narain, where the witness states that there were differences between the grantors, and suggests that this explains why the two deeds were not executed on the same day. I cannot accept this explanation. It perhaps might explain the delay in registration, but it does not explain the interval of 7 days. Furthermore, I have already pointed out that another deed of simple mortgage was executed on the 29th of August. Differences between the grantors ought, it seems to me, just as much to have delayed the execution of this deed as the execution of the deed of the 5th of September. As to the argument based on the improbability of the vendees converting themselves into mortgagees, it may have been that the predecessors in title of the defendants considered that it was unlikely that the plaintiffs would ever be able to redeem, and that the grantees would in any event gain the advantage of getting possession with the good will of the grantors. However this may be, I do not think that this matter can outweigh the other circumstances of the case. After careful consideration I have come to the conclusion that we ought to hold that at the time of the execution of the deed of the 29th of August, 1852, the parties to it intended that there should be an out and out sale of mauza Murlipur Phul

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and that the deed of the 5th of September following was the result of a subsequent arrangement between the parties, and that therefore the suit was rightly dismissed by the court of first instance. In my opinion the language of the deeds themselves, and the surrounding [602] circumstances, so far from showing that it was the intention of the parties on the 29th of August, 1851, merely to make the property security for money lent, on the contrary show that the intention was that there should be an out and out sale. The case of *Balkishen Das* v. *W. H. Legge* (1) was decided on the language of the documents and surrounding circumstances peculiar to that case, and for this reason cannot, I think, be relied on in the present case.

I would dismiss the appeal.

GRIFFIN, J.—The intention of the parties has to be gathered from the documents themselves, the circumstances attending their execution and also from the conduct of the parties. The reason usually assigned for the execution of deeds of conditional sale instead of ordinary mortgages is that Muhammadans who abide strictly by the tenets of their religion object to receiving interest on money lent. The vendees in the present case, who are Muhammadans, have no such scruples, for on the same date, *i.e.*, 29th of August, 1852, the plaintiff or his predecessors in title executed a deed of mortgage bearing interest in favour of the vendees in respect of another property. The sale was complete or absolute on 29th of August, 1852. The document in clear and unmistakeable terms indicates that it was a sale out and out. Mutation of names took place in respect of the property on 7th September, 1853, and ever since that date the vendees have remained as owners of the village. If it had been the intention of the plaintiff or his predecessors in title to execute only a mortgage-deed on the 29th August, 1852, it is difficult to imagine why they should have consented to execute an out and out sale-deed. That the agreement of the 5th September, 1852, was the result of an afterthought is, in my opinion, indicated first, by the lapse of seven days since the date of the execution of the sale-deed, and further by the fact that in order to execute the agreement the plaintiff had to incur the further expense of purchasing a fresh stamp-paper for Rs. 32.

If it had been the intention of the parties on the 5th of September 1852, that the sale-deed of the 29th August of the same year should not operate as a sale-deed, but that the defendants [603] were to remain in possession merely as mortgagees, the simplest and most direct methods for the plaintiff to adopt would have been on 5th September, 1852, to tear up the sale-deed and execute another document setting out the intention plainly and distinctly.

I would therefore agree with the view taken by the learned Chief Justice.

I would dismiss the appeal.

TUDBALL, J.—I am fully in agreement with my learned colleagues in the view they have taken of the case.

It is clearly a question of intention. On the 29th of August, 1852 two documents were executed, one an out and out sale of the property in question and another a simple mortgage-deed (bearing interest) of other property. The Muhammadan vendees, therefore, clearly had no scruple in taking interest and in openly declaring this in writing.

(1) (1899) I. L. R. 22 All., 149.

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If, therefore, the parties intended a mortgage in both cases, there was no reason why they should in the one case have executed what on the face of it is an out and out sale deed.

The agreement to resell on payment of the purchase money was executed seven days after (5th September, 1852). There is no explanation of this delay.

The witness, Narain, is one of the original vendors. He admits that Ilahi Bakhsh wished to purchase the property, but says that he was only willing to mortgage and that the two deeds were executed because Ilahi Bakhsh stated that as a Muhammadan he could not openly take interest. This statement is disproved by the simple mortgage deed of the 29th of August, 1852.

It is suggested at the bar that the Muhammadans wished to evade the usury laws which were then in force and forbade the taking of more than 12 per cent. interest. There is no material on record to indicate the profits of this village in 1852, and the resultant interest on the amount paid by the vendees.

In regard to registration it has first to be noted that under the law, as it then stood, registration was not compulsory, and the sale was complete on the 29th of August, 1852. Moreover, though the registration was delayed until May, 1853, even then the two documents were not registered together but on separate dates.

[604] On the evidence of Narain himself the sale deed up to the time of registration remained with the vendees and not with the vendors. It does not follow from the bare fact that the vendors handed it to the Sub-registrar in May, 1853, that it had till that date remained in their (the vendor's) hands.

It is contended that the language used in the deed of agreement, where it sets forth the action which the vendors might take to enforce the agreement in case the vendees failed to carry out their promise, is a reference to the procedure which was then in force under Regulation I of 1798 for the redemption of a mortgage, and clearly indicates the intention of the parties. In the first place I think the document has not been properly translated. The word 'and' has no place in the original. In the next place the language would apply in a certain degree to a suit for specific performance of contract. But in any case we have to look to the intention of the parties at the time when the sale-deed of the 29th of August, 1852, was executed, and it is not possible to say from this language in the deed of the 5th of September, 1852, that on the 29th of August, 1852, the parties intended a mortgage and not a sale. I would further point out that, though the vendors live in this very village and two settlements have taken place since the year 1852, they have never put forward at such settlements a claim to be recorded as mortgagors. The vendees have all along been recorded as full owners. The parties clearly understood what a mortgage was, including a mortgage by conditional sale, as is shown by the subsequent litigation (and its results) on the simple mortgage deed of the 29th of August, 1852. In my opinion there are not sufficient grounds for holding that the transaction entered into by the parties on the 29th of August, 1852, was other than what it purported to be on the face of the sale-deed of that date. The case is clearly distinguishable from the case of *Balkishen Das* v. *Legge* (1) and is similar to that of *Bhagwan*

(1) (1899) I. L. R. 22 All. 149.

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Sahai v. *Bhagwan Din* (1); in fact, is a far stronger case than the latter in that there was an interval of seven days between the two documents. I would, therefore, dismiss the appeal.

BY THE COURT.—The appeal is dismissed.

Appeal dismissed.

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33 A. 605 (=8 A. L. J. 996=12 I. C. 93).

[605] APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Tudball.

GANGA SINGH AND OTHERS (*Defendants*) *v.* CHEDI LAL AND OTHERS (*Plaintiffs*).*

[24th July, 1911.]

Pre-emption—Wojib ul-arz—Custom—Evidence—Nature of evidence required to establish a custom of pre-emption.

The plaintiffs claimed a right, based upon contract or custom, to pre-empt a sale of zamindari property. The property was situate in one of the three mahals of a village named Suram. The plaintiffs were not co-sharers with the vendors in that mahal: the vendees were strangers.

In 1873 the village Suram consisted of a single mahal, and the village wajib-ul-arz of that date contained the following reference to pre-emption:—"In future if any *pattidar* wishes to transfer his share by sale * * * to a stranger * * * first, the sharers in the *patti khas*, then *pattidars* in the *thok*, and then *digar pattidaran deh* shall have a right to purchase."

In 1883 perfect partition took place, and the village was divided into three separate mahals.

A fresh wajib-ul-arz was drawn up for each of the new mahals, but in each the provisions regarding pre-emption were copied *verbatim* from the wajib-ul-arz of 1873.

Held (1) that the plaintiffs had failed to establish any right of pre-emption based on contract; (2) that the oral evidence was worthless as supporting the custom set up by the plaintiffs, and (3) that the evidence afforded by the wajib-ul-arzes of 1873 and 1883 was quite insufficient to establish the right claimed by the plaintiffs. If such right was to be regarded as one based on an alleged custom. *Dalganjan Singh* v. *Kalka Singh* (2) referred to. *Auseri Lal* v. *Ram Bhajan Lal* (3) and *Sardar Singh* v. *Ijaz Husain Khan* (4) discussed.

Observations by RICHARDS, C. J., on the proper method for a Court to approach the consideration of pre-emption suits based upon custom.

[Fol. 24 I. C. 271; Ref. 14 I. C. 308; 15 I. C. 54: 24 I. C. 422; 38 All. 27=30 I. C. 947; 35 All. 478.]

THIS was a suit for pre-emption of certain zamindari property situate in one of the mahals of the village of Suram, pargana Ouraiya. In 1873 this village consisted of a single mahal and the wajib-ul-arz of that date contained the following reference to pre-emption:—"In future if any *pattidar* wishes to transfer his share by sale * * * to a stranger * * * first, the shares in the *patti khas*, then the *pattidars* in the *thok*, and then *digar pattidaran deh* shall have a right to purchase." In 1883 perfect [606] partition took place and the village was divided into three mahals. Fresh wajib-ul-arz were framed, but in each the provisions as to pre-emption were copied *verbatim* from the wajib-ul-arz of 1873. The plaintiffs were not co-sharers in the mahal in which the

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* First Appeal No. 296 of 1910 from a decree of Babu Bihari Lal, Subordinate Judge of Mainpuri, dated the 15th of September, 1910.

(1) (1890) I. L. R. 12 All. 387.
(2) (1899) I. L. R. 22 All. 1.
(3) (1905) I. L. R. 27 All. 602.
(4) (1906) I. L. R. 28 All. 614.

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property sold was situated. The vendees were strangers. There was no reliable evidence outside the wajib ul-arzes above referred to as to the existence of a right of pre-emption based either on contract or custom. The Court of first instance (Subordinate Judge of Mainpuri), however, decreed the plaintiffs' claim on the basis of the wajib-ul-arzes. The defendants thereupon appealed to the High Court.

Babu *Sarat Chandra Chaudhri* (for Dr. *Satis Chandra Banerji*), for the appellants.

Mr. *M. L. Agrawala* (with him the Hon'ble Pandit *Sundar Lal*), for the respondents.

RICHARDS, C. J.—This is an appeal in a suit for pre-emption. The admitted facts are as follows:—This property in question is situate in mauza Suram, pargana Ouraiya. In 1873, mauza Suram constituted a single mahal. The wajib-ul-arz of that date is produced and contains the following reference to pre-emption :—

"In future if any *pattidar* wishes to transfer his share by sale . . . to a stranger . . . , first the sharers in the *patti khas*, the *pattidars* in *thok*, and then *digar pattidaran deh* shall have the right to purchase."

In the year 1883 perfect partition took place and mauza Suram was divided into three separate mahals. A copy of the wajib-ul-arz on partition was copied out as the wajib-ul-arz for each of the new mahals.

In the events which have happened, the plaintiffs are not now co-sharers of the vendor, that is to say, they are not co-sharers in the same mahal, while the defendants are strangers. This view is, I think, supported by abundant authority, and if it is correct, it follows in the present case that the custom of pre-emption which existed in 1873, is the same custom which existed when this suit was instituted.

Now what was the custom which existed in 1873? It was a custom (leaving out immaterial preferential rights) for sharers in [607] the village to pre-empt as against strangers. But in 1873 every sharer in the village must have been also a co-sharer with the vendor, because the village was the one single mahal. It follows that there could never have been a custom of pre-emption in favour of persons who were not co-sharers with the vendor. This is sufficient to dispose of the case, unless it can be contended that co-ownership was a matter of no importance. I think it could hardly be contended for a moment that mere residence in the village would confer a right to pre-empt, or, that it was likely that such a custom would have grown up. It is absolutely clear that possession of a share in the village was an essential condition. The wajib-ul-arz itself so provides. I cannot see why the possession of a share in the village was essential unless co-partnership with each other was also essential. Under the Muhammadan law from which customs of pre-emption are said to have been borrowed, partnership is *the* most important fact. The importance of the existence of partnership between the pre-emptor and the vendor in pre-emption cases of zamindari property was considered at great length and I think fully recognized by the five Judges who decided the case of *Dalganjan* v. *Kalka Singh* (1). I propose to quote at some length from the judgment in this case, because, if the existence of co ownership is essential or important in pre-emption, it should be borne in mind when considering the probability or improbability of the existence of the custom claimed by the plaintiff in the present case and the weight to be attached to the wajib-ul-arz as evidence

(1) (1899) I. L. R. 22 All. 1.

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of it. At page 10, the Chief Justice says :—" The most essential feature of the co-parcenary body is the joint and several responsibility of the co-sharers for the payment of the Government revenue assessed on the mahal, coupled, in cases of zamindari tenure, with the holding and management of the whole of the lands of the mahal by all the co-sharers in common. It is for the mahal for 'the local area held under a separate engagement for the payment of the land revenue,' not for a village or other local area not being a mahal, that the settlement officer frames the wajib-ul-arz. It is meant as a record of the contracts, or customs of the co-sharers of the mahal. [608] This being its object, it is *prima facie* unlikely to include any contract or custom which is absolutely independent of the continuance of the mahal as a fiscal and proprietary unit or of the coparcenary body for which it is framed. Next, what is pre-emption ? It is a right very closely connected with the objects of the coparcenary system. Its essential purpose is the exclusion of strangers from the co-parcenary body and the maintenance of the existing proprietary body throughout all changes of ownership. It thus *prima facie* implies that the coparceners desire to preserve and not to destroy their mutual connection, and is *prima facie* inapplicable after that connection has been served by a perfect partition."

Again at page 12 the Chief Justice quotes from the case of *Motee Sah* v. *Mussumat Goklee* (1) :—" Now, an essential condition of the existence of a right of pre-emption is that the parties claiming such a right shall be coparceners in the same estate as those against whom the claim is made, a relation between the parties which is extinguished by the very operation of partition and the separate proprietorship thereby established." The learned Chief Justice adds :—" I infer that the wajib-ul-arz in that case confined the right of pre-emption to coparceners of the vendor," and it may be urged that the very question we have in this case to decide is whether or not the wajib-ul-arz in the present case confines the right of pre-emption to co-parceners of the vendor.

Practically speaking, the two wajib-ul-arzes of 1873 and 1883 are the only evidence of the existence of rights of pre-emption in the village or mahal.

The oral evidence is quite worthless as supporting the particular custom claimed by the plaintiffs. The learned Subordinate Judge decided in favour of the plaintiffs and decreed the suit. The defendants appeal.

The question is, have the plaintiffs a right of pre-emption based either on contract or on custom ? It seems to me absolutely clear that the plaintiffs have no right based on contract. If any right of pre-emption existed other than a right based on custom, such right must exist by virtue of a contract, the evidence of which is the partition wajib-ul-arz of 1883, but the plaintiffs [609] cannot rely upon this wajib-ul-arz as a contract. They were no parties to it. The wajib-ul-arz of 1883 in question is the wajib-ul-arz for mahal Bihari Lal, in which the plaintiffs are not co-sharers and have no concern. If the entry in the wajib-ul-arz of 1883 is a record of contract the contract was between the co-sharers in mahal Bihari Lal.

In my judgment the case of the plaintiffs must fail unless they can establish the existence of a custom giving them a right of pre-emption notwithstanding that they are not co-sharers of the vendors.

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(1) S. D. A. N. W. P. 1861 Vol. I. p 506.

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I wish to say a few words as to what I consider as a general rule is the proper method for the court to approach the consideration of pre-emption suits based on custom, because I think that the neglect of such method has led to much confusion and supposed conflict of judicial decisions. I think the same cause also has led the Courts into attempting to draw, what, with great respect, I must call almost ridiculous distinctions between different wajib-ul-arzes, particularly when regard is had to the circumstances under which such documents were prepared and the class of persons who prepared them.

In pre-emption cases based on custom the proper issue ought to be "does the custom alleged by the plaintiff pre-emptor exist." The onus lies on the plaintiff, and he must establish his case by the production of sufficient evidence. The proper issue is not what is the true construction of this or that wajib-ul-arz. No doubt it is quite true that the court will have to consider, amongst other things, the language of the wajib-ul-arz when that document is adduced in evidence. But the fact that the court has to consider the language of the wajib-ul-arz does not make the construction of the wajib-ul-arz the real issue, or the equivalent of the real issue in the case. This is not a mere verbal distinction. It is a real distinction, which, I think, ought to be carefully borne in mind. I am speaking, be it remembered, of cases of pre-emption based on custom. In cases based on contract the considerations may be quite different.

To continue. After considering the evidence, (whether such evidence consist solely of the wajib-ul-arz, or partly of the wajib-ul-arz and partly of other evidence), it is the duty of the **[610]** Court to come to a conclusion whether the fact of the existence of the custom is "proved," "disproved" or "not proved." I am using these expressions with the meaning given to them by section 3 of the Evidence Act. If the fact is proved, the plaintiff is of course entitled to a decree. If it is disproved, or not proved, the plaintiff's case fails.

During the argument numerous decisions were referred to, and the case has been presented to us as of considerable difficulty. It seems to me, however, that if we are at liberty to apply the simple and elementary rules which I have mentioned above, all difficulty quickly disappears. As I said before, the evidence in the present case must be treated as consisting of the two wajib-ul-arzes, which are *verbatim* copies of each other. I am clearly of opinion that partition does not abrogate or cause an existing custom of pre-emption to cease to exist. The custom continues after partition, unless the co-sharers in each new mahal enter into a new arrangement between themselves. It might perhaps be open to the co-sharers in one mahal to make a contract with the co-sharers in the other mahals. But this would be an unusual contract, and it would require clear evidence to prove it, This, with all respect, I think, is not the question. The question is, are we reasonably satisfied upon the evidence that the custom claimed by the plaintiffs exists? The wajib-ul-arz is not the custom. It is evidence of the custom, and in considering the wajib-ul-arz we are entitled to consider the condition of the village at the time the record was made, the possibility, or impossibility, the probability, or improbability of such a custom then existing, and whether or not the officer who prepared the wajib-ul-arz was really recording the custom claimed. Again, at page 28 the Chief Justice says:—"We are interpreting and applying a particular custom of which the plaintiff claims the benefit. In considering who is entitled to the benefit of a custom it is essential to see who are

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the persons among whom it has in fact habitually prevailed. It cannot be claimed by anyone who is not a member of the class thus determined. Now there can be no doubt as to what was the class of persons who at the time when the wajib-ul-arz was framed, habitually exercised the right of pre-emption by virtue of the custom. They were the co-sharers of the undivided mahal which [611] the village Sarai Sitan then formed and no others. There was no distinction between shareholders in the village and co-sharers of the entire village, there was only a single class of co-sharers. That is the only class among whom the custom actually prevailed, and to whom therefore the right belonged. It is now sought to apply the custom for the benefit of the plaintiff, who stands in a totally different relation to the village, to the vendor, and to the property sold. He is not a co-sharer of the entire village. He is not a member of the class who exercised the right of pre-emption at the time when the custom was recorded. He is a member of a class which only came into existence through the partition, persons who have shares in a particular sub-division of the village. He is not even a co-sharer of the vendor. To allow him to pre-empt under the old wajib-ul-arz would be, in my opinion, to change the custom while professing to apply it." The other Judges appear to have agreed with the learned Chief Justice. KNOX, J., says :—" I concur in all that the learned Chief Justice has written."

It seems to me that, the more unusual a custom or usage is, the stricter ought to be the proof of its existence, and that this applies to customs or usages of pre-emption just as much as to any other custom or usage. If the custom claimed is of a common or usual nature, the wajib-ul-arz may be sufficient proof and justify the court in coming to the conclusion that the custom exists. If the particular right of pre-emption claimed is of an unusual nature, the wajib-ul-arz may be almost worthless as evidence or quite insufficient to prove the existence of the custom. In the present case, I think that the custom claimed by the plaintiffs is of an unusual nature, and in support of this view I refer to the passages which I have quoted above and adopt what the learned Chief Justice has said on the importance of co-ownership in pre-emption. If this vexed question of pre-emption in the province of Agra is to be settled by legislation (and I hope it may be), I doubt very much whether any authority who would be likely to be consulted would suggest the propriety of giving a right of pre-emption to persons who were not co-sharers in the mahal. The expression *pattidar deh* in the wajib-ul-arz of 1873 clearly applied to co-owners, but, [612] even assuming for the purposes of argument that the expression strictly construed means simply "sharer in the village" and not "co-sharer in the village", nevertheless, after taking into consideration the time and circumstances under which the wajib-ul-arz was prepared and the constitution of the village, so far from believing that the custom claimed by the plaintiff existed, I believe that it did not exist. I am certainly quite unable to say that the existence of the custom has been proved.

The only evidence produced, *viz.* the wajib-ul-arz, does not convince me. The learned counsel for the respondents has referred to a number of authorities, and amongst them the case of *Anseri Lal* v. *Lal Ram Bhajan Lal* (1) and the case of *Sardar Singh* v. *Ijaz Husain Khan* (2).

The first of these cases was a first appeal and the court had to find on the question of fact. The terms of the record in the wajib-ul-arz were

(1) (1905) I. L. R. 27 All. 602. (2) (1906) I. L. R. 28 All. 684.

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very similar to the present case. STANLEY, C. J., held that the sharer in the village who was not a co-sharer with the vendor, had a right of pre-emption. At page 610, BURKITT, J., says:—" Having had an opportunity of perusing the judgment of the learned Chief Justice, I have come (though not without some hesitation) to the conclusion that his decision as to the meaning to be given to the words *mauza* or *deh* when used in a wajib-ul-arz is correct." Later on he says:—" I have no doubt that in a large number of cases the word *deh*, or mauza or *gaon* crept into the new wajib-ul-arz through the ignorance or carelessness of the settlement officer's muharrir when copying the wajib-ul-arz of the parent mauza." STANLEY, C. J., at page 609 says:—" Finding then no ambiguity whatever in the terms of the new wajib-ul-arz, it appears to me that the court is bound to construe them according to the plain sense of the words used, and that we ought not to put a construction contrary to the plain sense in view of anything *dehors* the documents." It seems to me, with all respect, that this was not the correct way of considering the question. Does it not appear as if BURKITT, J., was finding in favour of the existence of the custom (a question of fact) on evidence which he considered of no weight or value whatever. If the view taken by STANLEY, C. J., be **[613]** correct, the result might be that the Court, tying itself down to particular words used by an ignorant or careless muharrir, would find in favour of the existence of an unusual and unnatural custom which it was perfectly certain never existed at all, unless it shut its eyes to all other considerations save the actual words in the wajib-ul-arz.

In my opinion both the cases relied on are contrary to the view taken by the entire Bench which decided the case of *Dalganjan Singh* v. *Kalka Singh*. In the present case, I think that the learned Subordinate Judge was wrong under the circumstances in thinking that there could be a new custom or any variation of the custom after the partition, and that he ought to have applied his mind to considering what was the custom recorded in the year 1873, and whether or not the custom that was then recorded was a custom which entitled a person who was not a co-sharer with the vendor to pre-empt in the case of a sale by one of the co-sharers in the village Had he done so, and considered the great improbabilty, if not impossibility, of such a custom ever having existed; if he had taken into consideration that the record in the wajib-ul-arz must have been the result of instructions given by the co-sharers to the officer on matters concerning their coparcenary rights, I think it very improbable that he would have come to the conclusion that the plaintiff had proved the existence of the custom he claimed.

The learned Subordinate Judge might fairly have come to the conclusion that a custom of pre-emption existed among the co-sharers, but not *the* custom claimed by the plaintiffs, that is to say, a custom giving a right to a person who was neither a co-sharer with the vendor nor in the mahal. I have already given my reasons for holding that the plaintiff cannot succeed on the basis of contract. I would allow the appeal.

TUDBALL, J.—I fully agree with the learned Chief Justice. The plaintiffs claim the right to pre-empt, though at the date of the sale in question they had no share in the mahal, and were therefore not co-sharers with the vendor therein. If the claim be based on contract, then their suit fails for the reasons given by my learned colleague. If their claim be based on custom, then the custom put forward is one under which a person owning a share in a **[614]** separate mahal, (that

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is, a separate and distinct portion of a village which consists of several mahals), and who is not a member of the co-parcenary body to which the vendor belongs and is therefore not a co-sharer with the latter, has a right to pre-empt because the vendor has transferred his share to one who previously owned no share in any of the mahals in the village. In other words, the plaintiffs say :—"Though we are not co-owners with the vendor, still we own a share in one of the mahals in the village and the custom gives us a right to pre-empt." To establish his custom they produce the wajib-ul-arz of 1873, a document drawn up prior to partition and which for the purposes of this judgment I assume to contain the relation of an existing custom. That custom was one under which a member of an undivided coparcenary body could pre-empt if any member of that body sold his share to a stranger. The object of the custom was clearly to prevent the introduction of an outsider into the coparcenary body. Such a stranger might be very unwelcome to the other members. But this is not the custom which the present plaintiffs now put forward. The original coparcenary body has split up into several distinct and separate such bodies, no one of which has any further connection or concern, in any way, with any of the others. The words "*pattidar deh*" were used in the wajib-ul-arz of 1873 at a time when there was only one mahal. It does not follow that the courts must on the bare meaning of those words throw on one side and entirely leave out of consideration that *co-ownership* which was at the root of the custom itself. The custom, as re-corded in 1873, did not and could not refer to the state of affairs as they now are, when there are *pattidars* in the village who are not co-owners in a great part of the village with each other. The record of the custom in 1873 must be read in the light of the then existing state of affairs in order that its true meaning may be grasped. The object of the custom, the cause of its growth and existence must also be kept in view. Paying regard to all these points it is clear to my mind that the document in question does not prove the custom which is now put forward by the plaintiffs.

Turning now to the wajib-ul-arz of 1883, drawn up at partition for this mahal, we find that it is merely a *verbatim* copy [615] of the old one of 1873. If it is not a record of an agreement between the co-sharers of this mahal, it must be the record of a custom existing among the co-sharers of the mahal which had only just come into existence and in which no new custom could possibly have sprung up. The wajib-ul-arz, it must be noted, is drawn up, not for a village, but for a mahal, and is supposed to set forth custom obtaining among the co-sharers therein. If it be taken that it related to the old custom which had previously existed, and which was not necessarily destroyed by the partition, we are again met with the difficulty that the old custom contemplated the existence of co-ownership between the vendor and the pre-emptor. In the present circumstances that co-ownership does not exist. Muhammadan law gives the right of pre-emption, first of all, to *shafi-i-sharik*, then to *shafi-i-khalit* and, lastly, to *shafi-i-jar*. It originally applied to small plots of land and houses. In this country it has been extended to zamindari estates, but never on the ground of vicinage alone. Where two co-sharers of such an estate have perfectly partitioned their shares so as to entirely put an end to co-ownership in every way, it has been distinctly ruled more than once that under the Muhammadan law the right of pre-emption is lost; because after such a partition neither can be a *shafi-i-sharik* or a

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shafi-i-khalit ; and vicinage alone in such cases gives no right of pre-emption. It is worthy of note that co-ownership in Muhammadan law gives a prior right of pre-emption, and the customs which have sprung up among Hindus as well, in the case of such estates, have always had as their basis the existence of co-ownership among those persons to whom the custom applies. Of course it is conceivable that a custom of pre-emption might possibly spring up among the separate owners of separate mahals or separate villages for some special reason. It would be an unusual and extraordinary custom, and the person alleging it would have to prove it by clear, cogent and convincing evidence. A wajib-ul-arz is not conclusive evidence of any custom, and where a plaintiff puts forward such an unusual custom and cannot point to a single instance of its exercise within the memory or knowledge of man, the court will be justified in holding that the plaintiff has not proved the custom. In the case of an unusual and extraordinary **[616]** custom (other than that of pre-emption) in which no instances are proved of the exercise thereof, the courts have hesitated to hold that a custom is proved by the bare production of one or more wajib-ul-arzes ; and I can see no reason why the same rule should not apply to the very unusual and extraordinary custom which is now put forward in this case, under which a plaintiff who is not a co-sharer in the mahal and is not a co-owner with the vendor in anything, claims a right to prevent a man selling his property to whomsoever he pleases. The clear issue is the existence or non-existence of this unusual custom. Can the plaintiff be said to have proved it by a wajib-ul-arz drawn up when the state of the village was very different to what it now is, and when co-ownership in one unit, namely, the mahal, existed and all *pattidaran deh* were co-owners with each other which they now are not. In my opinion such evidence is not only insufficient but does not in the least go to establish the custom which is now put forward. I would, therefore, allow the appeal.

BY THE COURT:—The order of the Court is that we allow the appeal, set aside the decree of the court below, and dismiss the plaintiffs' claim with costs.

Appeal allowed.

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33 A. 616 (=8 A. L. J. 636=10 I. C. 476).

APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice and Mr. Justice Tudball.

MUHAMMAD SADIQ (*Defendant*) *v.* ABDUL MAJID (*Plaintiff*) AND MUSAMMAT HAKIMAN (*Defendant*).*

[2nd May, 1911.]

Act No. IX of 1908 (*Indian Limitation Act*), *section* 8—*Limitation—Amendment of plaint after expiry of limitation—Suit for pre-emption—Zamindari property—Incorrect statement of extent of share claimed.*

In a suit for pre-emption under the Muhammadan law of a zamindari share it was found that the necessary conditions of the Muhammadan law had been fulfilled; but, there being some doubt as to the exact share sold, the plaintiff had specified it in his plaint as 15 biswansis, when in fact it amounted to 17 biswan-

* Second Appeal No. 605 of 1910 from decree of A. W. R. Cole, District Judge of Moradabad, dated the 17th of April, 1910, confirming a decree of Muhammad Shamsuddin, Munsif of Nagina, dated the 14th of April, 1909.

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33 A. 616=8 A. L. J. 636 =10 I. C. 476.

sis. *Held* that it was within the competence of the court to allow the plaintiff to amend his plaint so as to claim the larger share, even after the period of limitation for the suit had expired.

[Dist: 36 All. 370; 64 I. C. 29; Ref: 66 I. C. 208=20 A. L. J. 159; Rel: 79 I. C. 287=50 Cal. 878=27 C. W. N. 1007;]

THE facts of this case were as follows:—

One Musammat Hakiman sold certain zamindari property to Muhammad Sadiq on the 16th of December, 1907. The price [617] settled was Rs. 1,800. The property sold consisted of a 17 biswansi share, 2 biswansis of which had come to the vendor by inheritance from her daughter. The plaintiff made the *talab* at the time, but made the demand with reference to 15 biswansis only which he believed at the time was the entire share that Hakiman could dispose of. He filed the suit on the last day allowed by the law of limitation, but having found out his mistake as to the extent of the share sold, he applied for amendment of the plaint. His application was allowed and he was granted leave to sue for the entire 17 biswansis, but when the application was granted the period of limitation for the suit had expired. The Courts below, however, decreed the claim. The defendant vendee appealed.

Mr. *Muhammad Ishaq Khan*, for the appellants :—

According to Muhammadan law the plaintiff ought to have claimed the entire property sold. His demand was ineffective. Disabilities which saved limitation in ordinary cases did not apply to pre-emption suits. Section 8 of the Limitation Act (IX of 1908) was clear on the point. See also *Durga Singh* v. *Bisheshar Dayal* (1). Even if the plaintiff did not know the exact amount of the share owned by the vendor that was no excuse.

Maulvi *Gulam Mujtaba*, for the respondents :—

The plaintiff purported to claim the entire share sold. The Court to which application for amendment was made was the proper Court to consider the question. It was too late to question it now. Section 107, clause 2 of the Civil Procedure Code gave new powers to appellate Courts. The Court exercised its discretion, and there was no reason to call it in question. *Ram Lal* v. *Harrison* (2), *Khem Karan* v. *Har Dayal* (3) and *The New Fleming Spinning & Weaving Co.* v. *Kessowji Naik* (4) were referred to. The amendment having been granted related back to the time of filing the suit.

Mr. *Muhammad Ishaq Khan* replied.

RICHARDS, C. J. and TUDBALL, J.:—This appeal arises out of a suit for pre-emption of certain zamindari property based on Muhammadan law. The defendant, Musammat Hakiman, sold [618] the property to the appellant, Muhammad Sadiq, on the 16th of December, 1907. The sale-deed was duly executed and registered, and it set forth that the share sold was in or about a 24 biswansi share. As a matter of fact, the share which the Musammat had was a 17 biswansi share, and this has been decided in the suit brought against her and her vendee by the other co-sharers. The plaintiff when he instituted his suit only claimed a 15 biswansi share, alleging that that was the share which the vendor had actually sold. The suit was instituted on the last day of limitation. Afterwards the plaintiff came to understand that the real share sold was, as we have said before, a 17 biswansi share, and accordingly he was allowed to amend the plaint by

(1) (1898) I. L. R. 24 All. 218.
(2) (1880) I. L. R. 2 All. 832.
(3) (1881) I. L. R. 4 All. 37.
(4) (1885) I. L. R. 9 Bom. 373.

claiming a 17 biswansi share instead of a 15 biswansi share. The first Court found that the formalities necessary under the Muhammadan law had been duly performed and the lower appellate Court accepted the finding. The plaintiff's suit was accordingly decreed.

In appeal it has been urged that the amendment was an amendment which ought not and could not have been made having regard to the provisions of the Limitation Act, and, secondly, that the Courts below were wrong in holding that the preliminaries required by the Muhammadan law had been fulfilled. The Courts are allowed by the Code ample power to amend, and we are slow to interfere with any amendment which the lower Courts have power to make, and which they in the exercise of discretion have made. We think, however, that no Court would have power to allow a new cause of action to be introduced into a plaint after that cause of action had become barred by limitation. The real question in the present appeal is whether or not we are bound to regard the amendment which was made, namely, to allow the plaintiff to claim 17 biswansis instead of 15 biswansis, as the introduction of a new cause of action, or whether it may be regarded as a correction of the description of the property.

With regard to the due performance of the formalities of the Muhammadan law, the evidence, which was believed by both the Courts below, was to the effect that the vendee informed the plaintiff in the present suit that he had purchased the "share of [619] Musammat Hakiman." There was no specification of exactly what the share was, and the plaintiff at once said without waiting to ask any questions that he claimed his right to pre-empt. We think that the Courts below were entitled on this evidence to hold that the formalities had been fulfilled. Of course the demand was made in the presence of witnesses.

There was a great deal of confusion as to what was in fact the actual share of the Musammat. We have already pointed out that although she purported to sell a share equal to about 24 biswansis, her real share was 17 biswansis. After consideration we have come to the conclusion that the amendment in this case may be looked upon as a correction of the description of the property. Looked upon in this light it was an amendment which the Court below was entitled to make; and if it was an amendment which the Court was entitled to make, we think that limitation must be reckoned as from the date of the presentation of the plaint, as explained by section 3. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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33 A. 616=8 A. L. J. 635 =10 I. C. 476.

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33 A. 619 (=8 A. L. J. 640=10 I. C. 564).

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

BALDEO SINGH AND OTHERS (*Plaintiffs*) *v.* JUGAL KISHORE AND OTHERS (*Defendants*).*

[3rd May, 1911.]

Easement—Flow of water—Natural channel—Duty of owner of land through which a natural channel runs.

* Second Appeal No. 63 of 1909 from a decree of Muhammad Ali, District Judge of Mirzapur, dated the 2nd of June, 1908, confirming a decree of Amjad-ul-lah, Subordinate Judge of Mirzapur, dated the 13th of March, 1908.

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33 A. 619=
8 A. L. J. 610
=10 I. C. 564.

The owner of land through which a river or other natural channel flows is bound, within certain limits, as between himself and other riparian owners, not to do anything which shall obstruct the flow of the water or materially interfere with their rights. But such owner is not bound to keep the channel clear so that the amount of water that can pass down it may not be diminished.

THE facts of this case were as follows: —The parties were zamindars of adjoining villages. The drainage water from some neighbouring hills flowed through three natural channels which joined each other at a point situate within the plaintiffs' villages. From this point the water flowed through a natural channel running through the defendants' villages and on to a streamlet further down. At some previous time the water from the [620] above-mentioned point used also to flow through a natural channel, named the Deosia channel, which ran through the plaintiffs' villages, but which had become silted up in course of time. The defendants built an embankment which obstructed the flowing of the water through their villages on to the streamlet. The water, therefore, accumulated in and flooded the plaintiffs' villages causing great damage. The plaintiffs brought a suit for the removal of the embankment and other reliefs. The lower Appellate Court came to the findings that the embankment was not an entirely new construction, and that the inundation of the plaintiffs' villages was due as much to the silting up of the channel of the Deosia drain as to the existence of the embankment; and the suit was dismissed. The plaintiffs appealed.

Mr. *M. L. Agarwala* (with Munshi *Kalindi Prasad*), for the appellant:—

It is my natural right to have the water flow down as it does. If the gradual silting up of one natural channel has diverted the course of the water into another natural channel then I am entitled to have the water flow down this second channel as it now does. Illustration (*h*) of section 7, clause (*b*), of the Easements Act applies to this case. The plaintiffs' villages are on a higher level than those of the defendants'; and the ruling in *Imam Ali* v. *Poresh Mundul* (1) fully applies to the present case. I also relay on *Abdul Hakim* v. *Gonesh Dutt* (2). It is not necessary for me to show exactly what share each defendant had in causing the obstruction, nor the exact extent to which the enbankment built by the defendant has caused an obstruction; *Thorpe* v. *Brumfitt* (3). It was no part of the plaintiffs' duty to keep clear the Deosia channel against the process of gradual silting up. They are in no way responsible if a natural channel ceases to exist owing to natural caues.

Munshi *Gokul Prasad* (with Maulvi *Ghulam Mujtaba*), for the respondents.

It was not the case of the plaintiffs, as set out in their pleadings, that the natural channel through Deosia had silted [621] up. It is for the plaintiffs, when there is a passage on their own land, to see that it is kept clear and that the burden is not thrown entirely on another person's land. The plaintiffs cannot by their own omission to clear the Deosia channel cast an additional burden on the defendants. They may clear it or allow it to silt up just as they please as long as they do not, by their omission, cause detriment to the defendants' land. Illustration (*h*) to section 7 of the Easements Act is not applicable. Here the claim is to allow the water to flow *out of* the plaintiff's land and not *within* it as contemplated in that illustration. The case in I. L. R. 8 Calcutta is distinguishable. There the

(1) (1882) I. L. R. 8 Cal. 468.
(2) (1885) I. L. R. 12 Cal. 323.
(3) (1873) 8 Ch. App. 650 (656).

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MAY 8.

APPELLATE CIVIL.

33 A. 619=8 A. L. J. 640 =10 I. C. 564.

defendants had stopped up *all* the passages for flow. In the case in 8 Chancery appeals the question, so far as it is material to the present case, was whether it was necessary for the plaintiff to show *which* of the defendants had caused the damage and to what extent. That is not the question in this case. Here the question is, to what extent has the joint action of the defendants caused an infringement of the plaintiffs' rights.

Mr. *M. L. Agarwala*, in reply:—Illustration (*h*) does apply. The defendants' action has altered the quantity and the force of the water flowing through my lands.

CHAMIER, J.—This was a suit by the appellants to have a *bandh* removed which had been built by the respondents, for a perpetual injunction restraining the respondents from building a *bandh* at the place in question, and for damages.

South of the villages of the parties is some high ground, the drainage from which passes first by several natural channels through four of the appellants' villages. From a point north of the appellants' village Sarkohi, the drainage passes on in one natural channel to the appellants' village Dobri. Further north again this channel branches out into channels, one running east to the place where the *bandh* in question has been erected at a point marked "T" in the map and the other running north and ultimately falling into the Garhai nadi. The latter channel for a part of its course is known as the Deosia channel or drain, and it seems that an arm runs out of it eastward and joins the other channels somewhere near the point "T" which is in the respondents' village. The appellants say that the respondents in Katik [622] 1312 Fasli, built a new *bandh* at "T," which so blocked the natural drainage as to cause the appellants' village Dobri to be inundated. The respondents' case was that the *bandh* in question is an old *bandh*, that the drainage passes away from the appellants' villages through the Deosia channel; that the appellants have blocked up this channel, thereby interfering with the natural drainage, and that the respondents have caused no damage to the appellants.

The findings of the first court are clear enough. It finds that the *bandh* in question is an old one and caused no damage to the appellants' land; that the appellants blocked up the Deosia drain and have themselves to thank for the inundation of their fields.

On appeal the District Judge said:—"If any inundation of the Dobri lands did take place, it must have been due as much to the blocking up of Deosia drain either by silting up or artificial means. As to the existence of the *bandh* at 'T', I am of opinion, therefore, that it is not satisfactorily proved that the inundation of the plaintiffs' lands was caused solely by the *bandh* at 'T', and therefore the defendants are not responsible for any loss which may have been suffered by the plaintiffs, apart from the fact (*sic*) whether the *bandh* in dispute was old or new."

Later on he says:—"I am therefore of opinion that the *bandh* in dispute is not proved to be an entirely new construction, and supposing it to be new, it is not proved that the inundation of the plaintiffs' lands was due entirely to the existence of the *bandh* in dispute."

The words "*either by silting up*" in the first finding rob it of any value that it might otherwise have possessed. We asked counsel for the respondents whether he could produce any authority for the proposition that the appellants are bound to keep the Deosia channel clear. He was unable to do so. What is called the Deosia channel is a natural not an

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33 A. 619=8 A. L. J. 640=10 I. C. 564.

artificial channel and I know of no authority for the proposition that the owner of land through which a river or other natural channel flows is bound to clear it out from time to time so that the amount of water that can pass down it may not be diminished. Such an [623] owner is bound within certain limits as between himself and other riparian owners not to do anything which shall obstruct the flow of the water or materially interfere with their rights. If from natural causes a river or channel passing through *A's* land silts up, with the result that more water is thrown into another river or channel running through *B's* land, and *B* blocks the river or channel on his land so as to throw the water back on to and flood *A's* land, *A* cannot be held to have contributed to this result, if all that can be said of him is that he has not kept the river or channel on his land clear. *A* is not responsible for the silting up of the channel on his land. If after the river or channel flowing through *A's* land has silted up, *B* blocks up the river or channel flowing through his land with the result that *A's* land is inundated, the result must be regarded as being due to *B's* action alone and *B* is *prima facie* liable for the consequences, though he may show that he has acquired a right to block up the channel partly. In my opinion, therefore, the first finding of the District Judge does not enable us to dispose of this appeal. There should also be a fresh finding on the question whether the *bandh* is new or old. I would remit the case to the lower appellate court for fresh findings upon the second and third issues framed by the first court.

KARAMAT HUSAIN, J.—I agree.

BY THE COURT :—The order of the court is that the case be remitted to the lower appellate court for fresh findings upon the second and third issues framed by the first court. Ten days will be allowed for objections on return of the finding.

The lower appellate court will take such additional evidence as the parties may adduce.

Issues remitted.

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33 A. 624 (=8 A. L. J. 658 =12 I. C. 83=12 Cr. L. J. 430).

[624] REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* FAKHR-UD-DIN KHAN.*

[7th May, 1911.]

Criminal Procedure Code, section 125—Security to keep the peace—Cancellation of bond—Power of Magistrate to send accused to jail.

Under section 125 of the Code of Criminal Procedure a District Magistrate may cancel a bond for good behaviour, but he is not competent to send the person whose bond is so cancelled to jail.

ONE Fakhr-ud-din Khan was called upon by a Magistrate of the first class to show cause under section 107 of the Code of Criminal Procedure. After due inquiry the Magistrate ordered him to file a bond with one surety to keep the peace for a certain period. He filed the bond required, and it was accepted by the Magistrate. Subsequently the District Magistrate, being of opinion that the person who stood as surety was unfit, in that he could exercise no effective supervision over Fakhr-ud-din

* Criminal Revision No. 160 of 1911 from an order of P. U. Allen, District Magistrate of Bareilly, dated the 20th of March 1911.

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REVISIONAL CRIMINAL.

33 A. 624=8 A. L. J. 668=12 I. C. 88=12 Cr. L. J. 480.

Khan, proceeded to cancel the bond and remitted Fakhr-ud-din to jail until such time as he should furnish a bond with a satisfactory surety.

Against this order Fakhr-ud-din applied in revision to the High Court.

Babu *Sital Prasad Ghosh*, for the applicant.

Section 125 of the Code of Criminal Procedure does not warant an order like that passed by the District Magistrate. His power was confined to the mere cancelling of the bond. He should not have passed such an order. Applicant had to remain in jail for a fortnight as he was not supplied with a copy of the order earlier and could not file a revision before.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown, was heard in reply.

TUDBALL, J.—The applicant, Fakhr-ud-din Khan, was called upon by a Magistrate of the first class to show cause under section 107 of the Criminal Procedure Code. After due inquiry the Magistrate ordered him to file a bond with one surety to keep the peace for a certain period. He filed his bond together with his surety and this was accepted by the Magistrate. The District Magistrate, subsequently, being of opinion that the [625] person who stood as surety was apparently unfit, in that he could exercise no influence over Fakhr-ud-din Khan, passed an order to the following effect :—"Accordingly I cancel the bond of the surety and direct that Fakhr-ud-din be detained in jail, until he is able to furnish such a surety as shall exercise proper control over him. Fakhr-ud-din Khan has accordingly been put in jail." The only section in the Code which enables a District Magistrate to cancel such a bond is section 125, but reading this section together with sections 118 and 121, it is quite clear that the bond contemplated by section 125 is the bond which has been given by the person against whom the order has been passed under section 118. Schedule V of the Code contains the form of the bond which is usually taken in such cases : form 11 is that which is taken in cases in which sureties also have to be provided. It was open to the District Magistrate to cancel the bond which was given by Fakhr-ud-din Khan, in the present case, under this section. But there is no section in the chapter, under which he is empowered to take the step which he has taken. It would no doubt have been open to him, if he had thought fit, to send the information and also the evidence relating to it, to the Magistrate who had passed the original order, and it might possibly have been open to the Magistrate to reject the surety. But the District Magistrate is not authorized to pass the order that he has done, nor is he empowered to send the accused to jail in this manner. I admit the application, set aside the order of the District Magistrate. The applicant will be released at once.

Order set aside.

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MAY 6.

APPELLATE CIVIL.

33 A. 626=8 A. L. J. 652=11 I. C. 932.

33 A. 626 (=8 A. L. J. 652=11 I. C. 932).

[626] APPELLATE CIVIL.

Before The Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

BALDEO SAHAI (*Plaintiff*) *v.* HABBANS AND ANOTHER (*Defendants*).*

[6th May, 1911.]

Champerty and maintenance—Agreements contrary to public policy—Assignment—Right of party to impeach.

Held that there may be a valid transfer of property for the purpose of financing a suit upon the terms that the property or the proceeds realized from the litigation shall be divided between the transferor and transferee irrespective of the fact whether or not there was any agreement for the payment of consideration "win or lose." The duty of the Court in such a case is to determine whether or not the agreement is a fair agreement to supply funds and does not purport to have been made so as to be inequitable or for improper objects, as for the purpose of gambling in litigation or of injuring others by encouraging unrighteous suits. *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1) followed.

Held also that, although as a general rule where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration, the rule is not invariable and would not apply where the transferor being a party to the litigation had never admitted the assignment, but on the contrary had pleaded that it was fictitious and without consideration. *Manshankar Pranjivan* v. *Bai Muli* (2) followed.

THIS was a suit for sale on a mortgage of the 7th of December 1894, executed by one Musammat Dhapo in favour of Kashmiri Das and Paras Ram. The interest of the mortgagees became vested in one Sri Ram, and he, on the 5th of February, 1901, conveyed his mortgagee rights to the plaintiff. In 1902, the mortgagor, Musammat Dhapo executed a deed of gift of all her property in favour of Harbans and others. Harbans and Sri Ram defended the suit of the plaintiff. Sri Ram in his defence pleaded that the sale-deed of the 5th of February, 1901, was fictitious and without consideration and that he was the real owner of the mortgagee rights. The Court of first instance (Munsif of Kairana) decreed the plaintiff's claim for the sale of half the property, but upon appeal this decree was set aside by the District Judge, and the plaintiff's suit dismissed *in toto*.

The plaintiff appealed to the High Court.

Mr. *A. H. C. Hamilton*, for the appellant.

[627] Babu *Sital Prasad Ghosh*, for the respondents.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for sale on a mortgage of the 7th of December, 1894, executed by Musammat Dhapo in favour of Kashmiri Das and Paras Ram. The interest of the mortgagees became vested in one Sri Ram, and he on the 5th of February, 1901, conveyed his mortgagee rights to the plaintiff. In 1902, the mortgagor, Musammat Dhapo, executed a deed of gift of all her property in favour of Harbans and others. Harbans and Sri Ram defended the suit of the plaintiff. Sri Ram in his defence pleaded that the sale-deed of the 5th

* Second Appeal No. 721 of 1910 from a decree of Landale Johnston, Additional Judge of Meerut, dated the 20th-21st of April, 1910, reversing a decree of Kameshwar Nath, Munsif of Kairana, dated the 20th of December, 1909.

(1) (1876) L. R. 4 I. A. 23; I. L. R. 2 Cal. 233.

(2) (1888) I. L. R. 12 Bom. 686.

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of February, 1901, was fictitious and without consideration and that he was the real owner of the mortgagee rights.

The court of first instance decreed the plaintiff's claim for sale of half of the property, but upon appeal this decree was set aside and the suit of the plaintiff dismissed *in toto*. The ground upon which the learned Additional District Judge dismissed the suit was, that the alleged deed of sale was fictitious and was illegal in view of the fact that there was no present consideration paid. In his judgment he observed :—" The Munsif found that no money passed and that the intention was that plaintiff should try his luck in suit." Then the learned Judge refers to the authorities to be found in Mr. Gour's work on the Transfer of Property Act and later on remarks :—

" If the arrangement was that proceeds should be divided after suit and realization of money without any agreement as to the payment of some consideration in any case, win or lose, it seems to me that the transaction cannot be regarded as a *bona fide* conveyance of a right, but on the other hand must be looked on as a mere nominal and fictitious transfer having for its object simply and solely the putting of plaintiff in a position to sue."

He accordingly holding this view of the law dismissed the plaintiff's suit.

The principal question argued in this appeal is that the view of the law propounded by the learned Judge is erroneous, and this contention is in our judgment well founded. The learned Judge was of opinion that an arrangement made on a transfer of property that the property, or the proceeds of the property, after suit should be divided between the transferor and transferee would not be a binding agreement as being opposed to public policy, but [628] must be regarded as a nominal and fictitious transaction, unless there was also " an agreement as to the payment of some consideration in any case, win or lose." This is not the law as it is laid down by their Lordships of the Privy Council. The law is thus stated in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1) :—

" Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. Indeed cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party ; or to be made, not with the *bona fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them."

This language is clear and precise and is authority for the proposition which has been pressed before us in argument by the learned counsel for the appellant, namely, that there may be a valid transfer of property for the purpose of the financing of a suit upon the terms that the property or the proceeds realized from the litigation shall be divided between the transferor and transferee irrespective of the fact whether or not there was any agreement for the payment of consideration " win or lose." The duty of the court in such a case is to determine whether or not the agreement is a fair agreement to supply funds and is not of the nature referred to in the later portion of the remarks of their Lordships. Under these circumstances it appears to us that before we determine this appeal we should have

(1) (1876) L. R. 4 I. A. 32.

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a finding upon the following issue, namely, whether in view of the ruling of their Lordships of the Privy Council the transfer in this case was a valid transfer.

The learned counsel for the appellant objects to our referring this issue on the ground that where an assignee sues on his assignment and proves the assignment, an adverse party cannot take the objection that there was no consideration. We do [629] not think that the ordinary rule applies to the circumstances of the present case. The transferor is a party to the litigation, and he pleaded that the sale-deed transferring the mortgage was fictitious and without consideration, and that he was the real owner of the mortgagee rights. This plea did not, it is true, find favour with the learned Munsif, but the lower appellate Court set aside the decree of the Munsif *in toto*. In the case of *Manishankar Pranjivan* v. *Bai Muli* (1) BIRDWOOD and PARSONS, JJ., held that, although in ordinary cases it is the rule that where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration, yet that, under the particular circumstances of that case that rule did not apply. One of the circumstances in that case was that there was on the record no admission of the assignment by the assignor. In the case before us, so far from there being on the record an admission of the assignment by the assignor, there was a direct denial by him that there was any valid transfer. We are supported in the view which we take by this decision, which has our approval, and we think that in the present case the Court was and is bound to determine whether or not the plea set up by Sri Ram and also by Harbans, namely, that the transfer was fictitious and without consideration is true in substance and in fact. We, therefore, must remit an issue upon the question of the validity of the transfer.

There is also another question which we think ought at the same time to be determined by the lower appellate Court, namely, whether Musammat Dhapo held any, and if so, what portion of the property which she purported to mortgage, by adverse possession. We refer this issue as also the following issue: Whether, having regard to the rule laid down by their Lordships of the Privy Council the assignment of the 5th of February, 1901, was fictitious and without consideration. We refer these issues to the lower appellate Court under order XLI, rule 25. The Court shall take such additional evidence as may be tendered, and on return of the findings the parties will have the usual ten days for filing objections.

[630] On return of the findings the following order was passed:—

RICHARDS, C. J. and BANERJI, J.—On the first issue referred to the Court below, the finding of that Court is against the plaintiff appellant. An exception has been taken to that finding, but the objection raises questions of fact which cannot be determined in second appeal. The learned counsel for the appellant asks us to reconsider the order by which we referred issues to the Court below. Even if we had power to do so, we are not inclined to re-open the questions, which were fully discussed and considered, and in regard to which a decision was come to as a result of such consideration. We may also observe that we see no reason for thinking that the decision arrived at, to which one of us was a party, was incorrect. In view of the finding of the Court below on the first issue referred the appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

(1) (1888) I. L. R. 12 Bom. 686.

33 A. 630 (=8 A. L. J. 798=11 I. C. 816).

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MISCELLANEOUS CIVIL.

33 A. 630=8 A. L. J. 798 =11 I. C. 816.

MISCELLANEOUS CIVIL.

Before Mr. Justice Tudball.

CHANDHAN AND ANOTHER (*Plaintiffs*) *v.* BISHAN SINGH AND OTHERS (*Defendants*).*

[6th May, 1911.]

Act No. VII of 1870 (*Court Fees Act*), *section* 7, *clause v.* (*d*)—*Court fee—Suit to recover a two-thirds share in certain specific plots sold—Court fee payable on market value.*

Where a Hindu widow possessed of certain zamindari property of the total area of 17 bighas 6 biswas, assessed to a revenue of Rs. 19-7-0, sold 11 bighas and 11 biswas out of the same, which was practically two-thirds of what she possessed, and specified the actual plots sold: *Held*, in a suit by two out of three reversioners to recover two-thirds of the property thus alienated, that, the claim being for specified plots and not a definite share of the whole estate paying revenue, the Court fee should be paid on the market-value of the property in suit and not five times the Government revenue.

[Fol: 77 I. C. 781=46 M. L. J. 345=1924 M. W. N. 338; Rel: 46 M. L. J. 346.]

ON the memorandum of appeal being filed, the Stamp Reporter made the following report:—

"The suit which gave rise to this appeal related to the property of Nar Singh, Fateh Singh and Bansi Singh. Musammat Dharmi, the life-estate holder, out of the entire property in her possession as such, sold specific plots of land, measuring 11 [631] bighas, 11 biswas, to the defendants vendees. The estate of which the land sold formed part was 17 bighas, 6 biswas in area and the revenue assessed on the entire share was Rs. 19-7-0. The plaintiffs, who, along with the defendant No. 4, the *karewa* husband of the vendor, alleged themselves to be the reversioners of the last male owner, came into court seeking to set aside the sale-deed executed by the life-estate-holder in favour of the defendants vendees, on the allegation that she by reason of her remarriage with the defendant No. 4, had forfeited her right to her former husband's property, and that the plaintiffs, along with the defendant No. 4, were entitled to the immediate possession of the property, hence the suit for recovery of possession over a two-thirds part of the property sold by cancelment of the sale-deed aforesaid, or in the alternative for a declaration that the sale-deed will not be binding on the plaintiffs after Musammat Dharmi's (vendor's) death.

"In answer to the plaintiffs' suit the defendants vendees pleaded, *inter alia*, that the plaint was insufficiently stamped, inasmuch as the court fee ought to have been paid on the market value of the land and not on five times the revenue. In dealing with this issue the learned Additional Judge observed:—

"In the plaint, the plaintiffs have, following the sale-deed, denoted the property in dispute both by the fractional share, as well as by number of the plots appertaining to No. 31 Khewat; out of which a two-third share is claimed. The latter description does not indicate that any specific plots are claimed. It only shows the plots appertaining to the whole of Khewat No. 31. I therefore hold that a court fee on the market value of the plots appertaining to No. 31 Khewat is not necessary."

"In my opinion the view taken by the learned Judge below is not correct. As it is detrimental to public revenue, I beg to submit that the fee should be paid on the market-value of the property claimed. The

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property sold was 11 bighas, 11 biswas in area, denoted by specific plots in the sale-deed. The claim related to the two-thirds of the property sold *and not to the two-thirds of the entire khewat.* Thus, though the property sold was a part of the entire revenue-paying estate, yet (1) it was not a definite fractional share of the whole, and (2) the plots sold are not separately assessed with revenue. The case, therefore, in my humble opinion, is not governed by section 7, clause v (*b*) [632] of Act No. VII of 1870, but it is a case to which section 7, clause v (*d*) should be applied, and therefore the court fee is payable on the proportionate market-value of the share claimed, i. e. on Rs. 2,000 for possession plus Rs. 10 on the relief as to cancelment of the sale-deed. This being so, a court fee of Rs. 135 is payable. Rupees 13-6-0 having been paid, there is therefore a deficiency of Rs. 121-10-0 × 2=Rs. 243-4-0, to be made good by the plaintiffs appellants for this court and the court of first instance.

The following objection was preferred by Mr. *A. H. C. Hamilton*, for the appellants:—

"The Stamp Reporter has misunderstood the sale-deed. It shows that besides the specific plots of lands the other rights and interests of the zamindari have been sold. Such being the case, the appellants cannot be put into the physical and actual possession of the property in suit, unless it is partitioned. The view adopted by the court below is right, and the Stamp Reporter cannot go behind that order."

The Stamp Reporter made the following further report:—

"The learned counsel for the appellant objects to the correctness of the office report, the case is, therefore, referred under section 5 of Act VII of 1870, for decision of the Taxing Officer. In support of my view I beg to cite the case of *Baija* v. *Mir* (1) and an unreported decision of this Court in S. A. No. 506 of 1904, dated the 17th August, 1905."

The Taxing Officer referred the case to the Taxing Judge.

"I refer this case, so far as it relates to the memorandum of appeal, as none of the rulings brought to my notice seem to relate to cases precisely on all fours with the present.

"The suit is for recovery of a two-thirds share in certain specific plots, measuring 11 bighas, 11 biswas, forming part, viz., two-thirds,* of an estate comprising 17 bighas, 6 biswas, and assessed to Rs. 19-7-0 revenue. The Additional Judge has held that the plaint which bears a court fee calculated on five times the revenue of 2/3 × 2/3 × Rs. 19-7-0 is correctly stamped. In his **[633]** view the claim was not for specific plots, and therefore the court fee is payable under section 7, v. (*b*).

"The court fee is payable under section 7, clause v (*b*) when

(1) Land which is the subject of the suit forms an entire estate paying annual revenue to Government.

This is not applicable to the present suit.

(2) Forms part of such an estate and is recorded as separately assessed to revenue.

Likewise not applicable.

(3) Forms a definite share of an estate, paying annual revenue to Government. In my opinion this also is not applicable. Possession is sought not of a definite share, say, two-thirds of an estate paying Revenue to Government, but two-thirds of certain specific plots. These specific plots constitute as regards area, two-thirds of the estate assessed to revenue, but do not

* Strictly speaking it is not quite two-thirds.

(1) Weekly Notes, 1894, p. 174.

constitute definite share * of the estate paying annual revenue to the Government, *i.e.*, of the whole estate. Had what was sold been simply two-thirds of the whole revenue-assessed estate, without specification of plots, and had the claim been for recovery of possession of two-thirds of such two-third share or 4/9 of the whole estate, the suit would have fallen under section 7, v (*b*).

"As it is, it seems to me to fall under section 7, v (*d*), and Court-fees to be payable on the market value."

33 A. 630=8 A. L. J. 798 =11 I. C. 816.

The following was the decision of the Taxing Judge:—

TUDBALL, J.—This is a reference by the Taxing Officer. The facts are briefly as follows:—A Hindu widow was in possession of certain zamindari property, to wit Khata Khewat 31, the total area was 17 bighas and 6 biswas, and it was assessed to a revenue of Rs. 19-7-0. She transferred 11 bighas, 11 biswas, out of the 17 bighas, 6 biswas, specifying in the sale-deed the actual plots which she transferred. Two out of three reversioners have now sued to recover two-thirds of the property, thus alienated. The question arises whether the Court fees are to be paid under section 7, clause v (*b*).

[634] Eleven bighas and 11 biswas are for all practical purposes two-thirds of 17 bighas and 6 biswas. But the lady did not sell a fractional two-thirds share in the whole estate; if she had done so, her transferee would have been the owner of a two-thirds share in each and every plot, and liable to pay two-thirds of the revenue. But as matters stand, it is not possible to say what is the actual revenue on the specified plots now sold. It is impossible to calculate the Court fee on five times the Government revenue and therefore the Court fee must be calculated under section 7, clause 5 (*d*). The land is part of an estate paying revenue, but is not a definite fractional share of such an estate. The Court fee is therefore payable on the market value.

I allow one month's time to make good the deficiency.

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33 A. 634 (=8 A. L. J. 660=11 I. C. 934).

APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

NITYA NAND AND OTHERS (*Defendants*) *v.* BISHAN LAL (*Plaintiff*) AND MOHAN LAL AND ANOTHER (*Defendants*).†

[9th May, 1911.]

Appeal—Jurisdiction—Valuation—Suit for specific performance of contract to sell—Additional relief claimed by way of cancellation of sale-deed subsequently executed.

Where a suit was primarily a suit for specific performance of a contract to sell certain property to the plaintiff's but also asked for the cancellation of a subsequent sale-deed of the property in favour of certain defendants, it was held that the latter relief was merely incidental to the former and its valuation would not affect the jurisdiction of the Appellate Court. *Pirthi Singh* v. *Maru Singh* (1) distinguished

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*See the ruling—*Baija* v. *Mir*, Weekly Notes, 1884, p. 174. Definite share means fractional share in whole estate.

† Second Appeal No. 431 of 1910 from a decree of H. M. Smith, Additional Judge of Aligarh, dated the 16th of April, 1910, reversing a decree of Muhammad Shafi Subordinate Judge of Aligarh, dated the 15th of June, 1908.

(1) (1911) 8 A. L. J. 266.

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APPELLATE CIVIL.

33 A. 634=
8 A. L. J. 660
=11 I.C. 934.

THE facts of this case were as follows:—

A certain house in Bulandshahr was the property of two brothers, members of a joint Hindu family. The plaintiff respondent entered into a contract with them for the purchase of the house. The contract was made on the 17th of May 1906, but was not reduced to writing. The plaintiff came to know that the defendants 1 and 2 the owners of the house, were about to sell the house to defendants 3, 4,5 and he, on the 27th of July 1906. [635] served the vendors and the vendees with a notice of his right to enforce the contract. The defendants, first party, had accepted Rs. 500 by way of earnest-money from defendants, second party, on the 5th of July, 1906, and they executed a sale-deed in their favour on the 3rd of September, 1906. The deed was registered on the 5th September, 1906. The plaintiff then sued for specific performance of the contract in his favour. The defendants pleaded want of a binding contract, and absence of notice till after the acceptance of earnest-money. They further said that the plaintiff had been acting as agent for another and could not sue himself. In addition to the enforcement of the contract, the plaintiff also prayed for cancellation of the sale-deed in favour of defendants, second party, wherein the price of the house was mentioned to be above Rs. 5,000. The first Court found that the contract for the sale of the house was entered into by one of the brothers, but that it was subject to the approval of the other brother, and further that plaintiff had been acting as agent for a third party and dismissed the suit. The District Judge found that there was a complete contract between the parties and that the brother making it was competent to act alone and decreed the suit. The defendants purchasers appealed.

Babu *Jogindro Nath Chaudhuri* (Mr. *B. E. O'Conor* and Dr. *Tej Bahadur Sapru* with him), for the appellants:—

An appeal did not lie to the District Judge, as the valuation of the deed sought to be cancelled was over Rs. 8,000. He had no jurisdiction to hear the appeal; *Pirthi Singh* v. *Maru Singh* (1). Both reliefs were necessary for the plaintiff. In questions of Court fee all that was to be seen was the relief asked for. Besides, according to section 27 of the Specific Relief Act, notice had to be given before payment of earnest-money by the third party.

The Hon'ble Pandit *Sundar Lal*, Babu *Durga Charan Banerji* and Babu *Girdhari Lal Agarwala*, for respondents, were not called upon.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises out of a suit for specific performance of a contract for the sale of a house. The defendants appellants are subsequent purchasers of the house [636] which, upon the finding of the court below, was agreed to be sold by the owners of the house to the plaintiff. A number of defences were pleaded. First, that the sale to the plaintiff was negotiated by one of two brothers who have not the authority of the other brother. Secondly, that the plaintiff represented that he was purchasing, not for himself, but for a third party. Thirdly, that the appellants were transferees for value, in good faith, without notice of the previous contract with the defendants.

In our opinion all these defences are concluded by the findings of the Court below. In our opinion, in coming to the conclusion which the lower Appellate court came to, no mistake in law was made.

(1) (1911) 8 A. L J. 266.

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33 A 634=
8 A. L. J. 660
=11 I. C. 934.

There was one other matter argued in the appeal, namely, that the claim being one to set aside a sale, the consideration for which was above Rs. 5,000, the appeal did not lie to the District Judge and the decree was *ultra vires*.

The plaintiff, no doubt, set forth in clause (*b*) of the prayer in the plaint a claim that the deed of transfer in favour of the appellants may be declared null and void as against the plaintiff. In our opinion the plaint and the prayer ought to be and can be read as a claim for specific performance against the owner of the house and subsequent puchasers who had bought with notice of the contract together with such incidental and proper relief as the Court ought to give in a suit of this nature.

The learned advocate for the appellants cited the case of *Pirthi Singh* v. *Maru Singh* (1). In that case the plaintiff brought a suit for sale on foot of a mortgage. He also made parties to the suit a number of other persons who had held prior incumbrances against the property, and he claimed that it might be declared that these prior incumbrances had been paid off and discharged. In our opinion it is only necessary to state the nature of that suit to show that it was quite different from the present suit. The present suit is neither more nor less than a suit for specific performance of a contract against the original vendor and subsequent vendees with notice. The prayer which the appellants contended was an independent cause of action is [637] merely an incidental relief to the claim for specific performa of the contract.

We dismiss the appeal with costs.

Appeal dismissed.

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33 A. 637 (=8 A. L. J. 700=10 I. C. 626).

APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

SRI KISHAN SINGH (*Plaintiff*) *v.* BACHCHA PANDE AND OTHERS (*Defendants*).*

[9th May, 1911.]

Pre-emption—Wajib-ul-arz—*Notice of sale given to member of a joint Hindu family—Effect of such notice—Effect of conditional reply disputing amount of alleged consideration.*

Held that a person having a right of pre-emption does not lose it by refusing to purchase the property at the price at which it is offered to him, because he believes that such price is in excess of the real price, where such belief is entertained and expressed in good faith.

Where the pre-emptor and his brothers were members of a joint Hindu family and the vendor addressed a notice to him and his brothers jointly, to which the pre-emptor's brother sent a reply; *held* that the plaintiff pre-emptor was entitled to claim the benefit of this reply as if it had been sent by himself.

Lajja Prasad v. *Debi Prasad* (2), *Amir Chand* v. *Ishar Das* (3), *Bholi Bibi* v. *Fahima Bibi* (4) and *Karim Baksh* v. *Khuda Baksh* (5) followed.

[Ref. 1 Lah. 51=55 I. C. 879.]

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* Second Appeal No. 1125 of 1910 from a decree of G. A. Paterson, District Judge of Benares, dated the 10th of September, 1910, reversing a decree of Murari Lal, Munsif of Benares, dated the 11th of July, 1910.

(1) (1911) 8 A. L. J. 266.
(2) (1880) I L. R. 3 All. 236.
(3) Weekly Notes, 1882, p. 46.
(4) Weekly Notes, 1882, p 136.
(5) (1894) I. L. R. 16 All. 247.

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33 A. 637=
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The plaintiff was lambardar of a village, and according to the wajib-ul-arz was entitled to pre-empt. On the 2nd of March, 1909, the vendors sent a notice addressed to the plaintiff and his brother, members of a joint family, that he was going to sell the property to the vendees for Rs. 1,500. The notice was delivered on the 15th of March, 1909. It gave a week's time within which the plaintiff was to comply with its condition. The plaintiff was, at the time the notice was delivered, away from home, and on the 22nd his brother replied to the notice offering Rs. 800 for the property, which he said was its real value. The property was sold to the vendees, on the 29th of March, 1909. The plaintiff then filed the present suit for pre-emption. The Court of first instance held that there was no waiver of the right of pre-emption by the plaintiff and further found that Rs. 911-1-9 was the real price [638] paid. It decreed the suit conditional upon the payment of Rs. 911-1-9. The lower appellate Court found that the price paid was Rs. 1,500. It held that the plaintiff must be deemed to have waived his right, inasmuch as he did not reply to the notice sent by the vendors, for, the plaintiff alone being entitled to preempt, the reply sent by his brother could not avail him. It relied on *Bhairon Singh* v. *Lalman* (1) and *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (2). The suit was accordingly dismissed.

The plaintiff appealed to the High Court.

Babu *Sarat Chandra Chaudhri* (for Munshi *Gokul Prasad*), for the appellant, contended that the rulings relied upon by the Appellate Court did not apply, because in those cases no steps were taken by the pre-emptor to comply with the notice addressed to him. In the present case one notice had been sent to the plaintiff and the brothers of the plaintiff, who formed a joint Hindu family, and the reply having been sent by the brother of the plaintiff, the latter was entitled to rely upon it. Further, at the time the notice was delivered, the plaintiff was not at home, and there was no finding by the appellate court as to when he returned, so that probably if he had sent a reply the seven days, margin would have been long past. Consequently the question reduced itself to this, *viz.*, whether the plaintiff should be deemed to have lost his right, because there was a difference as to the price as between himself and the vendor. If the difference was due to a *bona fide* belief in the mind of the plaintiff that the price at which he offered to purchase was the actual price and the vendor and the vendee were simply putting forward an inflated price, the plaintiff could not be held to have waived his right; *Lajja Prasad* v. *Debi Prasad* (3) *Amir Chand* v. *Ishar Das* (4) *Karim Baksh* v. *Khuda Baksh* 5).

The real issue, as held in *Amir Chand's* case, was whether the plaintiff *bona fide* believed that the actual price was Rs. 800. In the present case the property, a few years back had been purchased by the vendor himself for Rs. 800: the plaintiff when [639] asked by the vendor to purchase had offered Rs. 800: the reply sent by the plaintiff's brother distinctly stated that Rs. 800 was the real price and that the price demanded by the vendor (Rs. 1,500) was fictitous and incorrect, and finally the first Court held that Rs. 911-1-9 was the real price paid. In his plaint the plaintiff said that Rs. 800 was the real price, but offered to pay such price as the Court might determine. It was submitted that these facts went to show that the plaintiff entertained the belief *bona fide*.

(1) (1884) I. L. R. 7 All. 23.
(2) (1888) I. L. R. 11 All. 103
(3) (1880) I. L. R. 3 All. 236.
(4) Weekly Notes, 1882, p. 46.
(5) (1894) I. L. R. 16 All. 247.

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APPELLATE CIVIL.

33 A. 637=8 A. L. J. 700 =10 I. C. 626.

Dr. *Tej Bahadur Sapru*, for the respondents, submitted that the rulings relied upon for the appellant did not apply. In the present case the plaintiff seemed to have fixed his own price. It was not stated in the reply to the notice that he believed the real price to be Rs. 800. The plaintiff did not offer to pay such price as the court might fix. The plaintiff was *lambardar*, and according to the wajib-ul-arz the right to pre-empt was personal to him, and in fact he did not join his brothers along with him in the suit. The plaintiff, however, was extremely negligent, and he could not avail himself of the reply his brother had sent. The plaintiff in any event should be made to pay the costs of the defendant in all courts, because the true price had been found to be Rs. 1,500.

Babu *Sarat Chandra Chaudhri* was not called upon to reply.

RICHARDS, C. J., and BANERJI J.—This appeal arises out of a suit for pre-emption which has been dismissed by the lower appellate court on the ground that the plaintiff must be deemed to have refused to purchase the property when it was offered to him before the sale to the defendants vendees and thus waived his right of pre-emption. The property was sold to the defendants vendees for a consideration of Rs 1,500. The plaintiff alleged in his plaint that this amount was not the actual amount of consideration paid, but that the real consideration was Rs. 800. The court of first instance was of opinion that the real consideration was Rs. 911-1-9. The lower appellate court, however, found that the actual consideration was Rs. 1,500. It appears that before the sale, namely, on the 2nd of March, 1909 the vendor **[640]** sent a notice addressed to the plaintiff and other members of his family in which he stated that he was about to sell the property to the vendees for Rs. 1,500 and he asked the plaintiff and his cosharers to purchase the property for that price. The notice was actually delivered on the 15th of March, 1909. The time allowed for sending a reply was one week. On the 22nd of March, 1909, the plaintiff's brother sent a reply, in which he said that he and his co-sharers were willing to purchase the property for Rs. 800, which he said was the real price of the property. The plaintiff himself sent no reply, and for this reason the learned Judge was of opinion that, as the plaintiff himself paid no attention to the notice sent by the vendor, he was not entitled to rely on the reply which was sent by his brother. We do not agree with the learned Judge on this point. It is true that the plaintiff as lambardar had the right of pre-emption, but he was a member of a joint Hindu family, and the vendor issued his notice to all the members of the joint family. The reasonable view to take in respect of the reply is that it was sent on behalf of all the persons to whom the original notice was addressed and as an answer to that notice. Therefore it must be taken to be an answer, not only on behalf of the plaintiff's brother, but also on behalf of the plaintiff himself. The effect of this answer was that the plaintiff was willing to purchase the property for what was the real consideration for the sale. The plaintiff and his co-sharers did not believe that Rs. 1,500 was the real consideration and therefore they refused to purchase for a price which they honestly believed to be considerably in excess of the real price. The fact that the court of first instance found the real price to be far below the amount mentioned in the sale-deed and the notice is a circumstance which suggests that the plaintiff was justified in believing that the property was not being sold for the price mentioned. The plaintiff swore that the property had been purchased by the vendor for Rs. 800 only a few years before the date of the sale in question.

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33 A. 637=8 A. L. J. 700=10 I. C. 626.

So that it may be reasonably inferred that in refusing to purchase for the price mentioned, the plaintiff was under the *bona fide* belief that the refusal to purchase was due to the belief that the price of the property had been greatly inflated. That being so, this case comes within the [641] purview of the ruling of this Court in *Lajja Prasad* v. *Debi Prasad* (1). In that case it was held that a person having a right of pre-emption does not lose it by refusing to purchase the property at the price at which it was offered to him, because he believes that such price is in excess of the real price, where the belief is entertained and expressed in good faith. This case was followed in *Amir Chand* v. *Ishar Das* (2); *Bholi Bibi* v. *Fahima Bibi* (3) and in *Karim Bakhsh* v. *Khuda Bakhsh* (4). In accordance with these rulings we must hold that the plaintiff has not forfeited his right of pre-emption. Having regard, however, to the fact that he made untrue allegations in his plaint and deposition and also to the fact that the actual price has been found by the lower appellate court to be Rs. 1,500, we are of opinion that he must bear the costs of the litigation.

We accordingly allow the appeal and decree the plaintiff's claim for pre-emption conditional upon his paying Rs. 1,500 within two months from this date. In any event the plaintiff must pay the costs of the respondents in all courts. If the plaintiff fails to pay the purchase money and the costs within the time fixed, the suit will stand dismissed.

Appeal decreed.

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33 A. 641 (=8 A. L. J. 719=10 I. C. 908).

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox, and Mr. Justice Piggott.

GHISU MAL AND OTHERS (*Petitioners*) *v.* THE OFFICIAL LIQUIDATOR, SHRI BALDEO MILLS COMPANY, LIMITED, AND OTHERS (*Opposite Parties*).*

[10th May, 1911.]

Act No. VI of 1882 (*Indian Companies Act*), *section* 169—*Company—Winding up—Appeal—Notice of appeal—Limitation.*

On the 3rd of December, 1910, the District Judge of Aligarh made an order for the winding up under the supervision of the court of a company called the Shri Baldeo Mills Company, Limited. On the 7th of February, 1911, an application by some of the shareholders to reconsider the winding up order was dismissed. On the 25th of February, 1911, the applicants appealed to the High Court ostensibly against the order of the 7th of February, 1911, but in effect against the winding up order of the 3rd of December, 1910. No notice of this appeal was served on the respondents until at the earliest the 25th of March, 1911. [642] *Held* that the appeal was time barred in view of section 169 of the Indian Companies Act, 1882. *Ramanappa* v. *The Official Liquidator, Bellary Bruceptta Stock and Loan Transacting Company, Limited* (5), *Lakshminarasayya Setti* v. *Venkamma Setti* (6), *Wall* v. *Howard* (7) and *In re Sarawak and Hindustan Banking and Trading Company, Limited* (8) referred to.

[Ref. 25 I. C. 666; Rel: 73 I. C. 211.]

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* First Appeal No. 28 of 1911 from an order of A. Sabonadiere, District Judge of Aligarh, dated the 7th of February, 1911.

(1) (1890) I. L. R. 3 All. 236.
(2) Weekly Notes, 1882, p. 46.
(3) Weekly Notes, 1882, p. 136.
(4) (1882) I. L. R. 16 All. 247
(5) (1898) I. L. R. 22 Mad. 291.
(6) (1901) I. L. R. 25 Mad. 576.
(7) (1898) I. L. R. 18 All. 215.
(8) (1679) I. L. R. 4 Cal. 704.

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33 A. 641=8 A. L. J. 719 =10 I. C. 908.

THE material facts were as follows :—

On the 3rd of December, 1910, an order was passed directing a company called the Shri Baldeo Mills Company, Limited, to be wound up. That order was duly notified in the Government Gazette. Certain share-holders thereafter applied to the Judge on the 7th of February, 1911, to reconsider and revoke the order, on the ground that they had no notice, and no opportunity was given to them to put forward their objections. The application was refused by an order of the same date. On the 25th of February, 1911, they filed an appeal purporting to be from this order, but mainly directed against the validity of the order for winding up. At the time of filing the appeal in the High Court an order was prayed for and obtained directing notices of filing the appeal to issue under section 169 of the Companies Act. There was no prayer for an order, and no order was made, extending time for service of notice of appeal. The notices were not served till the 25th of March, 1911. On the appeal coming up for hearing :

The official liquidator appeared in person and took a preliminary objection to the hearing of the appeal :—

Although the appeal is, on the face of it, from the order rejecting the application for re-hearing, as a matter of fact, the grounds are directed against the validity of the order of the 3rd of December, directing the company to be wound up. The latter order, not having been appealed against within three weeks from its date, as required by section 169 of the Companies Act, has become final, and no appeal calling that order in question can now be heard. Again, from whichever order the appeal may be deemed to be, notice of it was not served within three weeks from the date of the order. The words "notice is given" in section 169 mean "notice is served ;" and the section contemplates that the appeal should be properly filed and notice thereof be served within three weeks from the date of the order appealed against, unless the time is extended **[643]** by the Court of Appeal. The case of *Wall* v. *Howard* (1) is an authority for this. In that case the notices were not *served* till the 7th of June, 1894, and it was held that the notices were not *given* till that date. It was open to the appellants to pray for an extension of time under section 169, but they did not do so. The requirements of the section are not fulfilled by obtaining an order, within three weeks, directing notices to issue.

Dr. *Tej Bahadur Sapru*, for the appellants, in reply to the preliminary objection :—

The appellants had no notice of the order of the 3rd of December, and so could not appeal within three weeks of that date. A party must have notice of an order before he can appeal from it. At all events we have a right of appeal against the order of the 7th of February ; for, under section 169, there is an appeal from any order passed in the course of the winding up.

Then, as to the question of notice. Section 169 does not expressly lay down that notice is to be *served* within three weeks. Had that been the intention of the Legislature, it would have distinctly said so. Section 169 says that notice is to be *given* within three weeks. If that be held tantamount to service of notice then great hardship will result ; for, in the majority of cases, even with the greatest promptitude on the appellant's part notice may not be served within the prescribed time on respondents, share-holders, living in different parts of the country. All that

(1) (1899) I. L. R. 18 All. 215.

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the appellant can do is to get an order within time for the issue of notices ; he can have no hand in the service of those notices. It is sufficient compliance with the requirements of the section if notices are "ordered to be given" within the prescribed time. The cases do not lay down that "given" means "served." In the case in I. L. R. 18 All. the order which could be appealed against was that of the 30th of April, 1894; and the appeal was filed on the 2nd of June, 1894. There the appeal itself was filed more than three weeks after the date of the order complained of ; and it was not necessary to decide any other point. The present question did not, therefore, arise in that case. In the case of [644] *Lakshminarasayya* v. *Venkanna* (1) there are some observations in my favour at p. 579 of the report, although the point was not expressly decided. He further cited *Ramanappa* v. *The Official Liquidator, Bellary Brucepetta Stock and Loan Transacting Company Limited* (2) and *In re Sarawak and Hindustan Banking and Trading Company, Limited* (3).

KNOX and PIGGOTT, JJ. :—The appeal before us is on the face of it an appeal against the order of the District Judge, dated the 7th of February, 1911. The order in question is an order refusing to revoke an order passed by him on the 3rd of December, 1910, which order was for the winding up of a company known as Shri Baldeo Mills Company, Limited, Hathras. A preliminary objection is taken by the Official Liquidator to the hearing of this appeal on the ground that the appeal is time-barred. The objection sets out two grounds on which the plea of limitation is pressed. The first is that the order winding up the company was passed on the 3rd of December, 1910, and has become final. Section 169 of the Indian Companies Act, while allowing appeals from any order or decision in the matter of winding up of a company, provides further that no appeal will be heard unless notice of the same is given within three weeks after the order complained of has been made in the manner in which notices of appeal are ordinarily given under the Code of Civil Procedure unless such time is extended by the court of appeal. Secondly, even if the appeal be taken to be against the order, dated the 7th of February, 1911, it is still out of time. The memorandum of appeal was presented within three weeks from the 7th of February, 1911, but notice was not given until long after three weeks had passed. In our opinion the preliminary objection is a good one and prevails. We were referred to several cases by the learned advocate for the appellants, namely, *Ramanappa* v. *The Official Liquidator, Bellary Brucep tta Stock and Loan Transacting Company, Limited* (2), *Lakshminarasayya Setti* v. *Venkanna Setti* (1), *R. Wall* v. *J. E. Howard* (4), *In re Sarawak and Hindustan Banking and Trading Company, Limited* (3). We have considered all these cases, and in our [645] opinion the position taken up in all these cases are against the appellants. The appeal is beyond time and is dismissed with costs. Separate sets of costs will be allowed in case of the Official Liquidator, respondents Nos. 4 and 5 and respondent No. 33.

Appeal dismissed.

(1) (1901) I. L. R. 25 Mad. 576.
(2) (1898) I. L. R. 22 Mad. 291.
(3) (1879) I. L. R. 4 Cal. 704.
(4) (1896) I. L. R. 18 All. 215.

33 A. 645 (=8 A. L. J. 678=11 I. C. 935).

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APPELLATE CIVIL.

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

33 A. 645=8 A. L. J. 678 =11 I. C. 935.

DUTTA AND OTHERS (*Defendants*), *v.* KHEDU (*Plaintiff*).*

[11th May, 1911.]

Civil Procedure Code (1908), *sections* 99, 107, *schedule II—Arbitration—Appellate court, powers of—Reference once made unaffected by death of party.*

An application for a reference to arbitration under schedule II to the Code of Civil Procedure, 1908, may be made to an appellate court as well as to a court of original jurisdiction, and the court is bound to accept and act upon such application if made by all the parties interested in the appeal. When an application for arbitration has been made, it will not lapse by reason of the death of one of the parties; but if the right to sue survives, the arbitration must be proceeded with after substitution of the representatives of the deceased party. *Perumalla Satyanarayana* v. *Perumalla Venkata Rangayya* (1) referred to.

IN this case when the suit was in appeal before the lower appellate court (District Judge of Benares) all the parties interested applied for a reference to arbitration under the second schedule to the Code of Civil Procedure, 1908. The Judge however rejected the application holding that the powers conferred by the second schedule to the Code were not exercisable by an appellate court.

Babu *Piari Lal Banerji*, for the appellant:—

The order of the lower court cancelling the reference to arbitration is illegal. An appellate court can refer a case to arbitration. The learned Judge has held that the law dealing with arbitration no longer forms part of the Civil Procedure Code, as the second schedule cannot be said to be a part of the Code. This reasoning is not sound.

Munshi *Haribans Sahai* for the respondent:—

The lower court says that under section 2, clauses (1) and (18) of the Civil Procedure Code, 'Code' includes 'rules' and 'rules' mean 'rules and forms contained in the first schedule or made under section 122 or 125.' Therefore the second schedule is [646] not part of the Code. Further, the appeal abates, as one of the appellants Gurudatta is dead. The reference to arbitration is also therefore now of no force. The appeal is based solely on one ground. The order was only an interlocutory order. At most it was an irregularity only, and was covered by section 99 of the Code. In section (1), clause (2) of the second schedule the word 'shall' is directory only and not mandatory; and jurisdiction does not cease till the order of reference is made; *Abdul Hamid* v. *Riaz-ud-din* (2). The fifth schedule has been referred to in sections 154 and 155 of the Code. At any rate, an order for reference should not be made on the original application, inasmuch as the arbitrator had already made an award before any order for reference was made.

Babu *Piari Lal Banerji*, in reply.

The appeal does not abate on the death of an appellant. The cause of action survives and the reference to arbitration holds good. *Perumalla* v. *Perumalla* (1).

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* Second Appeal No. 713 of 1910 from a decree of G. A. Paterson, District Judge of Benares, dated the 17th of March, 1910, confirming a decree of Kesari Narain Chand, additional Munsif of Benares, dated the 25th of November 1909.

(1) (1903) I. L. R. 27 Mad. 112. (2) (1907) I. L. R. 30 All. 32.

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33 A. 645=8 A. L. J. 678 =11 I. C. 935.

It will be open to the legal representatives of Gurudatta to refuse to join in the reference afterwards. The law of arbitration was related to a separate schedule, because a new enactment is to be passed on the subject. There is some difference between mere submission and reference to arbitration. It was the policy of the law to allow parties to choose their own forum. The word 'shall' should be construed as mandatory. He quoted *Sheo Dat* v. *Sheo Shankar Singh* (1), *Perumalla* v. *Perumalla* (2), *Abdul Hamid* v. *Riazuddin* (3), *Ramjidas Poddar* v. *Howse* (4), and *Raza Ali* v. *Fida Ali* (5).

KARAMAT HUSAIN and CHAMIER, JJ:—When this case was before the lower appellate court all parties joined in an application to the court that the matters in difference between them should be referred to arbitration, and an arbitrator was named in the application. The court declined to make a reference to arbitration because in its opinion schedule II of the Code of the Civil Procedure was no part of the Code and therefore section 107 of the Code did not confer upon an appellate court the power to make a reference to arbitration conferred upon courts of first [647] instance. This view cannot be supported. The second schedule to the Code is as much an enactment as any other part of the Code, and there is no doubt that the lower appellate court in this case had power to make a reference to arbitration as prayed by the parties. Under paragraph 3, schedule II, the court ought to have referred the matters in dispute to the arbitrator named in the application. It is contended that the error committed by the court is cured by section 99 of the Code. But, inasmuch as the error resulted in the substitution of the Judge's decision for the decision of the arbitrator, it is impossible to hold that the case is governed by section 99 of the Code. Then it was suggested that it would be useless to remand this case to the lower appellate court, because one of the parties to the original application has died. It seems clear, however, that the authority of an arbitrator is not necessarily revoked by the death of one of the parties to a proposed arbitration. In the present case the right to sue survived, and therefore after substitution of the representative of the deceased party the case should have been referred to the arbitration as prayed. We are supported in this opinion by the decision of the Madras High Court in *Perumalla Satyanarayana* v. *Perumalla Venkata Rangayya* (2). We allow this appeal, set aside the decree of the lower appellate court, and remand the case to that court for disposal according to law. Costs of this appeal will be costs in the cause.

Appeal allowed.

33 A. 647 (=8 A. L. J. 791=11 I. C. 815).

REVISIONAL CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Piggott.

RAM KISHAN DAS (*Applicant*) *v.* JAI KISHAN DAS AND OTHERS (*Opposite Parties*).*

[11th May, 1911.]

Act No. I of 1877 (Specific Relief Act), section 9—Possessory suit dismissed—Application by plaintiff for revision rejected.

* Civil Revision No. 8 of 1911.

(1) (1904) I. L. R. 27 All. 53.
(2) (1903) I. L. R. 27 Mad. 112.
(3) (1907) I. L. R. 30 All. 92.
(4) (1907) I. L. R. 35 Cal. 190.
(5) (1900) 4 Oudh Cases. 17.

When the plaintiff's suit under section 9 of the Specific Relief Act, 1877, was dismissed, the High Court declined to interfere in revision upon the ground that it was open to the plaintiff to take another remedy and bring a regular suit on title. *Jwala* v. *Ganga Prasad* (1) followed.

[Fol: 1914 M. W. N. 95=22 I. C. 279.]

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33 A. 647=8 A. L. J. 791 =11 I. C. 814.

[648] The facts of this case were as follows:—

THE plaintiff lived in a house, of which his father was entitled to possession as executor of a certain will, in Benares. During his temporary absence the defendant took possession of the house. On his return to Benares the plaintiff brought a suit for possession under section 9 of the Specific Relief Act. The court of first instance was of opinion that the father alone could sue for recovery of possession and dismissed the suit. The plaintiff came in revision to the High Court.

The Hon'ble Pandit *Sundar Lal* (with him Mr. *A. H. C. Hamilton*), for the opposite parties, raised a preliminary objection to the hearing of the application:—

The ground on which the revision is sought is that the lower court was wrong in law in holding that the plaintiff was not entitled to sue. A mere mistake of law is not a sufficient ground for revision. Besides, the plaintiff has another remedy open to him; he can bring a regular suit for recovery of possession. Having another remedy, he is not entitled to come in revision.

Babu *Jogendro Nath Chaudhuri* (with him Dr. *Satish Chandra Banerji* and Babu *Harendra Krishna Mukerji*), for the plaintiff applicant:—

The only question for determination in a suit under section 9 of the Specific Relief Act is, whether the plaintiff has been in actual possession. That question was found for the plaintiff. The court, however, held that the possession was not juridical possession. But, under section 9, the mere fact of possession is sufficient; it need not be juridical. The plaintiff was entitled to a decree under section 9; and in dismissing his suit the lower court has failed to exercise a jurisdiction vested in it by law. A revision lies under such circumstances. I am supported by the analogous case of *Rudrappa bin Sankappa* v. *Narsingrao* (2).

The other remedy, a regular suit for possession, which is open to the plaintiff is of an entirely different character from the one given by section 9. In a regular suit the plaintiff has to prove his title; but in a suit under section 9 no proof of title is required. The benefit and privilege conferred by section 9 are not available to the plaintiff by the other remedy. There is no other [649] remedy enforcing a mere right to continuance of possession. Strictly speaking, the plaintiff has no other remedy, as he has no title in himself.

The Hon'ble Pandit *Sundar Lal* referred to *Jwala* v. *Ganga Prasad* (1).

KNOX and PIGGOTT, JJ.:—The petitioner instituted a suit in the Court of the Subordinate Judge of Benares for possession. It was a summary suit brought in accordance with section 9 of the Specific Relief Act. The Subordinate Judge found that the plaintiff's possession was not, as he expresses it, juridical, but merely physical, and that he enjoyed possession as representative of his father, who was the person entitled to possession, and dismissed the suit. The plaintiff has come to this Court in revision. We have the authority of the case of *Jwala* v. *Ganga Prasad* (1) for refusing to interfere in revision in cases like the present, where another

(1) (1908) I. L. R. 30 All. 331.

(2) (1904) I. L. R. 29 Bom. 218.

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remedy is open to the aggrieved party. We think that the case is not one in which we should interfere. It is apparently a family quarrel. Petition is dismissed with costs.

Application rejected.

33 A. 647=8 A. L. J. 791 =11 I.C. 815.

33 A. 649 (=11 I. C. 39=8 A. L. J. 715.)

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Piggott.

DWARKA PRASAD (*Defendant*) *v.* BRIJ MOHAN LAL (*Plaintiff*).*

[12th May, 1911.]

Civil Procedure Code (1908), *order V, rules* 15-23—*Practice—Issue of summons—Summons transmitted for service to Court having jurisdiction in the place where defendant resides—Question of sufficiency or insufficiency of service to be determined by Court serving summons.*

Where a summons is sent by a Court in which a suit is filed to a Court within the jurisdiction of which the defendant resides for service on the defendant, it is the serving court and not the issuing court with which, ordinarily speaking, rests the decision whether such summons has been properly served or not, though possibly there may be cases in which the issuing Court may find it necessary to re-open the question of service and to decide thereon. *Roma Nath Bural* v. *Guggodonandan Sen* (1) dissented from. The provisions of order V, rules 15 to 23, discussed.

[650] IN this case one Brij Mohan Lal filed a suit against Dwarka Prasad in the Court of the Additional Subordinate Judge of Agra. Summons was issued to the Munsif of Muttra on the 9th of April, 1910, for service on Dwarka Prasad. The date fixed for hearing was the 10th of May, 1910. A process-server subordinate to the Munsif's Court at Muttra went to the village where Dwarka Prasad was supposed to be residing. He made a return of the process on the 20th of April and in that return he said that he had effected substituted service under order V, rule 17. The Munsif of Muttra examined the process-server on oath touching his proceedings and declared that summons had not been duly served. With this declaration he ordered the summons to be returned to the Additional Subordinate Judge of Agra. No further steps appear to have been taken before the day appointed for hearing. On the day fixed for hearing the Additional Subordinate Judge took up the case and came to the conclusion that service upon Dwarka Prasad had been properly made. He therefore gave a decree *ex parte* against Dwarka Prasad. The defendant applied under order IX, rule 13 of the Code of Civil Procedure for restoration and re-hearing of the suit. This application was rejected. The defendant thereupon appealed to the High Court.

Pandit *Shiam Kishan Dar*, for the appellant.

Munshi *Gulzari Lal*, for the respondent.

KNOX and PIGGOTT, JJ.:—This is an appeal from an order passed by the Additional Subordinate Judge of Agra, rejecting an application made to him under Order IX, rule 13 of the Code of Civil Procedure. The applicant had in his petition alleged that the summons in the original case had not been duly served upon him. We find on looking at the record that the Additional Subordinate Judge of Agra had issued a summons to the Munsif of Muttra for service on Dwarka Prasad, on the 9th of April, 1910. The date fixed for hearing was the 10th of May, 1910. A process-server subordinate to the Munsif's Court at Muttra went to the village where Dwarka Prasad

*First Appeal No. 15 of 1911, from an order of Kalka Singh, Additional Subordinate Judge of Agra, dated the 5th of November, 1910.

(1) (1895) I. L. R. 22 Cal. 889.

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33 A. 649=11 I. C. 39=8 A. L. J. 715.

was supposed to be residing. He made a return of the process on the 20th of April and in that return he said that he had effected substituted service under order V, rule 17. The Munsif of Muttra [651] examined the process-server on oath touching his proceedings and declared that summons had not been duly served. With this declaration he ordered the summons to be returned to the Additional Subordinate Judge of Agra. No further steps appear to have been taken before the day appointed for hearing. On the day fixed for hearing the Additional Subordinate Judge took up the case and came to the conclusion, upon what grounds one cannot tell, that service upon Dwarka Prasad had been properly made. He therefore gave a decree *ex parte* against Dwarka Prasad. In the appeal from the order dismissing the application for rehearing the appellant takes the plea that the summons was not duly served upon the appellant, and that he had no notice of the suit.

It is contended that the return made by the Munsif of Muttra should be accepted as strong evidence that the summons was not duly served, and that the view taken by the Munsif of Muttra was the right and proper view, inasmuch as the serving officer's report shows that Dwarka Prasad was not at the time of the service present in the village and that there was no one authorized to receive summons on his behalf. Our attention was also drawn to the fact that there was evidence to show that Dwarka Prasad had not been to this village for a year or more, and that the plaintiff himself admitted that Dwarka Prasad had not been to the village for four months preceding the service. On the other hand it is contended before us that the Additional Subordinate Judge was the proper Court to say whether the service was properly effected or not, and reliance was placed in support of this contention on *Romanath Bural* v. *Guggodonandan Sen* (1). The procedure regarding service of summons is to be found in order V, rules 15 to 23, of the Code of Civil Procedure. Rule 21 lays down that the summons may be sent by the Court from which it is issued to any Court which has jurisdiction over the place where the defendant resides. The Court receiving the summons is directed by rule 23 to proceed as if the summons had been issued by that Court and shall then, by which we understand when the proceedings authorized have been taken, return the summons to the Court by which it was issued together [652] with the proceedings, if any, with regard thereto. The method which the Court has to adopt in serving processes is governed by the rules contained in order 5, and also such rules as may from time to time be laid down by this Court. In accordance with those rules the processes are to be entered in a register kept for the purpose and made over to the process-server. The process-server should carry out services, if possible, in one of the methods prescribed by rule 16 or rule 17. In the present case he appears to have endeavoured to effect service under rule 16, and as that was impossible, to have adopted the procedure prescribed by rule 17. There is no doubt that he was in error regarding the house upon the outer door of which he affixed the copy of the summons. It was not the house in which the defendant ordinarily resided at that time. But apart from this error his procedure was according to the rule. He returned the process to the Court from which he had received the summons with the report of service endorsed thereon. The Munsif of Muttra upon the return of the summons together with the affidavit of the serving officer went on under rule 19 to endorse a declaration to the effect that the

(1) (1895) I. L. R. 22 Cal. 889.

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33 A. 649=11 I. C. 39=8 A. L. J. 715.

summons had not been duly served. Appendix B, form No. 10, which provides for cases in which a summons for another Court is to be returned, shows that the procedure of the Munsif was correct. Obviously he is the person who is in the best position to decide whether the process has been duly served or not. The process-server is attached to his Court and he should be far better able to judge how far he is or is not telling the truth than a Court situate miles away and in whose presence the evidence regarding the service of process is not and cannot with proper regard to convenience be taken. Seeing that in this case the Munsif of Muttra acting with the powers given him by rules 23 and 19 had certified that the process had not been duly served, it was a very serious step for the Additional Subordinate Judge of Agra, without apparently any other evidence before him, to overrule this certificate and to declare that the process had been duly served. We are not prepared to say that there may not be cases in which the Court originally issuing the summons may find it necessary to re-open the question of service and to decide thereon. But such cases **[653]** should be rare, and it appears to us that under such circumstances the Court issuing the process should only act upon good and a strong evidence which comes or is brought to its notice. Order 5, rule 23, directs that the Court upon receipt of the process from another Court shall proceed as if it had full power to carry out the procedure laid down in rule 23. We see no reason why such procedure should be limited to all but the last sentence of rule 19, and why we should read into rule 19 that only the Court issuing the process is the Court that can declare that the summons has been duly served. It is easy to conceive that such a view of rule 19 may easily lead to unnecessary and round about procedure. If the contention were sound, it would mean that the Court receiving the summons may upon hearing the affidavit of the process-server come to the conclusion that it is the duty of the process-server to return to the village and make further search or that when a process-server has wrongly omitted to effect substituted service under rule 17 to order the process-server to go back and effect such substituted service. But whatever its opinion, it would not be able to issue the necessary orders, but would have to leave the orders to the Court issuing the summons. No advantage is gained by returning the summons to the issuing Court and then having it sent back by the issuing Court to the second Court to carry out a procedure of this kind. With due respect to the view taken in *Romanath Bural* v. *Guggodonandan Sen* (1), we are not prepared to follow what is therein laid down. In the present case we are satisfied that the Munsif of Muttra took the right view that the service had not been sufficient. It follows therefore that under order IX, rule 13 Dwarka Prasad was entitled to have the *ex parte* order and decree set aside and the case re-heard. We allow the appeal, set aside the order appealed from and direct the Additional Subordinate Judge to re-admit the case upon the file of pending cases and dispose of it according to law. Costs here and hitherto will abide the event.

Appeal decreed.

(1) (1895) I. L. R. 22 Cal. 889.

33 A. 654 (=10 I. C 908=8 C L. J. 733).

[654] APPELLATE CIVIL.

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APPELLATE CIVIL.

33 A. 654=
10 I. C. 908=
8 A. L. J. 733.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

TULSHI RAM (*Plaintiff*) *v.* BABU AND ANOTHER (*Defendants*).*

[12th, May, 1911].

Hindu law—Mitakshara—Joint Hindu family—Alienation by one member without the consent of a co-parcener—Legal necessity—Right of subsequently born co-parcener to impugn the transaction.

Where an alienation of ancestral property is invalid as having been made without legal necessity by one member of the coparcenary without the consent of the rest, it is open to co-parceners to object to such alienation notwithstanding that they were born subsequently thereto. *Kali Shankar* v *Nawab Singh* (1) referred to. *Chuttan Lal* v. *Kallu* (2) distinguished.

[Ref. 30 M. L. J. 592=34 I. C. 794 ; 60 I. C. 68 ; 2 Lah. 114=61 I. C. 628 ; 64 I. C. 757 ; 66 I. C. 945 ; 79 I. C. 1019 ; Dist. 83 I. C 1052=22 A. L J. 809=46 All. 882 ; Dist. 79 I. C. 1010 ; Ref. 78 I. C 384 ; 78 I. C. 260.]

THE facts of this case were as follows :—

A mortgage-deed was executed by one Ram Sahai, who had two sons, Boli and Sundar, who were at the time joint with him. Boli attested the deed, and died subsequently, leaving two sons. The mortgagee sued after the death of Ram Sahai and Boli, and asked for a decree for sale against the mortgagors' son and grandsons. The latter pleaded absence of legal necessity for the alienation, which was also alleged to have been made without their consent. The court of first instance found that the transfer was made without legal necessity and without the consent of Sundar, but, as the grandsons had not been born at the time of the mortgage, the Court decreed the claim against them. Upon appeal by the grandsons the lower Appellate Court upheld the finding regarding absence of necessity; held that Boli was not estopped by reason of having attested the deed, and exempted the share of the appellants.

Upon second appeal by the plaintiff, the decree below was affirmed. The following judgment was delivered by KNOX, J.

"This appeal is another ingenious attempt to get behind findings of fact based on evidence. The learned vakil for the appellant ignores the fact that the findings are dead against him and tries to get rid of the decree by attacking points which in the face of the findings are against him. The appeal is dismissed with cost."

The plaintiff appealed under section 10 of the Letters Patent. The appeal was originally heard by STANLEY, C. J., and GRIFFIN, J., who remitted an issue. The appeal then came on for hearing before RICHARDS, C. J., and BANERJI, J.

Babu *Girdhari Lal Agarwala*, for the appellant, relied on *Chuttan Lal* v. *Kallu* (2) and argued that upon the finding [655] that the grandsons were not in existence when the mortgage was made, the plaintiff was entitled to a decree against them and their share in the property.

Dr. *Satish Chandra Banerji*, for the respondents, submitted that the mortgagor not having made the transfer with the assent of his coparceners who were then in existence, and there being no necessity for it the mortgage was invalid and created no charge upon any portion of the

*Appeal No. 90 of 1910 under section 10 of the Letters Patent

(1) (1909) I. L. R. 31 All. 507. (2) (1910) I. L. R. 33 All. 283.

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8 A. L. J. 733.

property. He cited *Kali Sankar* v. *Nawab Singh* (1) and Mayne's Hindu Law, 7th ed., section 342, p. 449.

Babu *Girdhari Lal Agarwala* was heard in reply.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit to enforce a mortgage. The mortgage was made in the year 1891 by one Ram Sahai. Ram Sahai had two sons, Boli and Sundar Lal. Boli left surviving him two sons, Babu Lal and Munshi Lal. The suit was instituted in the year 1909 against Sundar Lal, Babu Lal and Munshi Lal. The defence was that there was no legal necessity and that therefore Ram Sahai had no power to mortgage the ancestral property. The Court of first instance found that there was no legal necessity for the loan. It however, gave a decree for the sale of two-thirds of the property, exempting one-third as being the share of Sundar Lal, who had not consented to the mortgage. This was not very accurate, because on partition the share of Sundar Lal in the property after the death of his father would have been one-half and not one-third. On appeal by Babu Lal and Munshi Lal, the lower Appellate Court affirmed the finding on the question of legal necessity and dismissed the plaintiff's suit to the extent of a further one-third. Why it gave a decree for sale of one-third we do not know. However, the question does not arise, inasmuch as neither Babu Lal nor Munshi Lal appealed. The plaintiff then preferred an appeal to the High Court. The case coming before our learned brother, he dismissed the appeal, whereupon the present appeal was preferred under the Letters Patent. A Bench of this Court remitted issues to the Court below as to whether Babu Lal and Munshi Lal were born in the year 1891 when the mortgage was made. The finding on this issue is that neither was born until some **[656]** time subsequently. It is now contended on behalf of the appellant that inasmuch as neither Babu Lal nor Munshi Lal was alive at the date of the mortgage they cannot question the validity of the mortgage.

A passage to be found at page 449 of the 7th edition of Mayne's Hindu Law was referred to. It is as follows:—"A son cannot object to alienation validly made by his father before he was born or begotten, because he could only by birth obtain an interest in property which was then existing in his ancestor." It seems to us that in order that the alienation should bind sons who are afterwards begotten, it must be a valid and effectual alienation. On the very same page Mr. Mayne says:—"On the other hand, if the alienation was made by a father without necessity and without the consent of sons then living, it would not only be invalid against them but also against any son born before they had ratified the transaction; and no consent given by them after his birth would render it binding upon him.' In the present case the family at the time of the alienation consisted of Ram Sahai and his two sons, Boli and Sundar Lal. It is clear on the finding of the Court that Sundar Lal gave no consent. The attempted alienation was therefore invalid and ineffectual.

There is abundant authority, if it was wanted, that where there is no legal necessity, one of the co-parcenary body cannot alienate the ancestral property without the consent of all the other members; see *Kali Shankar* v. *Nawab Singh* (1). The case of *Chuttan Lal* v. *Kallu* (2) was also relied upon on behalf of the appellant. In that case it would appear that there

(1) (1909) I. L. R. 31 All. 507.

(2) (1910) I. L. R. 33 All. 283.

had been a valid alienation before the birth of the member who afterwards sought to impugn its validity.

In our opinion the decision of our learned brother was correct and we therefore dismiss the appeal with costs.

Appeal dismissed.

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33 A. 655 = 10 I. C. 908 = 18 A. L. J. 733.

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33 A. 657 (=8 A. L. J. 670=11 I. C. 20).

[657] APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

ULFAT RAI AND ANOTHER (*Plaintiffs*) *v.* GAURI SHANKAR AND OTHERS (*Defendants*).*

[12th May, 1911.]

Act No. IX of 1872 (*Indian Contract Act*), *sections* 10 *and* 11—*Guardian and minor—Sale of his own property by guardian to minor—Sale valid if for benefit of minor.*

A certificated guardian transferred some immovable property belonging to himself to his minor wards in satisfaction of money which he owed to them. After the guardian's death the minors sued his heirs for possession of the property. *Held*, on the finding that the transaction was *bona fide* and for the benefit of the minors, that the transfer in their favour was valid and could be enforced by them as against the heirs of their late guardian.

[**Ref.** 37 Mad. 590; 13 A. L. J. 185=27 I. C. 733; 33 I. C. 994=22 C. W. N. 130; 31 I. C. 792=13 A. L. J. 1034; **Fol.** 82 I. C. 96=5 Lah. 317.]

THIS was an appeal, under section 10 of the Letters Patent from a judgment of KARAMAT HUSAIN, J. The facts of the case sufficiently appear from the judgment under appeal, which was as follows :—

"One Mul Chand, who was a certificated guardian of the two plaintiffs, Ulfat Rai and Balak Ram, executed a sale-deed of some immovable property belonging to himself in favour of his minor wards, and applied for mutation of names, but died before the passing of possession to the minors After his death the minors brought an action for possession of the property. The court of first instance, on the authority of *Mohori Bibee* v. *Dharmodas Ghose* (1), dismissed the suit on the ground that a contract to which a minor is party is void. On appeal the decree of the court of first instance was affirmed by the lower appellate court. The lower appellate court in its judgment says, 'Mul Chand, deceased, who executed the sale deed in their favour, happened to be their certificated guardian, but there is nothing in the sale-deed or the plaint to show that he acted in his dual capacity in this transaction. He did not make the contract with himself as guardian of his wards. His contract was clearly with the wards themselves, and it was therefore void *ab initio*.' The plaintiffs have preferred a second appeal to this court, and two points are argued before me. The first is that when the guardian contracted and sold the property to his wards he must be deemed to have purchased it himself as guardian, and that the minors must not be deemed to be a party to the conveyance of sale. In the face of the finding recorded by the lower appellate court I cannot accede to this contention. The minors must be deemed to be a party to the conveyance of sale. The second is that as the sale was made in favour of a minor the ruling of their Lordships of the Privy Council in I. L. R 30 Cal. 539, has no application In support of this contention the learned vakil relies on certain observations made in *Meghan Dube* v. *Pran Singh* (2). Those observations are as follows :—' The first plea raised on behalf of the appellants is that [658] the contract on which the suit is based is void, inasmuch as the mortgagee was a minor at the date of the execution of the mortgage-deed. The learned vakil for the appellants relies upon the ruling of the Privy Council referred to above upon which the court of first instance had based one of its conclusions. That was a case in which their Lordships of the Privy Council held that a contract made by a minor was absolutely void and not merely voidable. That, however, is not the case here. The contract in this case was made by persons of

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*Appeal No. 105 of 1910 under section 10 of the Letters Patent.

(1) (1902) I. L R 30 Cal. 539. (2) (1907) I. L. R. 30 All. 63.

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33 A. 657=8 A. L. J. 670= 11 I. C. 20.

full age, but the person in whose favour the mortgage-deed was executed was a minor. The question of validity of the mortgage does not in our opinion arise.' The learned vakil on the basis of the above observations says that in the case before me the sale was made by a person of full age and the minors in whose favour the sale was made were vendees and that, therefore, the ruling of their Lordships of the Privy Council does not govern this case. I am of opinion that a contract to which a minor is a party, be he a promisee or a promisor is void, and with the greatest respect to the observations made by the learned judges in *Meghan Dube* v. *Pran Singh*, I find myself unable to hold that the sale in favour of the minors, because the vendor was of age, is not void. The result is that the appeal fails and is dismissed with costs."

The plaintiffs appealed.

Munshi *Gulzari Lal*, for the appellants, submitted that the Privy Council ruling had no application and that there was no prohibition in law against a minor being a transferee. In this case it must be held that Mul Chand acted as guardian in the matter of sale. He relied on *Meghan Dube* v. *Pran Singh* (1).

Munshi *Govind Prasad*, for the respondents, relied on *Nanakotti Narayanga Chetty* v. *Logalinga Chetty* (2), and an unreported judgment of KNOX and PIGGOTT, JJ., in E. F. A. 92 of 1910, decided on the 10th of May, 1911, and contended that the plaintiffs as minors could not enter into a contract of sale. The finding of the lower appellate Court was that Mul Chand did not act as their guardian in the matter of the sale and this finding was binding in second appeal.

RICHARDS, C.J., and BANERJI, J.—The facts out of which this appeal arises are very simple. One Mul Chand was the certificated guardian of the plaintiffs. He managed their property for some time and shortly before his death he found himself indebted to them in the sum of Rs. 2,500. In order to discharge this liability he transferred by a document, which on the face of it appears to be a sale-deed, certain immovable property to the minors. He next proceeded to make an application [659] to have mutation of names effected for the benefit of the minors, but before this matter could be carried out Mul Chand died. The defendants, who are the heirs of Mul Chand, then entered into possession. One of the minors has now come of age, and he brings this suit on behalf of himself and his minor brother to recover the property which was transferred into their names by Mul Chand. The defence is that a contract for sale with a minor is absolutely void and reliance is placed on *Mohori Bibee* v *Dharmodas Ghose*, (3). This defence on the face of it is very unmeritorious. It certainly would be a very fraudulent defence, if it had been put forward by Mul Chand, but it is to be said in his favour that if he had lived he never would have put forward the defence which is now put forward by his heirs. In our opinion the proper inference to be drawn from the peculiar facts of this case is that Mul Chand acting on behalf of the minors transferred into their names the property in question. If Mul Chand, as guardian of the minor, had negotiated with a third party and purchased on their behalf certain property and had it transferred into the names of the minors, we do not think it could for a moment be said that the transfer would be void. We do not think that the mere fact that the property in question was the property of Mul Chand can make any difference where we find that transaction was for the benefit of the minors. No doubt if a certificated guardian had fraudulently transferred certain property of his own for more than it was worth to the minors, the minors would be able to repudiate the transfer

(1) (1907) I. L. R. 30 All. 63. (2) (1909) I. L. R. 33 Mad. 312.
(3) (1902) I. L. R. 30 Cal. 589.

on the ground of fraud. There is, however, nothing in the Transfer of Property Act which makes a minor incapable of being the transferee of immovable property. He cannot transfer immovable property, it is true, but that is a different thing from becoming a transferee.

We consider that under the circumstances of this case we are entitled to make and ought to make every reasonable presumption in favour of the minors, and we consider that we are quite justified in presuming that Mul Chand in his capacity as guardian of the minors accepted the transfer on their behalf In the view that we hold it is not necessary to express any opinion upon **[660]** the broad question as to what would be the effect of a transaction in which it was clearly shown that a minor acting entirely in his own behalf con racted for and purchased immovable property. This case is devoid of all merits. We allow the appeal, set aside the decree of this court and of the courts below and remand the case to the court of first instance for determination of the other question. The plaintiffs will have their costs of the appeal to this court and of the lower appellate court. The costs in the court of first instance will abide the event.

Appeal allowed.

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33 A. 660 (=8 A. L. J. 710=11 I. C. 36.)

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

DASONDHAY AND OTHERS (*Defendants*) *v.* MUHAMMAD ABU NASAR AND OTHERS (*Plaintiffs*).*

[13th May, 1911.]

Civil Procedure Code (1882), *sections* 30 *and* 539—*Civil Procedure Code* (1908), *section* 92—*Waqf—Alienation of waqf property—Suit to set aside such alienation and for declaration that property is waqf—Right to sue.*

Held that a suit by two Muhammadans for a declaration that a certain property is waqf and to set aside the alienation of such property by the persons in charge thereof is not a suit contemplated by section 539 of the Code of Civil Procedure, 1882, or section 92 of the Code of Civil Procedure, 1908, and is maintainable without permission obtained under section 30 of that Code.

Muhammad Abdullah Khan v. *Kallu* (1), *Jamal-ud-din* v *Mujtaba Husain* (2) and *Kazi Hassan* v *Sagun Balkrishna* (3) followed.

[Ref: 19 I. C 973; 95 All. 194; **Fol** : 16 M.L.T. 165=27 M.L.J. 270=25 I.C. 559; 49 I.C. 355=23 C.W.N. 115; 65 I.C. 90]

THE facts of this case are as follows :—

A certain piece of land in village Gangoli, district Saharanpur, measuring 3 bighas and 10 biswas, was alleged by the plaintiffs to be part of an endowment comprising a mosque, a grave-yard, a *takia* (*fakir's* stand) and a shrine of one Hazrat Abdulla Nekmard. The Muhammadan defendants and their ancestor, Haji Shah, were *mujawars*, attendants who received a part of the offerings at the shrine, but had no right of transfer. They held the property subject to the will of the plaintiffs and other Muhammadans, and the superintendence of the property was in the hands of the plaintiffs and their ancestors. Defendants

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*Second Appeal No. 1081 of 1910 from a decree of E. O E. Leggatt, District Judge of Saharanpur, dated the 27th of May, 1910, confirming a decree of Maula Bakhsh, Subordinate Judge of Saharanpur, dated the 10th of August, 1908.

(1) (1899) I. L. R. 21 All 187.
(2) (1903) I. L. R. 25 All. 631.
(3) (1899) I.L.R. 24 Bom. 170

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33 A. 660=8 A. L. J. 710 =11 I. C 36.

[661] Nos. 1 to 3, the Muhammadan defendants, had sold to defendants Nos. 4 to 7, the Hindu defendants, a portion of the land, alleging it to be their property, and plaintiffs therefore brought the present suit stating that the sale had been made at the instigation of the Hindus of the village, who had claimed the mosque as a temple on two previous occasions in 1844 and 1861, and had raised a dispute in consequence of which there had been both civil and criminal litigation, and that at both times the mosque had been held to be waqf property, and all the Muhammadans of the village had a right to use the shrine, the mosque, the grave-yard, the *takia* and the land attached for upkeep and maintenance for the performance of their religious ceremonies and the burial of their dead. The defence set up by the Muhammadan defendants was that the tomb on the land was that of their ancestor Abdulla Nekmard, and that it as well as the land which surrounded it was their private property of which they held possession as owners. There might be a few graves on the plot, but they were of their ancestors only. It was not a public grave yard, the defendants having long had their houses on the land, and having let out part of the land itself. They further alleged that the suit had been instituted by Abu Nasar at the instigation of some of the other plaintiffs, Kallu, Abdul Hasan and Ghissa, whom one of the defendants, Imam-uddin, had prosecuted for assault and criminal trespass, and that the plaintiffs, if they had any cause of action, should bring a suit under section 539 of the Code of Civil Procedure. Defendants Nos. 4 to 7 supported this written statement.

It was held by the court of first instance that the property was waqf; that the plaintiffs had held possession within twelve years preceding the suit, and that the defendants had acted prior to this litigation as trustees only and that their alienation was not *bona fide*. It consequently decreed the suit.

The lower appellate court was of opinion that possession had not been proved by the plaintiffs, but that they had a right to sue as members of the Muhammadan community, and it upheld the decree.

The defendants appealed.

[662] Mr. *Nihal Chand* (for Dr. *Satish Chandra Banerji*), for the appellants:—

The wajib-ul-arz and the other documents in the case had not been interpreted correctly by the courts below. Properly construed, they showed that the property was transferable, and appellants had acquired a valid title therein. Plaintiffs were not entitled to a decree for possession, as possession had not been shown, and they had no cause of action. The proper remedy of the plaintiffs lay in a suit under section 539 of the Code of Civil Procedure.

Mr. *Abdul Raoof*, for the respondents.

Defendants were not *mutawallis* and were as much trespassers as any body. Every Muhammadan of the locality had a right to prevent the deterioration of the waqf property. The plaintiffs had a right to sue as Zamindars and as members of the public: *Zafaryab Ali* v. *Bakhtawar Singh* (1), *Jawahra* v. *Akbar Husain* (2). The right was confined to the local Muhammadans. Plaintiffs had a right of prayer in the mosque, and therefore they were interested in its protection and maintenance. There were no trustees in this case. The *mujawars* were mere trespassers. The cause of action arose on the sale of the property.

(1) (1883) I. L. R. 5 All. 497.

(2) (1884) I. L. R. 7 All. 178.

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Kazi Hassan v. *Sagun Balkrishna* (1) and *Muhammad Abdullah Khan* v. *Kallu* (2) were referred to.

Dr. *Satish Chandra Banerji*, in reply :—

Section 539 was amended in 1888, and a large number of cases were overruled. Plaintiffs had no cause of action. They could not bring a suit for possession merely because they possessed a right of entry. Plaintiffs were not prevented from exercising their right of entry. Section 30 of the Civil Procedure Code also applied. A declaration was purely a discretionary remedy in this case. There was no interference with the rights of any body by the sale. He referred to Amir Ali's Muhammadan Law p. 545-9. Amir Ali and Woodroffe, Civil Procedure Code, page 365.

KARAMAT HUSAIN and CHAMIER, JJ. :—This was a suit by the respondents who are some of the Muhammadan residents of Kasba [663] Gangoli in the Saharanpur district for a declaration that 3 bighas odd of land situated in the Kasba was waqf property, that certain sale deeds executed by the Muhammadan appellants in favour of the Hindu appellants were invalid, for possession of the property alienated, and for other reliefs. The respondents' case was and is that in the Kasba in question there has for a very long time been a shrine dedicated to one Abdulla Nekmard, a mosque, grave-yard, a *takia*, and various buildings ; that the land and all the buildings thereon are waqf; that all the Muhammadans of the Kasba have a right to use the shrine, mosque, grave-yard, and *takia*, and that the land which has been alienated was originally made waqf for the purpose of providing for the expenses of the mosque and *takia*. The respondents alleged that the Muhammadan appellants were *mujawars* attached to the mosque and *takia*. The appellants pleaded that the Muhammadan appellants were owners of the property which they had alienated. The first court found that the land and buildings were all waqf ; that the transfers which had been made were invalid, and that section 539 of the Code of Civil Procedure which was in force at the time the suit was brought, did not bar the suit and it decreed the claim. Its decision was confirmed on appeal by the District Judge who held that the property was waqf and that the suit was not barred by limitation. The first question for decision in this second appeal is, whether there is evidence to support the finding that the property is waqf. The District Judge rests his decision principally upon documentary evidence which begins with a *Goshwara Khatauni* prepared under Regulation IX of 1833 and ends with certain public documents dated as recently as 1897. We think that it is unnecessary to detail these documents. In our opinion they fully justify the conclusion of the learned Judge that the property was made waqf many years ago, and has been treated as such until recently and that the Muhammadan defendants are no more than *mujawars*, although they in fact claim to be the proprietors of the property. The 13th ground of appeal to the District Judge was that the suit was barred by section 539 of the Code of Civil Procedure. The learned Judge notes in the course of his judgment that this ground of appeal was not taken in the memorandum of appeal to his Court, but the [664] question was raised in the course of the argument, and we think we are bound to take notice of it. It seems to us quite clear that the suit is not one of the kind or kinds contemplated by section 539 of the Code of 1882 or section 92 of the present Code of Civil Procedure. But if it is not a suit of the kind contemplated by those sections the question arises whether the plaintiffs respondents have any right to maintain the suit. It is quite clear that

(3) (1899) I. L. R. 24 Bom. 170. (4) (1899) I. L. R. 21 All. 187.

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33 A. 660=8 A. L. J. 710 =11 I. C. 36.

all the Muhammadan residents of the Kasba could have joined in a suit of this description to protect the waqf property, and that if the respondents had obtained the leave of the Court under section 30 of the Code, they could have maintained the suit on be half of the Muhammadan community.

They did not attempt to obtain permission of the Court, but in view of the fact that no objection on the ground of the absence of such permission was taken to the suit, either in the Court of first instance or in the lower appellate Court, and to the fact that the objection based upon section 539 of the Code of 1882 was dropped in the lower appellate court, we think that it would be wrong to dismiss the suit on the ground that the permission of the Court was not obtained under section 30 of the Code. It seems that according to the decisions in *Muhammad Abdullah Khan* v. *Kallu* (1), *Jamal-ud-din* v. *Mujtaba Husain* (2) and *Kazi Hassan* v. *Sagun Balkrishna* (3) the respondents are entitled to maintain the suit themselves without reference to the provisions of section 30 of the Code. In either view, therefore, we must hold that the suit is maintainable. It seems to us, however, that whether the respondents are regarded as suing for themselves or on behalf of the whole Muhammadan community of the Kasba, they are not entitled to a decree for possession of the property. They are entitled only to a declaration that the transfers mentioned in the first prayer for relief are invalid on the ground that the property is waqf. In this view it is unnecessary to consider the question which was raised in the Court below as to whether the plaintiff's respondents were at any time in possession of the property.

[665] For the above reasons we allow the appeal in part and in lieu of the decree for possession of the property we declare that the transfers made by the Muhammadan defendants in favour of the Hindu defendants are invalid. As the appeal has in substance failed and the point on which the decree has been modified was not taken in the grounds of appeal. We direct that the appellants pay the costs of the respondents.

Appeal dismissed.

33 A. 666 (=8 A. L. J. 757=10 I. C. 565.)

APPELLATE CIVIL.

Before Mr. Justice Karmat Hussain and Mr. Justice Chamier.

KISHORI DUBAIN (*Plaintiff*) *v.* MUNDRA DUBAIN AND ANOTHER (*Defendants*).*

[18th May, 1911.]

Construction of document—Will—Gift—Property given to two brothers who were joint—Nature of estate taken by brothers—Hindu law.

Where property is given or devised, without specification of the individual interests of the recipients, to persons who are members of a joint Hindu family, it does not follow that they take such property as joint property, the principle of joint tenancy being unknown to Hindu law save in connection with the joint Hindu family *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (4), *Bai Diwali* v. *Patel Bechardas* (5) and *Gopi* v. *Jaldhara* (6) referred to. *Mankamma Kunwar* v. *Balkishan Das* (7) doubted.

* Second Appeal No 930 of 1910 from a decree of F. D Simpson, District Judge of Gorakhpur, dated the 29th of August, 1919, reversing a decree of Guru Prasad Dube, Additional Subordinate Judge of Gorakhpur, dated the 23rd of March, 1910

(1) (1899) I. L. R. 21 All. 187.
(2) (1903) I. L. R. 25 All. 681.
(3) (1899) I. L. R. 24 Bom 170.
(4) (1898) I. L. R. 25 Cal 670.
(5) (1902) I. L. R. 26 Bom. 445.
(6) (1910) I. L. R. 33 All. 41.
(7) (1904) I. L. R. 26 All. 36.

[Ref. 26 I. C. 689; 63 I. C. 301=19 A. L. J. 608=43 All. 600; Dist. 39 Mad. 817=30 I. C. 755; Ref. 68 I. C. 217=77 I. C. 450=37 C. L. J. 233=50 Cal. 370; Rel. 79 I. C 86.]

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33 A. 658=8 A. L. J. 757=10 I. C. 568.

THE following pedigree explains the position of the parties to this appeal and other persons to whom reference will be made:—

RAM CHARAN DUBE.
(died June 1878).

Deoki Nandan =Sonkali

Laohhmi Prasad.

Kali Prasad (died Maroh 1887).

Sarup Narain.

Jainti Prasad (died 18-9) = Mundra, defendant.

Triloki (died 20th April 1908) =Kishori, plaintiff.

Deoki Nandan died in his father's lifetime. Kali Prasad was alleged to have become a fakir, but he returned and filed a suit **[666]** for partition, in which a decree was made on the 6th of June 1874, giving him a one-third share. Jainti Prasad died in 1889, and after him Sarup Narain continued in possession. He was succeeded by his son Triloki, and the latter by his widow Kishori. Mundra, the widow of Jainti Prasad, executed a lease of two villages, Misraulia and Gular Bahar, claiming that they were her husband's self-acquisition. She set up a gift by Ram Charan and a will of Kali Prasad in favour of the two brothers. Musammat Kishori then filed the present suit to have the lease set aside, alleging that these documents had never been given effect to, and that the brothers had taken the estate jointly in the natural course. The court of first instance held that Jainti Prasad and Sarup Narain were joint; that the gift was of no operation, as Ram Charan was joint with them, and that they were the natural heirs of Kali Prasad. The defendant appealed, alleging that the brothers were not joint, as they used to live separately. The District Judge held that the property had been held in severalty, as there had been a gift. As mutation did not correspond to the actual shares, there must have been family exchanges and transfers of the property. The plaintiff appealed.

The Hon'ble Pandit *Sunder Lal* (with him Dr. *Satish Chandra Banerji* and Munshi *Govind Prasad*,) for the appellant:—

The whole property was joint and ancestral. The will and the deed of gift were executed, but had never been given effect to. The property had devolved in the natural course. The will of Kali Prasad merely declared his natural heirs to be heirs. It simply said '*jo bhatijyan hamare hain waris apna qayam karke likh dete hain.*' The gift by Ram Charan was invalid because the property was joint family property. There was no specification of shares even. There was no evidence as to any partition in the family save that about Kali Prasad's. This was comprised in the decree of the 6th of June, 1874, which merely defined his share as one-third. This partition could only be effective as between the brothers, but would not affect the brother's sons. Therefore Sarup Narain and Jainti Prasad continued to be joint.

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[667] There may have been partition as between Kali Prasad and Ram Charan, but there was no partition *inter se* between Ram Charan, Lachhmi Prasad and his sons. Probably Lachhmi Prasad was alive on the date of the gift by Ram Charan. There can be only two theories in the case. Either on the partition by Kali Prasad, the rest of the family continued joint, or there was also a division between them consequent on the partition. Assuming that there was this fresh partition, Lachhmi Prasad would have got his share of the property, and that share would be joint as between him and his two sons, and Ram Charan's own share would descend to them as joint property. The decree of the 6th of June, 1874, was also in the plaintiff's favour, because it also did not specify any shares except that of one-third awarded to Kali Prasad.

The question is whether Jainti Prasad and Sarup Narain were joint when Jainti Prasad died. No actual partition between them was proved as a matter of fact. The court of first instance found that they were joint. The lower court did not go into the question at all. If there was no actual evidence of partition, there was no inference of partition in law. Assuming that Ram Charan and Lachhmi Prasad got one-third each, Lachhmi Prasad's one-third share would be joint as between Sarup Narain and Jainti Prasad. There was no proof even that Sarup Narain and Jainti Prasad were born at the time of the partition suit. Therefore Lachhmi Prasad and his sons were joint, and as between the sons there was no partition.

Lachhmi's interest was inherited jointly by his sons and became joint property. In any case, the two villages, Misraulia and Gular Babar, would be joint property, and these very villages had been leased out by the respondent. There was no specification of shares in the will by Kali Prasad. The whole property was therefore given jointly to two members of a joint family, and would descend to them as joint property ; *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (1). This was a very strong case, and it did not accept the Allahabad ruling on the point, though the latter was so reasonable. The [668] Privy Council held that under an intestacy, daughter's sons would take jointly. Not only the sons of one daughter, but the sons of several daughters residing in several families at several places would all hold a joint estate in any property that descended to them, and that property would possess all the incidents of joint family property. Their Lordships of the Privy Council overruled *Jasoda Koer* v. *Sheo Pershad Singh* (2), which had laid down that if any property that was not joint property came into the possession of joint members of a family, it would not be joint property.

This ruling applies if there is no separate specification of shares, *i. e.*, if the gift or sale be made jointly. I may refer to the case of a joint purchase. This is the case of a joint gift. These are modes of acquisition of property. The ordinary presumption of Hindu Law is in favour of jointness. The instance of the funds being separate only rebuts that presumption. If there are six members in a joint family property given only to three or four, would it be joint as between these three or four. There is no getting out of the Privy Council case. The facts are almost parallel. Property is held here jointly. Sons and nephews may not be co-owners, yet they hold it jointly. The contrary must be shown by him who alleges separation. No difference can be made, because persons in

(1) (1902) I. L. R. 25 Mad. 678 (85). (2) (1889) I. L. R. 17 Cal. 33.

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the ascending or descending line do not share in the joint property; *Radhabai* v. *Nanarav* (1), *Mankamna Kunwar* v. *Balkishan Das* (2), *Durga Dei* v. *Balmakund* (3) and *Ram Pershad Singh* v. *Lakhpati Koer* (4).

The course of conduct later on in the family would show the devolution of the property. It was not necessary for the plaintiff to prove adverse possession. She succeeded to it in the natural course. It was alleged that there was no denial of defendant's title before suit. It was unnecessary, because defendant was not in possession, and it only became necessary when she executed this lease. If Ram Charan, Lachmi Prasad, and **[669]** his sons were joint, the latter succeeded to the property by inheritance and held it jointly. If partition was assumed, the interest of Lachhmi Prasad was still joint with that of his sons, and the share of Ram Charan came to them jointly; as also did Kali Prasad's interest in his share. The villages under lease were covered neither by the gift nor by the will. They devolved on the plaintiff, and the defendant had no title. The lease was invalid in law.

Babu *Surendra Nath Sen* (with him the Hon'ble Pandit *Moti Lal Nehru*) for the respondents :—

The decree of the 6th of June, 1874, was not a mere declaratory decree, as it contained a patition of revenue-paying property. The terms of that decree themselves show that it was a partition decree. It was passed on two suits for partition, one against Ram Charan and one against Lachhmi Prasad and the widow of Deoki Nandan. A decree for one-third would never have been passed unless there had been persons in the suit representing particular units of the family. The nature of the tenancy was converted from joint tenancy to tenancy in common as soon as the Court had to determine a share. It was not necessary for the decree to separate Lachhmi Prasad and his two sons. The ruling in 29 Allahabad does not affect the case. So long as Ram Charan's share was not determined, Kali Prasad's could not be found. Hence the shares of both Ram Charan and Lachhmi Prasad had to be found. In 29 All. 93. half had been given to uncle and half to his brother's two joint sons, it was not necessary there to determine the shares of the two sons. They were treated merely as members of one branch. The same principle applies here; *Balkishen Das* v. *Ram Narain Sahu* (5). Kali Prasad did not continue joint even after the decree, because the will declared that he was the sole and absolute owner, and he executed a sale deed to Ishri Prasad of one-third of his own one-third share on the 14th of August, 1874.

I would invite the attention of the Court to the gift of Ram Charan. The gift militates against the theory of jointness. What could be the ostensible object of making a gift to his natural heirs, who were already members of a joint family? The **[670]** parties to the decree constituted the aggregate units of the joint family; *Parsotam Rao* v. *Radha Bai* (6). As to the case of daughters, the general rule was that daughters took a joint estate, and if one of them died, her sons could not succeed as against the others. There was no question of Hindu Law, but entirely of construction; *Sreemutty Soorjeemoney Dasse* v. *Denobundoo Mullick* (7). One should look to the surrounding circumstances only if there was an ambiguity in construction. In 1878, the testator could have no anticipations

(1) (1879) I. L. R. 3 Bom. 151 (153).
(2) (1905) I. L. R. 28 All. 38.
(3) (1906) I. L. R. 29 All. 93.
(4) (1902) I. L. R. 30 Cal. 231 (253).
(5) (1903) I. L. R. 30 Cal. 733 (750).
(6) (1910) 7 A. L. J. 451 (456).
(7) (1857) 6 Moo. I. A. 526 (550).

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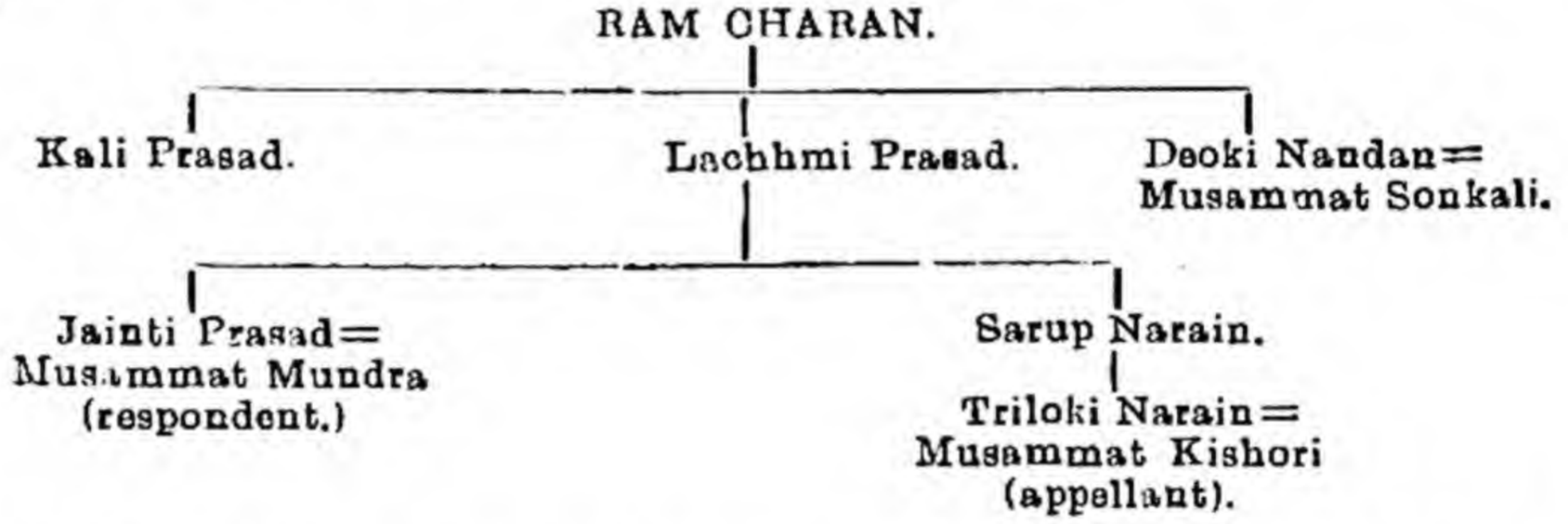
33 A. 665=8 A. L. J. 757=10 I. C. 865.

that Jainti Prasad would die young, because if Jainti Prasad would have left any children, they would not inherit. A presumption of joint tenancy existed in Hindu law but not in English law. It would be a question of construction in each case. and would not be held joint merely because the donees happened to be joint; *Vydinada* v. *Nagammal* (1). There was a conflict of judicial opinion on this point, till *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (2), which overruled 11 Mad. and held that documents were to be subject to natural interpretation and not to technical rules of English Law. *Rewun Persad* v. *Mussumat Radha Beeby* (3), *Mankamna Kunwar* v. *Balkishan Das* (4), *Gopi* v. *Jaldhara* (5), *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (6), *Bai Diwali* v. *Patel Bechardas* (7) and *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (8) were also cited.

As to the argument that the documents had not been given effect to, there was a clear finding of fact in the judgment of the lower Court, and this ground could not be urged in second appeal. The two villages of Misraulia and Gular Bahar were merely reclaimed jungle and so had not been mentioned by name in the deeds. Their lordships had to look at the deed of gift only by itself; *Zahuran* v. *Rahim* (9). Mere continuity of possessoin was not adverse possession. The latter had not been proved.

Munshi *Govind Prasad*, in reply.

[671] CHAMIER, J.—The following pedigree explains the position of the parties to this appeal and other persons to whom reference will be made:—



After the death of Deoki Nandan, which occurred many years ago, Ram Charan, his sons Kali Prasad and Lachhmi Prasad, and his grandsons Jainti Prasad and Sarup Narain constituted a joint family. In 1874, Kali Prasad brought suits against Ram Charan, Lachhmi Prasad and Sonkali for partition and possession of his share in the family property and obtained decrees which established his right to possession of a one-third share. In August 1876, Kali Prasad made a will whereby he left his shares in the villages Katyalu, Bisauli, Kanura and Badhya, to his nephews, Jainti Prasad and Sarup Narain. In January, 1878, Ram Charan executed a deed of gift whereby he transferred to the same two persons his ancestral and acquired shares in the four villages mentioned above and other property. All the males in the family have died. The dates on which they died are not material. It is only necessary to state that Jainti Prasad predeceased his brother Sarup Narain, and on Jainti's death mutation of names in respect of the shares standing in his name

(1) (1884) I. L. R. 11 Mad. 253.
(2) (1896) I. L. R. 23 Cal. 670.
(3) (1846) 4 Moo. I. A. 137.
(4) (1905) I. L. R. 28 All. 38.
(5) (1910) I. L. R. 33 All. 41.
(6) (1897) I. L. R. 24 Cal. 646 (652).
(7) (1902) I. L. R. 26 Bom. 445.
(8) (1903) I. L. R. 27 Mad. 800.
(9) (1900) 8 A. L. J. 247.

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was made in favour of the respondent, Musammat Mundra. On the death of Sarup Narain, mutation of names in respect of the property standing in his name was made in favour of his son, Triloki Narain, and on the latter's death in favour of the appellant, Musammat Kishori. It may be mentioned here that Musammat Sonkali was at one time recorded with Jainti and Sarup as one of the proprietors of shares in two villages called Misraulia and Gular Bahar, a fact which seems to have puzzled the lower appellate court. The explanation is to be found in the deed of gift executed by Ram Charan, whereby he gave his [672] shares in certain jungle land to Musammat Sonkali for life and thereafter to his two grandsons. That land, as the lower appellate court has shown, is now known as Misraulia and Gular Bahar. With the exception of these two villages the whole of the property in the six villages with which we are concerned in the present case was for many years recorded in the names of Jainti Prasad and Sarup Narain.

The respondent, Musammat Mundra, having made a lease of her recorded shares in two of the villages in favour of the respondent, Mahant Beni Bibikanandgir, and having in other ways shown that she intended to claim a widow's estate in the property recorded in her name, the appellant brought the suit out of which this appeal has arisen, claiming a declaration that she is the owner and in possession of the property recorded in Musammat Mundra's name, and that the lease is invalid. The appellant's case is that the brothers, Jainti and Sarup, held all the property recorded in their names as members of a joint family; that on the death of Jainti the whole passed to Sarup Narain, on the latter's death to Triloki Narain, and on his death to the appellant who has been in undisputed possession for many years. The respondent's case is that the decree of 1874 operated to sever the interests of Kali Prasad, Ram Charan and Lachhmi Prasad; that each took a one-third share, Lachhmi Prasad taking one-third for himself and his two sons; that Jainti Prasad and Sarup Narain each took a separate interest under the will of their uncle, Kali Prasad, and under the deed of gift executed by their grandfather, with the result that the interest of Jainti, which is the property now in dispute, passed on his death to his widow, Musammat Mundra.

The first question is as to the effect of the decree of 1874. There is no doubt that the decree operated to sever the share of Kali Prasad from the shares of the rest of the family. The appellant referred to the decisions in *Durga Dei* v. *Balmakund*(1) and *Balkishen Das* v. *Ram Narain Sahu* (2) and contended that as shares were not actually allotted by the decree to Ram Charan and Lachhmi Prasad, these two should be held to have remained joint in estate. The respondent referred to the case of [673] *Ram Pershad Singh* v. *Lakhpati Koer* (3), and contended that Ram Charan and Lachhmi Prasad should be regarded as having held separately after the decree, because in order to determine the shares of Kali Prasad it was necessary to determine the shares of Ram Charan and Lachhmi Prasad, and because the evidence shows that they held their shares separately after the decree. They might, no doubt, have elected to remain in union, but the evidence shows that they did not. Ram Charan, as already stated, transferred his shares to his grandsons, and there is other evidence to support the view of the lower appellate court that Ram Charan held a separate share after the decree of 1874.

(1) (1909) I. L. R. 29 All 93.
(2) (1903) I. L. R. 30 Cal. 738.
(3) (1902) I. L. R. 30 Cal. 231.

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The second and most important question in this case is whether Jainti Prasad and Sarup Narain took separate interests under the will and deed of gift, as contended by the respondents, or took the property as undivided co-parceners, as contended by the appellant. The latter does not suggest that the two brothers took the property as joint tenants in the sense of the English law. Her learned advocate relied principally upon the decision of their Lordships of the Privy Council in *Venkatayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (1). That case does not appear to me to have any real bearing on the question which we have to decide. There the question was whether the sons of a daughter who were members of a joint family with their father and had succeeded to their maternal grandfather's estate on the death of their mother, took the property as undivided co-parceners (i.e. jointly) or as tenants in common. It has been pointed out by the Madras High Court, see *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (2), that that decision cannot be regarded as laying down a rule that all property coming to two or more persons who happen to be members of a joint family is taken by them jointly, i.e., with the rights of co-parceners in a joint family. Moreover, we have to deal here not with succession on an intestacy, to which alone the ruling of the Privy Council can be applied, but to a case of property passing under a deed of gift. The nature of the interests [674] taken by the two brothers depends upon the language of the will and deed of gift, and, if the language is ambiguous, upon any presumption or rule of construction that may be applicable to such documents. There is nothing either in the will or the deed of gift which gives any indication as to whether the testator or donor intended that the two brothers should hold as undivided co-parceners or as tenants in common with separate interests. There are cases, e. g., *Vydinada* v. *Nagammal* (3) and *Mankamna Kunwar* v. *Balkishan Das* (4), in which it has been held in accordance with a rule of English law that a gift or bequest to two persons without more creates a joint tenancy, but their Lordships of the Privy Council have disapproved of the application of this rule to the will of a Hindu and have observed that the principle of joint tenancy is unknown to Hindu law except in the case of co-parcenary between the members of an undivided family ; *Jogeswar Narain Deo* v. *Kam Chandra Dutt* (5). As regard may be had to surrounding circumstances in order to ascertain the meaning of the testator in the one case and of the donor in the other, the learned advocate for the appellant has relied upon the fact that the brothers were at the time of the gift and will members of a joint family and has pointed out that this circumstance was relied upon by this Court in the case of *Mankamna Kunwar* v. *Balkishan Das* (4) as a reason for holding that a joint tenancy had been created by a deed of gift. The respondent's learned vakil contended that the authority of the last mentioned case was much weakened by the erroneous application of a rule of English conveyancing to the construction of a deed of gift executed by a Hindu, and he referred to a later case of *Gopi* v *Jaldhara* (6), in which, following a decision of the Privy Council, one of the same Judges declined to apply that rule to the construction of a will executed by a Hindu. The learned vakil referred also to the case of *Bai Diwali* v. *Patel Bechardas* (7). There, property had been given to two brothers who were members of a joint Hindu family. One died leaving a widow, and it was held that she was

(1) (1902) I. L. R. 25 Mad. 678.
(2) (1903) I. L. R. 27 Mad. 300.
(3) (1888) I. L. R. 11 Mad. 258.
(4) (1905) I. L. R. 28 All. 88.
(5) (1896) I. L. R. 23 Cal 670.
(6) (1910) I. L. R. 33 All 41.
(7) (1902) I. L. R. 26 Bom. 445.

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33 A. 666=8 A. L. J. 757 =11 I. C. 865.

[675] entitled to half the property as heir of her husband. The facts of the present case are very much the same. It was suggested that, as this Court in the case of *Mankamna Kunwar* v. *Balkishan Das* (1) relied upon the fact that the donees were living as undivided co-parceners as a reason for holding that the donor intended that they should hold the property passing to them under the deed of gift, in the same manner we should give the same weight to a similar circumstance in the present case. That would not be a proper way of using a reported decision. One document cannot be construed by reference to decisions on other documents executed in different circumstances and containing different language. We must determine for ourselves what weight should be attached to the fact that the two brothers, Jainti Prasad and Sarup Narain, were living in union when the will and deed of gift were executed in their favour. It was suggested that a passage in the judgment of the Privy Council in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (2), to the effect that the principle of joint tenancy is unknown to the Hindu law except in the sense of co-parcenary between the members of an undivided family recognizes the possibility of property being given or devised to two or more Hindus to be held by them in co-parcenary under the Hindu law. But the context shows that nothing of the kind was intended or contemplated. Their Lordships were considering only the incidents of the right of survivorship between joint tenants under the English law. There seems to be a difficulty in treating a gift or devise of property to two members of a joint family as gift or devise to them of property to be held as undivided co-parceners, for, as pointed out in the case of *Bai Diwali* v. *Lalee Bechardas* (3), such a devise or gift would create interests in favour of the issue of the donees who might be unborn at the time of the gift on the death of the testator. I see no reason whatever for supposing that either Ram Charan or Kali Prasad intended that any children that might be born to either of the brothers should on their birth acquire an interest in the property. It must be remembered that the two brothers were at the time joint with [676] their father, Lachhmi Prasad, and others, and the fact that the gift and devise were made to them only suggests that there was no intention to benefit any other members of the joint family whether then in existence or to be born thereafter. It must also be remembered that Ram Charan had already given some property to Lachhmi Prasad to be held by him separately. In the circumstances I am unable to come to the conclusion that either Kali Prasad or Ram Charan intended that the two brothers should hold the property given to them as undivided co-parceners. The fact that the two brothers were joint is not in my opinion a sufficient reason, in the present case, for holding that the donor and testator intended that they should hold the property as undivided co-parceners. The lower appellate Court held that the brothers took in severalty, and I am not satisfied that that decision is erroneous.

The question of limitation is disposed of by the finding of the lower appellate Court that, though there is no good evidence of possession on the part of Musammat Mundra, there is no good evidence that her relatives ever held adversely to her.

I would dismiss the appeal with costs.

KARAMAT HUSAIN, J.—I agree.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

(1) (1904) I. L. R. 28 All. 38.
(2) (1896) I. L. R. 23 Cal. 670.
(3) (1902) I. L. R. 26 Bom. 445.

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33 A. 677=8 A. L. J. 723=10 I. C. 543.

33 A. 677 (=8 A. L. J. 723=10 I. C. 543).

[677] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

RAM KISHAN DAS (*Plaintiff*) *v.* TUNDA MAL AND OTHERS (*Defendants*).*

[18th May, 1911].

Hindu Law—Joint family property—Separate property—Burden of proof—Nucleus—Presumption.

It is necessary to establish the existence of a nucleus of joint family property before the property in the possession of any one member can be presumed to be joint family property. There is no presumption that a Hindu family has any joint property. *Taruck Chunder Toladar* v. *Joodheshteer Chunder Koondco* (1) dissented from. *Mooljt Lilla* v. *Gokuldas Vulla* (2), *Tolseydas Ludha* v. *Premji Tricumdas* (3), *Dwarka Prasad* v. *Jamna Das* (4) followed. *Lal Bahadur* v. *Kanhaiya Lal* (5) referred to.

[Dist. 35 All. 534; Appr: 27 M. L. J. 677=26 I. C. 33; Ref. 62 I. C. 436=25 C. W. N. 382; Fol. 56 I. C. 129; 71 I. C. 130=16 L. W. 936=1923 M. W. N. 57.]

THE facts of this case are fully stated in the order of Tudball J. referring the appeal to a Bench of two Judges.

"The facts of this case as held by the Court below are as follows:—

"In the year 1879 there was a joint Hindu family consisting of Hulas Rai and his two sons, Dal Chand and Gulab Rai. Dal Chand was then a minor of some 8 or 9 years of age. Gulab Rai was an adult. The family home was at Daulatgarh, a village in the Bulandshahr district Gulab Rai purchased a house in that year, situated in the town of Bulandshahr. There is no evidence to show that at that time there was any nucleus of family property or any family funds of any sort. The present plaintiff appellant obtained a money decree against Gulab Rai and Dal Chand in recent years Hulas Rai is dead. Gulab Rai executed a sale deed of the house in question in favour of the contending defendant, Tunda Mal. The plaintiff attached it in execution of his decree Tunda Mal objected on the ground that it belonged to him, and it was released. Thereupon plaintiff brought this suit for a declaration that the house belonged to Gulab Rai and Dal Chand and was liable to attachment and sale in execution of his decree. In his plaint he merely alleged that Gulab Rai and Dal Chand were both owners of the home, without stating how or when they acquired it. He then mentioned the circumstances of the attachment and the objections raised and the decision thereon. He then alleged that Gulab Rai had in order to defeat and defraud him executed a fictitious and collusive sale deed in favour of Tunda Mal without any consideration. Gulab Rai being dead on the date of institution of the suit, his daughter was made a defendant in his place. Tunda Mal defended the suit He pleaded (1) that Gulab Rai alone was the owner of the house; (2) that the sale was a *bona fide* sale for consideration; (3) that Dal Chand was separate from Gulab Rai. Both the courts held:—

(1) That Gulab and Dal Chand were joint.
(2) That the sale to Tunda Mal was *bona fide* and for consideration.

[678] "The Munsif, however, held that as Gulab and his brother were joint, the presumption was that the house was acquired from joint family funds, and therefore Gulab Rai alone had no power to sell it, it being joint family property. He therefore held the sale to be invalid in law and decreed the claim. The lower appellate Court, however, held that, there being no evidence to show that Gulab Rai purchased the house out of joint family funds, the presumption was that he had acquired it for himself. The Munsif relied on the decision in *Lamraj Rai* v. *Salik Rai* (6). In this case the pleadings disclosed the fact that the family was possessed of property. The lower Court relied on the ruling in *Hem Nath Rai* v. *Janki Rai* (7), in which it was

* Second Appeal No. 974 of 1910 from a decree of H. M Smith, Additional Judge of Aligarh, dated the 8th of August, 1910, reversing a decree of Kunwar Sen, Munsif of Bulandshahr, dated the 21st of June, 1910.

(1) (1873) 19 W. R. C. R. 178.
(2) (1883) I. L. R, 8 Bom, 15.
(3) (1888) I. L. R. 13 Bom. 61.
(4) (1910) 13 Bom. L. R. 133.
(5) (1906) I. L. R. 29 All. 244.
(6) Weekly Notes, 1899, p. 214.
(7) Weekly Notes, 1905, p. 212.

held that to render property in the hands of members of a joint Hindu family joint property, the consideration for its purchase must have either proceeded out of ancestral funds or have been produced out of the joint property or by joint labour ; but neither of these alternatives is matter of legal presumption. It can only be brought to the cognisance of the Court by evidence, and he who wishes to establish it must produce that evidence. Both these two decisions were given by Judges of this Court sitting singly. The case for the plaintiff appellant as put forward now is that the family was joint and therefore presumably joint in estate as well as in food and worship. Accordingly the presumption is that Gulab Rai acquired the house out of joint family funds. Admittedly there is no evidence whatsoever that in 1879 there were any joint funds. The opposite party alleges separation. It is urged on his behalf that there can be no presumption that the joint family possessed any funds at all. Mr. Justice AIKMAN in *Ramraj Rai* v. *Salik Rai*, ruled that it was not necessary to show that the family was possessed of means, wherefrom the property might have been acquired, but the pleadings in that case disclosed the fact that the family was possessed of property. Here they do not, and considering the state of the pleadings it seems to me hard to hold that the presumption is that this house was acquired out of family funds. It is neither admitted nor proved that there was any nucleus of family property. My attention has been called to certain rulings and decisions of the Calcutta High Court. In view of the conflict, however, between the two rulings of this Court mentioned above, I refer the matter to a Bench of two Judges."

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Mr. *Abdul Raoof*, for the appellant, contended that the whole question in the appeal was whether the burden had been rightly laid upon the plaintiff. The presumption of law in the case of every Hindu family was that it was joint in food, worship and estate, so that the person who alleged the contrary was bound to prove it. The Courts below had found that the brothers lived jointly and the first Court had further found that there was some business carried on by the family ; therefore the defendant was bound to prove that the house was the exclusive property of Gulab Rai. The presumption being that a Hindu family was joint in estate, it was incumbent upon the defendant to prove that [679] the house, acquired as it has been when the family was joint, was Gulab Rai's exclusive property. The plaintiff was not bound to prove that there was a *nucleus* of property by means of which the house was acquired. He relied on *Taruck Chunder Totadar* v. *Joodheshteer Chunder Koondoo* (1), *Gobind Chunder Mookerjee* v. *Doorgapersaud Baboo* (2), *Jagmohandas Kilabhai* v. *Allu Maria Duskal* (3) and *Ramraj* v. *Salik Rai* (4). He criticised the ruling of KNOX J., in *Hem Nath Rai* v. *Janki Rai* (5) as being in conflict with the above cases, and having overlooked the statement of the law contained in Mayne's Hindu Law and Usage, 7th ed., p. 365, section 290.

Babu *Sarat Chandra Chaudhri* (for Babu *Jogindro Nath Chaudhri*), for the respondent, Tunda Mal, argued that in every case the plaintiff must lay the foundation by stating proper facts. In the present case all that was alleged was that the two brothers were the owners of the house in suit, and the fact was denied by the respondent, who further alleged that the house was the self-acquired property of Gulab Rai. From this statement it would by no means follow that the house was joint property. The normal condition of every Hindu family was that it was joint, *i. e.*, it had not entered into a partition, but there was no presumption that such family possessed property. In order to be joint property the consideration for its purchase must have proceeded either out of ancestral funds, or have been produced out of joint property or by joint labour. None of these could be presumed. In each one of the cases referred to by

(1) (1873) 19 W. R. C. R. 178.
(2) (1874) 22 W. R. C. R. 249.
(3) (1894) I. L. R. 19 Bom. 338.
(4) Weekly Notes, 1899, p. 214.
(5) Weekly Notes, 1905, p. 212.

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the other side it appeared from the pleadings that there was joint property, and consequently onus was thrown on the party who alleged separate acquisition. Further, the case of *Dhurm Das Pandey* v. *Shama Soondri Dibiah* (1) did not support the conclusion of COUCH, C. J., for in that case possession of property was admitted and was not presumed. The single fact of living in commensality would not raise the presumption that the family possessed property; *Dhunookdharee Lall* v. *Gunput Lall* (2), *Khelut Chunder Ghose* v. *Koonj Lall Dhur* (3), *Musst. Soobheldur* v. *Boloram* [680] *Dewan* (4). But the former two rulings were decisions of Division Benches, and the third was a full Bench case. PONTIFEX, J., in 12 B. L. R., 349, was inclined to hold that the plaintiff must prove that there was a nucleus of property; *Dwarka Prasad* v. *Jamna Das* (5). The case in 19 Bombay dealt with the question whether a succession certificate would be necessary for the realization of a 'debt' and must be limited to its peculiar facts. Mayne's Hindu Law and Usage, 7th edn., p. 367, section 291, was also relied upon. The finding in the present case was that there was no proof of the existence of ancestral funds. The suit must, therefore, fail.

Mr. *Abdul Raoof*, in reply, cited *Kanhia Lal* v. *Debi Das* (6).

CHAMIER, J.—The appellant having obtained a decree against two brothers, named Gulab Rai and Dal Chand, attached a house in Bulandshahr, alleging that it was the property of the judgment-debtors. The respondent, Tunda Mal, objected on the ground that he had purchased the house from Gulab Rai who had been sole owner of it.

The objection was allowed. The appellant then brought the present suit claiming a declaration that the house was the joint property of Gulab Rai and Dal Chand; that the sale by Gulab Rai was consequently invalid, and that the house was liable to be attached in execution of the appellant's decree. The first court decreed the claim, but the decision was reversed by the lower Appellate Court.

It has been found that the house in question was purchased by Gulab Rai at a time when he was living in union with his father and brother. But there is no evidence that the family ever possessed any joint property. If there is a presumption that the house was joint family property and the burden of proof lies on respondent to prove that the house was the self-acquired property of Gulab Rai, the claim must be decreed, for the respondent has not attempted to prove that the house was acquired by Gulab Rai with his own funds. All that was proved is that the house was acquired in the name of Gulab Rai alone. On the question [681] of the burden of proof the Courts below have differed. The first court followed the decision of AIKMAN, J., in *Ramraj Rai* v. *Gulab Rai* (7). The lower Appellate Court followed the decision of KNOX, J., in *Hem Nath Rai* v *Janki Rai* (8).

The point came before COUCH, C. J. and GLOVER, J., in the case of *Taruck Chunder Totadar* v. *Joodheshteer Chunder Koondoo* (9). SIR RICHARD COUCH observed that there had been a conflict of decisions in the Calcutta High Court which it was impossible to reconcile. He referred to the decisions of the Privy Council in *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (10) and *Dhurm Das Pandey* v. *Shama Soondri*

(1) (1843) 3 Moo. I. A., 229.
(2) (1868) 10 W. R. C. R. 192.
(3) (1868) 10 W. R. C. R. 333.
(4) (1862) W. R. Sp. No. 57.
(5) (1910) 13 Bom. L. R. 133.
(6) (1899) I. L. R. 22 All. 141.
(7) Weekly Notes, 1889, p. 214.
(8) Weekly Notes, 1905, p. 212.
(9) (1873) 19 W. R. C. R. 178.
(10) (1869) 12 Moo. I. A. 523.

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Dibiah (1) as justifying the view that, as every Hindu family was presumably joint in food, worship and estate, if one member of the family was found to be in possession of property the presumption would be not that he was in possession of it as separate property acquired by him but as member of a joint family. His judgment in the later case of *Gobind Chunder Mookerjee* v. *Doorgapersaud Babuo* (2) shows that his view was not accepted by other members of the court. In the case in 3 Moo. I. A., at p. 240, their Lordships of the Privy Council said :—"It is allowed that this was a family who lived in commensality, eating together, and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that under these circumstances the presumption of law is that all the property they were in possession of was joint property until it was shown by evidence that one member was possessed of separate property." This passage has often been referred to as justifying the view that property found in possession of one member of a joint family cannot be presumed to be joint family property unless there is evidence that the family possessed some joint property. But COUCH, C. J., referring to this passage said :—"Now with regard to what their Lordships say as to the family being possessed of property.....the rule that the possession of one of the joint owners is the possession of all would apply to this extent that if one of them was found to be in possession [682] of any property, the presumption would be not that he was in possession of it as separate property acquired by him, but as a member of joint family." It seems to me that the passage cited from the judgment of their Lordships shows the necessity of proof that a family has *some joint property*, before it can be presumed that property held by any one member is joint family property. My view is supported by the judgment of MELVILL and KEMBALL, JJ. in *Lakshman Mayaram* v. *Jamnabai* (3), in the course of which the passage in question and the decision of the Privy Council in *Luximon Row Sudasew* v. *Mullar Row Bajee* (4), are referred to as authorities for the proposition that when there is ancestral property by means of which other property may have been acquired, then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate. The necessity of establishing the existence of a nucleus of joint family property before the property in possession of any one member can be presumed to be joint family property is recognised in the cases of *Moolji Lilla* v. *Gokuldas Vulla* (5), *Toolseydas Ludha* v. *Premji Tricumdas* (6) and *Dwarka Prasad* v. *Jamna Das* (7). The statement of SARGENT, C. J. in *Jagmohandas Kilabhai* v. *Allu Maria Duskal* (8) that the decision in *Taruck Chunder Totadar* v. *Joodheshteer Chunder Koondoo* (9) had always been followed by the Bombay High Court cannot refer to the point now under consideration. In *Kanhia Lal* v. *Debi Das* (10) BLAIR and BURKITT, JJ. said :—"We hold that as the defendants set up their separate acquisition in a suit for the partition of a joint family, which admittedly was possessed as such of some property, the presumption of law was that the whole of the property of each individual belonged to the common stock." This is in accordance with the view taken by the Bombay High Court. In the case of *Lal Bahadur* v. *Kanhaiya*

(1) (1843) 3 Moo. I. A. 229.
(2) (1874) 22 W. R. C. R. 248.
(3) (1882) I. L. R. 6 Bom. 225.
(4) (1831) 2 Knapp. 60.
(5) (1883) I. L. R. 8 Bom. 154.
(6) (1888) I. L. R. 13 Bom. 61.
(7) (1910) 13 Bom. L. R. 133.
(8) (1894) I. L. R. 19 Bom. 388.
(9) (1873) 19 W. C. R. 178.
(10) (1899) I. L. R. 22 All. 141.

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Lal (1) the Privy Council said:—"It is admitted that Durga Prasad and his sons lived together as a joint Hindu family, and it is established that there [683] was a considerable nucleus of ancestral property in his hands after the partition (between Durga Prasad and his brothers). The onus was, therefore, on the respondent to prove that his subsequently acquired property was his separate property." Their Lordships thus recognized the necessity of establishing the existence of some joint property, before the property held by all the members could be presumed to be joint. In the case decided by AIKMAN, J. mentioned above, there was proof that the family possessed some property. That was sufficient to justify the presumption which the plaintiff wished the court to make, and I do not understand why AIKMAN, J. went as far as he did. The text-books treat it as settled law that there is no presumption that a family has any joint property and that it cannot be presumed that property found in the possession of any one member is joint family property unless it is shown that the family as such possessed at least some property. See Ghose on Hindu Law, 2nd edition, p. 368, Mayne's Hindu Law, 7th edition, pp. 364 and 368. The weight of authority is clearly in favour of the view stated in the text-books.

For the above reasons I would dismiss this appeal with costs.

KARAMAT HUSAIN, J.—I agree.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

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33 A. 683 (=8 A. L. J. 746=11 I. C. 762.)

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

MUHAMMAD TALIB HUSAIN AND OTHERS (*Defendants*) *v.* INAYATI JAN (*Plaintiff*) AND HAIDRI BEGAM AND OTHERS (*Pro forma Defendants*).*

[11th May, 1911.]

Muhammadan law—Shias—Dispute between husband and wife as to wife's dower—Arbitration—Award transferring property of husband to wife—Further conveyance unnecessary.

A Muhammadan husband and wife of the Shia persuasion referred a dispute relating to the wife's dower to arbitrators, who, under a registered award, transferred the absolute ownership of the husband's property *in præsenti* to the wife, reserved possession of it to the husband for life with control over the income, and provided that in the event of the wife predeceasing her husband, he should continue in possession for life, while in the event of the husband dying [684] before the wife, she should be owner and the heirs of the husband could not interfere. Mutation of names followed in favour of the wife, who executed a mukhtarnama in favour of her husband for the management of the property conveyed to her under the award:—

Held, that the award was sufficient to transfer the ownership of the property covered by it *in præsenti* to the wife, and no conveyance need have been executed. *Ram Baksh* v. *Mughlani Khanam* (2) followed.

Quære, whether an award is governed by Muhammadan law.

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* Second Appeal No. 945 of 1910 from a decree of E. M. Nanavutty, Additional Judge of Bareilly, dated the 2nd of August, 1910, reversing a decree of Pandit Girraj Kishor Dat, Subordinate Judge of Bareilly, dated the 13th of January, 1909.

(1) (1906) I. L. R. 29 All. 241. (2) (1908) I. L. R. 26 All. 266.

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THE facts of this case were as follows :—

On the 10th of June, 1907, one Muhammad Ibrahim Ali died without any issue. His wife, Musammat Salim-un-nissa, had predeceased him on the 5th of April, 1907. Musammat Salim-un-nissa in her life-time brought a suit againt her husband for dower, which had been fixed at Rs. 24,000. Besides this, Ibrahim Ali had incurred other debts also. The suit was referred to arbitration by a registered agreement, dated the 5th of April, 1881. Two pleaders, Mazhar Ali and Barkat Ahmad, were appointed arbitrators, and they delivered an award on the 17th of June, 1881. The award laid down that in view of the dower debt, the ownership of the entire property of Ibrahim Ali was to pass to Musammat Salim-un-nissa subject to certain limitations. These were that Ibrahim Ali was to enjoy the income of the property during his life-time subject of course to his wife's maintenance, and that he could possess no right of alienation, but that if an alienation became necessary to pay off his other debts Musammat Salim-un-nissa would have to consent to such a transfer.

In pursuance of this award, Ibrahim Ali applied for mutation of names in favour of Salim-un-nissa, and had a general power of attorney executed by her in his own name. This continued to be the condition of affairs down to the 5th of April 1907, the date of Salim-un-nissa's death. During this period, Salim-un-nissa had exercised ownership by executing several leases of the property. On her decease, Ibrahim Ali had the names of her heirs entered in the revenue papers. This was about twenty days before his own death, which accrued on the 10th of June, 1907.

The plaintiff, who was an heir of Ibrahim Ali, sued for her share of the property. Defendants 1 to 3 were the heirs of [685] Salim-un-nissa, while the defendants 4 to 7 had been merely added *pro forma*, being the other heirs of Ibrahim Ali. The plaintiff alleged that the heirs of Salim-un-nissa had been entered in the papers as Ibrahim Ali had become insane towards the close of his life. The fact of insanity had been found established by the court below, but it was held immaterial to decide the real question in the suit—the acquisition of their rights by the defendants 1 to 3.

The court of first instance dismissed the suit. On appeal the District Judge held that the award was merely a nominal transaction made with intent to defeat the heirs of Ibrahim Ali, who was a Shia, and otherwise prevented by Shia law from interfering with the interest of his heirs. He also held that the award was not sufficient to transfer the property and decreed the suit.

The defendants appealed.

Babu *Jogindro Nath Chaudhri* (with him The Hon'ble Nawab *Muhammad Abdul Majid* and Maulvi *Shafi-uz-zaman*), for the appellants :—

The award is not fictitious. It was given effect to by mutation, by delivery of possession and by many acts of ownership. It has been said by the lower court that the award by itself was not sufficient to create a valid transfer, that it could only direct transfers, but that these would not be operative unless there was an express conveyance by deeds properly executed. The award as well as the submission to arbitration was made in 1881, before the Transfer of Property Act came into force. Hence alienations of property could be made by mere word of mouth. No deed was necessary. No suggestion had been made in the lower court that the arbitrators had exceeded their power. It was a case of long acquiescence, and the question had never been raised in that form. There was nothing

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in the award to vitiate it. It was merely a transfer of ownership with a reservation of the usufruct to the transferor. If the arbitrators were merely carrying out the wishes of Ibrahim Ali, they were only creating an estate in favour of the wife with the consent of the husband. In India, conveyance was recognized by the acts and conduct of the parties themselves. The passing [686] of possession was not necessary for a transfer; *Chokhey Singh* v. *Jote Singh* (1).

There were three points in the case—(*a*) whether the award and the submission to arbitration could legally create a right in favour of Salim-un-nissa; (*b*) what was the nature of the estate conveyed by the award, and (*c*) whether the award had been followed by proper conveyances.

As to the first point, the award was a good and genuine award. The intervention of arbitrators could not be less efficacious than a registered deed. By some people, even greater sanctity was attached to an award than to a mere transfer, for instance, in partition cases, whether a *panchayatnama* was executed for the sake of mere formality, though all arrangements had previously been made about the partition. As to the third point, conveyances were not necessary to the validity of a transfer; *Ram Bakhsh* v. *Mughlani Khanam* (2).

It was idle to suggest seriously that the transfer was nominal. The award was neither unlawful nor against public policy; *Nasir-ul-Haq* v. *Faiyaz-ul-Rahman* (3).

The interest in the property which Ibrahim Ali retained was not exactly a life-estate. He retained control over the property; but he had no right in the *corpus*. If a life-estate is given to *A* with remainder to *B*, that would be very much like a will. But when a vested remainder is given by a registered instrument, is it a will? It created a present interest and not a future one. Ibrahim had no power to revoke the transfer, whereas a will is always revocable. This was the second point in the case. The learned Judge holds that it was a device to defeat the interests of the heirs, as Ibrahim, being a Shia, could not do so himself, and therefore it was invalid, being colourable. It was a valid transfer of rights, and therefore inheritable. It was said that the case was governed by the law of estoppel but could the husband have receded from the consequences of his act? Could he have applied for a mukhtarnama in his own name if he had not accepted the award?

[687] Mr. *M. L. Agarwala* (with him Maulvi *Ghulam Mujtaba*), for the plaintiff respondent:—

The only two points in the case—whether the transaction was real, and if so, whether the estate it created was legal—were concluded by the findings in the case. The lower appellate court had found that the document was merely a device. It had observed that there was not real dispute about the dower between the husband and the wife. The lower court had taken a very strong view. The award had been followed by a decree, but still it was set aside. The whole motive of Ibrahim Ali was to get round the rule of Shia law in favour of the heirs. It was a dodge to evade the law of inheritance. The transaction was a peculiar one. Ibrahim Ali was master of the property in his life-time. The Musammat was to be owner only on his death. There was no transfer of ownership. The estate of Salim-un-nissa would not vest in her unless she survived her husband. Salim-un-nissa predeceased her husband, and her estate

(1) (1908) I. L. R. 31 All. 73.
(2) (1903) I. L. R., 26 All. 266.
(3) (1911) I. L. R. 33 All. 457.

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never vested in her; *Saiad Kasum* v. *Shaista Bibi* (1), *Abdul Wahid Khan* v. *Nuran Bibi* (2), *Mussamut Humeeda* v. *Mussamut Budlun* (3).

Maulvi *Ghulam Mujtaba* (with him the Hon'ble Pandit *Sundar Lal*), for the other respondents:—

Mutation merely followed up the proceeding on paper. It is generally effected to strengthen a false case. It was an attempt to get round the Muhammadan law. That law would apply to a compromise between parties to a suit, if the effect thereof was to impair the proprietary interest of the heirs, Ibrahim Ali could not transfer the interest he did and furthermore he did not actually do so, as his wife died before him.

Babu *Jogindra Nath Chaudhri*, in reply.

KARAMAT HUSAIN, J.—One Ibrahim Ali and his wife Salim-un-nissa, both governed by the Shia law, under an agreement registered on the 25th of April, 1881, referred their dispute relating to dower and the mode of its payment to arbitrators. The arbitrators, Mazhar Ali and Barkat Ahmad, under an award registered on the 29th of September, 1881, transferred the **[688]** absolute ownership of Ibrahim Ali's property *in præsenti* to Salim-un-nissa, reserved possession of it to Ibrahim Ali for his life, gave him control over its income, and provided that if Musammat Salim-un-nissa died before Ibrahim Ali, his possession over the entire property should continue for his life; that no lawful heir would have any right to sue for the property and its profits; that if Ibrahim Ali died before Salim-un-nissa, the first party (Salim-un-nissa) should be owner of the villages and their mesne profits, and that the heirs of Ibrahim Ali could not interfere.

Mutation of names was effected in favour of Salim-un-nissa, and she, on the 26th of May 1883, executed a general power of attorney in favour of her husband for the management of the property which she got under the award. She sold some, mortgaged some, and leased some of it.

Salim-un-nissa died on the 5th of April, 1907, and the defendants 1, 2 and 3 got their names entered in respect of one-half of the property covered by the award, and the name of Ibrahim Ali in respect of the other half. Ibrahim Ali died on the 10th of June, 1907 and the plaintiff, who is one of his heirs, brought an action for her share, alleging that the property covered by the award was Ibrahim Ali's; that he did not intend to vest its ownership in his life in Salim-un-nissa that the award had not the effect of transferring the property to Salim-un-nissa, and that it was not valid under the Shia law.

The defence was that the husband did intend to transfer *in præsenti* the ownership of the property to his wife, that the award did transfer it, and that it was lawful under the Shia law and effect was given to it.

The Court of first instance dismissed the suit. The lower Appellate Court reversed the decree, holding in substance as follows:—An award under the English law transfers no property and therefore the award in question was not sufficient to have effect of conveying the property to the wife.

As the arbitrators reserved the possession of the property to the husband for his life, they did not transfer its ownership to her.

Mutation of names conferred no proprietary title on Salim-un-nissa. Ibrahim Ali admitted the claim for dower and stated **[689]** that he did not wish to give up possession of his zamindari during his life-time, and the arbitrators carried out his wishes giving the matter a legal aspect

(1) (1875) 7 N. W. P. C. R. 313.
(2) (1885) I. L. R. 11 Cal. 597.
(3) (1872) 17 W. R. C. R. 525.

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just to satisfy Salim-un-nissa, who was to be the owner of the property in case she survived Ibrahim Ali. The agreement and award constitute a device by Ibrahim Ali to prevent his wife and her heirs from suing him for dower debt. Ibrahim Ali was not in his full senses when he signed the application for mutation of names after the death of his wife.

In second appeal it is contended that the award is genuine; that it has been acted upon; that it transferred absolute ownership *in præsenti* to Salim-un-nissa, and that according to the Shia law the agreement made between the husband and wife by the award is lawful. On behalf of the respondents it was at first argued that the arrangement made by the award could not be made under the Shia School of Muhammadan law, but afterwards it was rightly conceded by the learned vakil for the respondents that it could be made. I am not disposed to hold that the award was governed by Muhammadan law, but it is unnecessary to discuss it now.

Next it was contended by the learned vakil for the respondents that the agreement, dated the 25th of April, 1881, and the award, dated the 17th of June, 1881, were fictitious, and that Ibrahim Ali had no intention to pass the ownership of the property in his life-time to his wife, and that the whole thing was done to defeat the rights of the heirs of Ibrahim Ali in his estate.

I have no doubt that Ibrahim did intend to transfer the absolute ownership of his property to his wife *in præsenti* and that effect was given to the award. The finding of the lower Appellate Court that the arbitrators carried out the wishes of Ibrahim Ali and the contention of the respondents that the agreement and the award were designed to defeat the rights of the heirs of Ibrahim Ali completely negative the idea that the arrangement in the award was a mere paper transaction and that no effect was given to it.

Ownership and possession are two distinct juristic conceptions and in every transfer of ownership from one person to [690] another by the act of the party a transfer of possession is not necessary.

The fact that possession was reserved for the husband does in no way show that the ownership of the property did not pass to the wife. The award was sufficient to transfer ownership to Salim-un-nissa; see *Ram Bakhsh* v. *Mughlani Khanam* (1). Mutation alone creates no title, but in the case before us the award made the wife absolute owner of the property; and mutation showed that effect was given to the award.

For the above reasons I would set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs.

CHAMIER, J.—I concur.

BY THE COURT.—The appeal is decreed with costs. The decree of the lower Appellate Court is set aside and the decree of the Court of first instance restored.

Appeal allowed.

(1) (1903) I. L. R. 26 All. 266.

33 A. 690 (=10 I. C. 903=8 A. L. J. 889.)

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33 A. 690=
10 I. C 903
=8 A. L. J.
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APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Piggott.

RAM NARAIN DUBE AND ANOTHER (*Defendants*) *v.* JAGDEO AND OTHERS (*Plaintiffs*).*

[22nd May, 1911.]

Civil Procedure Code (1908), *order XVII, rule* 3 ; *order XLI, rule* 27—*Procedure—Order for parties to appear with witnesses at adjourned hearing—Default of plaintiff's witnesses—Dismissal of suit.*

On the date fixed for the hearing of a suit the parties and their witnesses were present, but, as there was some prospect of a compromise, the hearing was ajourned. On the adjourned date the plaintiffs were present, but their witnesses, though summoned, did not appear. The plaintiffs did not apply for an adjournment, nor did they ask the Court to enforce the attendance of their witnesses under order XVI, rule 10, of the Code of Civil Procedure, 1908, and the Court, acting apparently under order XVII, rule 3 of the Code, dismissed the suit. The plaintiffs appealed, and the District Judge, dealing with the case as if the plaintiffs had made default in appearing, remitted the case to the first Court to be disposed of according to law. *Held* that the procedure of the District Judge was erroneous : he should have proceeded under order XLI, rule 27, to direct the admission of fresh evidence, and under order XLI, rule 25, to refer the issues for trial to the Court of first instance.

[691] THE facts of this case were as follows :—

A suit was fixed for hearing on the 24th of April, 1910. The parties and their witnesses were present on that date ; but as the parties were negotiating for a compromise, they made a joint application for two weeks' adjournment. The Court made an order granting the application and directing the parties to file the compromise within two weeks and failing that, to be present with their witnesses on the 27th of May, 1910. The compromise was not effected and the parties summoned their witnesses for the said date. On that date the parties and their pleaders were present when the case was called on, but the plaintiffs' witnesses had not come, although summoned. The plaintiffs' pleader stated to the Court that the witnesses would be coming shortly ; but no application was made for adjournment or for enforcing the appearance of the witnesses by issue of warrant or attachment. The Court proceeded to decide the suit under order XVII, rule 3, of the Code of Civil Procedure, 1908, and dismissed it. On appeal, the District Judge treated the case as if it had been dismissed for default of appearance, and setting aside the order of dismissal, remanded the suit under order XLI, rule 23.

The defendants appealed.

Maulvi *Ghulam Mujtaba*, for the appellants :—

The District Judge was wrong in his opinion that the dismissal was for default of appearance. There was no failure of appearance as the plaintiffs, and their pleaders also, were present. The failure was in production of evidence, for which time had been granted by the Court by its order of the 24th of April, 1910. Under these circumstances the action of the Court under order XVII, rule 3, was the right action. It would have been wrong to have dismissed the suit for default, which could be done only when neither the plaintiff nor his pleader was present; *Badam* v. *Nathu Singh* (1), *Sitara Begam* v. *Tulshi Singh* (2). The difference between order XVII, rule 2, and order XVII, rule 3, is well pointed out in *Chandramathi*

* First Appeal No. 17 of 1911 from an order of J. H. Cuming, District Judge of Jaunpur, dated the 15th of December, 1910.

(1) (1902) I. L. R. 25 All. 194. (2) (1901) I. L. R. 23 All. 462.

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Ammal v. *Narayanasami Aiyar* (1). The ruling in *Dulhin Sonrai Kuari* v. *Audhan Singh* (2), which is relied on by the lower Appellate Court, is not in point, as the circumstances were entirely different.

[692] Mr. *Muhammad Ishaq Khan*, for the respondents :—

Order XVII, rule 3, was not applicable to this case. The suit was not adjourned on the 24th of April, 1910, on the application of the plaintiffs alone. Both parties had jointly applied for time ; and order XVII, rule 3, does not apply to such a case. The dismissal, therefore, could not be under that rule ; it was for default. The mere presence of the pleader where he did nothing more than praying for time would not be sufficient appearance, and the dismissal was, properly, one for default. The latest authority on this point is the case of *Satish Chandra Mukerjee* v. *Ahara Prasad Mukerjee* (3). There was an oral application for adjournment ; no written application could be made, as the Court at once proceeded to write the judgment. In the absence of witnesses the plaintiff is in the same position as his pleader; so that the presence of the plaintiff personally would not alter the case. The Appellate Court can allow further evidence to be taken under order XLI, rule 27. This is a case in which there is substantial cause within the meaning of clause (*b*) of that rule. The plaintiff exercised all due diligence in summoning his witnesses ; they were served, but did not turn up in time. It was not the fault of the plaintiff at all.

Maulvi *Ghulam Mujtaba* in reply :—

It is for a party to move the Court to take action under order XVI, rule 10, and not for the Court to proceed *suo motu* to further the production of the witnesses of that party ; *J. G. Bachman* v. *Lall Beharee Pandey* (4). The plaintiffs did not move the Court to take any steps. They should have used the utmost diligence. When a plaintiff does not exhaust all means provided by the law for the production of evidence, the Court may rightly proceed to dispose of the case on the materials present before it ; and the case should not be remanded for taking further evidence ; *Luchmun Singh* v. *Chokowree Singh* (5). In that case a remand for further evidence was not allowed, although the plaintiff had exercised much greater diligence than in the present case. The language of order XVI, rule 10, is stronger than that of the law in force at the time when these rulings were laid down, and [693] the requirements of the rule should be strictly complied with. The Court should be satisfied that the evidence is material. It would be casting too great a burden on Courts to lay down that in every case in which witnesses do not attend, the Court is, of its own motion, and without any initiative or help from the party who summoned those witnesses to decide which of the witnesses are material and to act under order XVI, rule 10. The plaintiffs could easily have taken the initiative if they were in earnest about the attendance of their witnesses. There was ample time to put in an application for adjournment.

KNOX and PIGGOTT, JJ. :—We find ourselves unable to support the order passed by the learned District Judge in this case on the grounds taken by him. The ruling which the learned Judge professes to follow namely, *Dulhin Sonraj Kuari* v. *Audhan Singh* (2), differs in circumstances materially from the case before us. In the present case the parties to the suit were present in Court on the 24th of April, 1910, the day fixed for the first hearing. The witnesses, too, were in attendance on that day, so

(1) (1909) I. L. R. 33 Mad. 241.
(2) Weekly Notes, 1891, p. 112.
(3) (1907) I. L. R. 34 Cal. 403.
(4) (1870) 13 W. R. C. R. 324.
(5) (1876) 25 W. R. C. R. 154.

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far as we gather from the order sheet. On that day the parties expressed a desire to compromise the matter in dispute between them and the Court very properly granted time for this purpose. It, however, directed the parties, if they found themselves unable to come to terms, to present themselves again in court with evidence on the 27th of May, 1910. They were unable to agree. On the 27th of May, 1910, the parties were present in court, but the witnesses for the plaintiffs, although summoned to appear on that date had not appeared in court, although the time fixed for the opening of the court and for their attendance had passed by a considerable interval. The plaintiffs' pleader appears to have stated to the Court that the witnesses were coming, but neither then nor afterwards was any application for adjournment put in on the part of the plaintiffs, nor did the plaintiffs apply to enforce the attendance of the witnesses. The Court went on to deal with the case under order XVII, rule 3, and proceeded to decide the suit forthwith against the plaintiffs. The plaintiffs appealed to the District Judge. The District Judge dealt with the case as though the plaintiffs had made a default in appearing, and setting aside **[694]** the order of the court of first instance, directed that court to restore the suit to its file to be disposed of anew, according to law. His procedure was in error. There had been no default on the part of the plaintiffs. At the same time the Court could by reference to its file, and no doubt did so refer, find that the plaintiffs used due diligence in causing their witnesses to be summoned. It might fairly have presumed from the fact that the witnesses had twice been summoned by the plaintiffs that the evidence of such witnesses was material; that the plaintiffs deemed it material and fully intended to have put it before the court, but were prevented by the non-appearance of the witnesses. It is contended by the defendants appellants that when this stage had been reached, the plaintiffs, if in earnest, ought to have applied to the court to enforce the power given to the court by order XVI, rule 10, clauses (2) and (3). But it is a matter of experience that parties who have cited witnesses, and who, when such witnesses do not appear, proceed to put them to the indignity of arrest or proclamation, often find such witnesses very unwilling to give evidence on behalf of the persons who have thus acted. We think that, under the circumstances, the court, which certainly had reason to believe that the evidence was material and that the witnesses were failing to attend, so far as it could then judge, without lawful excuse, would have exercised a sound discretion in putting in force the powers entrusted to it by order XVI, rule 10, clauses (2) and (3) of the Code of Civil Procedure. Our attention was called to certain rulings of the Calcutta High Court passed under the previous Code of Civil Procedure, namely, *J. G. Bachman* v. *Lall Beharee Pandey* (1) and *Luchmun Singh* v. *Chokowree Singh* (2). It was urged that there is considerable difference between the present Code and the previous Code so far as the duty cast on the court in this matter is concerned. As we read the present Code, we think that the present Code leaves the court a discretion to proceed at once when witnesses have failed to attend, if from any circumstance before it, it has reason to believe that the evidence of such defaulting witnesses is material, and that the witnesses are defaulting. It **[695]** would be for the witnesses to show that their absence rested on lawful excuse. It is urged before us that where a number of witnesses have

(1) (1870) 13 W. R., C. R., 324.

(2) (1876) 25 W. R, C. R., 154.

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been cited, it would be casting too great a burden on a Court to proceed against all who might have defaulted. The probability is that in such a case the Court would of itself see that the evidence of all such witnesses is not material. The Court can generally make a shrewd guess where witnesses have been unnecessarily summoned. In any case a discretion is allowed by law. We think that the Court should have proceeded under order XLI, rule 27, to direct the admission of fresh evidence and under order XLI, rule 25, to refer the issues, which in this case had never been really tried, for trial to the Court of first instance, directing that Court to return findings. We so far allow the appeal as to make the order just pointed out. Costs will abide the event.

Appeal allowed.

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33 A. 695 (=11 I. C. 17=8 A. L. J. 826.)

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

IKRAM-ULLAH KHAN AND OTHERS (*Defendants*) *v.* MOTI CHAND AND OTHERS (*Plaintiffs*).*

[24th May, 1911.]

Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 10, 20, 83—*Sale of zamindari—Agreement to surrender ex-proprietary rights—Possession not delivered—Suit for damages for breach of contract—Void contract.*

Held that a transaction, one of the objects of which is that one party shall be divested of his ex-proprietary rights and that those rights shall vest in the other party, or a sale of zamindari property coupled with an agreement to relinquish the exproprietary rights of the vendor, is void so far as the relinquishment of exproprietary rights is concerned. *Bhikham Singh* v. *Har Prasad* (1), *Muridhar* v. *Pem Raj* (2), *Kashi Prasad* v. *Kedar Nath Sahu* (3), *Raghubans Sahai* v. *Brijnandan Lal* (4), *Bharath Singh* v. *Debi Dayal Singh* (5) and *Khurshed Ali* v. *Wazir-un-nissa* (6) referred to.

[Fol: 17 I. C. 522.]

THE facts of this case are, briefly, as follows:—

The defendants sold certain zamindari property to the plaintiffs by a registered sale deed, dated the 2nd of May, 1903. The sale deed contained a stipulation that the defendants would relinquish their sir and khudkasht lands and give the **[696]** plaintiffs possession thereof, or in default would be liable to damages at the rate of Rs. 16 per bigha. On the 5th of May, 1903, the defendants executed a deed of relinquishment of the sir and khudkasht lands, but they did not get it registered, nor did they give the plaintiffs possession. On the application of the plaintiffs for compulsory registration it was registered as against some of the defendants, but not as against all. The present suit was brought to recover a sum of Rs. 9,468 8-0 as damages for breach of the covenant to relinquish the sir and khudkasht lands. The court of first instance (Subordinate Judge of Azamgarh) gave the plaintiffs a decree. The defendants appealed to the High Court.

Maulvi *Muhammad Ishaq* (with Mr. *B E. O'Conor*) for the appellants, contended that the contract which was the basis of the plaintiffs' suit was

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*First Appeal No 144 of 1909 from a decree of Ram Chandra Chaudhri, Subordinate Judge of Azamgarh, dated, the 13th of October 1909.

(1) (1896) I. L. R. 19 All. 35.
(2) (1899) I. L. R. 22 All. 205.
(3) (1897) I. L. R. 20 All. 219.
(4) (1909) 6 A. L. J. 477.
(5) (1909) 6 A. L. J. 555.
(6) (1910) 7 A. L. J. 778.

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wholly void, and cited the following rulings :—*Indar Sen* v. *Naubat Singh* (1), *Kashi Prasad* v. *Kedar Nath Sahu* (2), *Murlidhar* v. *Pem Raj* (3), *Bhikham Singh* v. *Har Prasad* (4), *Bharath Singh* v. *Debi Dayal Singh* (5) and *Khurshed Ali* v. *Wazir-un-nissa* (6).

Babu *Durga Charan Banerji* (with him the Hon'ble Pandit *Sundar Lal* and Munshi *Kalandi Prasad*), for the respondents :—

The contract to relinquish or surrender an ex-proprietary right is not illegal. The law recognizes relinquishment in favour of a zamindar, hence a contract to relinquish is perfectly lawful. Specific performance of such a contract may not be allowed, because the law does not favour surrender by compulsion. Consideration has nothing to do with the legality of such a contract. See the Agra Tenancy Act, 1901, section 83 (3), *Gaya Singh* v. *Udit Singh* (7) and *Lekhraj* v. *Parshadi* (8).

Surrender means the placing of the zamindar in possession. This deed is evidence of an agreement to surrender the rights which came into existence upon the sale. We seek to enforce, not a sale of ex-proprietary rights, but an agreement to pay damages in the event of the ex-proprietary tenant failing to **[697]** surrender those rights. Under Article 115 of the Limitation Act, the suit is within time.

Maulvi *Muhammad Ishaq*, in reply referred to *Indar Sen* v. *Naubat Singh* (9), *Baldeo* v. *Kunlan* (10) and *Raghuban Sahai* v. *Brijnandan Lal* (11).

KARAMAT HUSAIN, J.—The defendants, on the 2nd of May, 1903, executed a sale deed of certain zamindari property in favour of the plaintiff. The material portion of the sale deed is the following :—

"We, all the executants.....absolutely sold in lieu of the remaining amount of Rs. 77,500, the whole of the mauzas Khorant Daulsapur, and Bharthpur, together with all the zamindari rights appertaining to them and mal and sair items .....in short, all the rights appertaining to the zamindari property, together with sir and khudkasht lands and ex-proprietary tenancy right, without the exception of any thing or right.

"We, the executants have relinquished our claim and interest in respect of all the sir and khudkasht lands. We shall execute a deed of relinquishment of claim in respect of the sir lands and shall file an application surrendering the holding. If we should make a delay in, or take any objection to the filing of an application surrendering the holding, or to the execution of the deed of relinquishment of claim in respect of the sir lands, or should we, the executants, our heirs, or representatives, or successors, keep in our possession any portion of the sir and khudkasht lands; then we and our heirs and representatives and successors shall pay damages in respect thereof at the rate of Rs. 16 per bigha."

In pursuance of the stipulation set forth above, the defendants, on the 5th of May, 1903, executed a deed of relinquishment in favour of the plaintiffs which contained the following passages :—

"We, the executants, have absolutely sold the whole of the mauzas Khorant Daulsapur, and Bhartipur..... .....and have removed our possession and put the said vendees in possession of the whole of the property sold. We, the executants, have 735 bighas 9 biswas 4 dhurs of the sir and khudkasht lands in the said mauzas according to the detail given below. As we, the executants, have no longer any concern whatever with the property sold in the said villages, and as we, for want of concern, are unable to cultivate the sir lands and pay the rent, we have of our free will and accord relinquished our claim and right in respect of all the sir and khudkhast lands which,

(1) (1885) I. L. R. 7 All. 847.
(2) (1897) I. L. R. 20 All. 219.
(3) (1899) I. L. R. 22 All. 205.
(4) (1896) I. L. R. 19 All. 35.
(5) (1909) 6 A. L. J. 555.
(6) (1910) 7 A. L. J. 778.
(7) (1891) I. L. R. 13 All. 396.
(8) (1909) 6 A. L. J. 713.
(9) (1885) I. L. R. 7 All. 847 (850).
(10) Weekly Notes, 1893, p. 27.
(11) (1909) 6 A. L. J. 477.

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according to the detail given below, we, the executants, have in the villages sold and have removed our possession and put the vendees in possession of the same."

[698] The defendants did not, however, have the deed of relinquishment registered, and on the application of the plaintiffs it was registered compulsorily against the male executants of the said deed, but not against the female executants. On the 14th of July, 1903, according to the allegations in the plaint, a demand was made by the plaintiffs calling on the defendants to relinquish the ex-proprietary holdings and to put the plaintiffs in possession thereof. The defendants did not deliver possession of the sir to the plaintiffs. On the basis of the deed of relinquishment there were law suits between the parties for the arrears of rent of the sir and for the determination of the rent therefor. As those suits, in my opinion, do not bar the present suits, I need not give their details.

The suit out of which this appeal arose, was brought on the 3rd of July, 1909, for damages amounting to Rs. 9,468-8-0 for the breach of the contract of relinquishment, together with interest. The case for the plaintiffs is that the defendants in pursuance of a stipulation entered in the sale deed of 2nd May, 1903, executed a deed of relinquishment on the 5th of May 1903, which was compulsorily registered on the 13th of July, 1903. On the 14th of July, 1903, the plaintiffs asked the defendants to relinquish the sir and put the plaintiffs in possession of it. But they declined to do so, and hence the suit for damages for the breach of the contract to relinquish. The pleas in defence with which we have to deal in this case are, that the sale deed and the deed of relinquishment, so far as they entitle the plaintiffs to sue for damages, are illegal, and that the suit is barred by limitation. The Court below decreed the claim. The agreement to relinquish in its opinion is a lawful agreement, inasmuch as a sir holder is entitled under the law to relinquish his holding, whenever he pleases, according to the provisions of s. 83 of the Agra Tenancy Act. In support of this view the Court below relies upon *Gaya Singh* v. *Udit Singh* (1) and *Lekhraj* v. *Parshadi* (2). The cause of action, according to the Court below, arose on the 14th of July, 1903, when delivery of possession was refused to be made and a breach of the contract to relinquish was committed, and hence the suit under article 116 of the schedule II of the [699] Limitation Act is not time-barred. The defendants appeal to this Court, and their learned vakil contends that the transaction of the sale of the zamindari and the so-called relinquishment of the sir land form one single transaction having for one of its objects the transfer of the sir, which is illegal, and that if the transaction of reliquishment be supposed to be a separate and independent transaction, even then, according to the rulings of this Court, it would be unlawful. In support of the above proposition he relies on *Indar Sen* v. *Naubat Singh* (3), *Baldeo* v. *Kundun* (4), *Bhikham Singh* v. *Har Prasad* (5), *Kashi Prasad* v. *Kedar Nath Sahu* (6), *Murlidhar* v. *Pem Raj* (7), *Dipan Rai* v. *Ram Khelawan* (8) and *Khurshed Ali* v. *Wazir-un-nissa* (9). The learned advocate for the respondents in answer to the argument of the learned vakil for the appellant says that the rulings quoted by the learned vakil do not touch the point in question in the present case, which really is whether a sir holder can or cannot agree to relinquish his holding in favour of his zamindar; that, according to the

(1) (1891) I. L. R. 13 All. 396.
(2) (1909) 6 A. L. J. 713.
(3) (1885) I. L. R. 7 All. 847.
(4) Weekly Notes, 1898, p. 27.
(5) (1898) I. L. R. 19 All. 35.
(6) (1897) I. L. R. 20 All. 219.
(7) (1899) I. L. R. 22 All. 205.
(8) (1907) I. L. R. 32 All. 388.
(9) (1910) 7 A. L. J. 776.

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provisions of section 83 of the Tenancy Act relinquishment of a sir land in favour of the zamindar is sanctioned by law, and that, as the relinquishment of a sir is a lawful act, an agreement to relinquish sir cannot in any way be unlawful. In support of what he says he relies on *Gaya Singh* v. *Udit Singh* (1) and *Bharath Singh* v. *Debi Dayal Singh* (2). The case reported in I. L. R. 13 All. p. 396, simply lays down that there is nothing in law to prevent a tenant from voluntarily relinquishing his ex-proprietary tenancy in favour of his zamindar. But it does not touch the question whether a tenant can or cannot enter into an agreement to relinquish his ex-proprietary holding. In the case of *Bharath Singh* v. *Debi Dayal Singh* (2), there was an actual relinquishment of an ex-proprietary holding in favour of the zamindar, and therefore that case also has no bearing upon the point in the present case. The transaction entered into between the plaintiffs on the one hand and the defendants on the other, may either be regarded as a single transaction, one of the objects of which [700] was that the defendants be divested of their ex-proprietary rights and that those rights should vest in the plaintiffs, or it may be regarded as consisting of two distinct and separate transactions, one, the sale of the zamindari property, and the other the agreement to relinquish the ex-proprietary rights. In either view the cases referred to by the learned vakil for the appellants are authorities for the proposition that the said transaction, so far as it deals with the relinquishment of the ex-proprietary rights, is void, inasmuch as the defendants, by means of a transfer or by means of an agreement to relinquish, had no power under the law to divest themselves of their ex-proprietary rights and the agreement to relinquish ex-proprietary rights is illegal.

For the above reasons I would allow the appeal and set aside the decree of the court below with costs. In this view of the case it is unnecessary for me to enter into the question of limitation.

CHAMIER, J.—It appears to me that the case is covered by authority. In *Bhikham Singh* v. *Har Prasad* (3), the defendants had sold certain zamindari property to the plaintiffs, expressly including therein any rights which might accrue to them as ex-proprietary tenants, and they purported to relinquish those rights in favour of the plaintiffs. It was held that the attempted sale of prospective ex-proprietary rights was invalid, and that the plaintiffs were not entitled to any compensation for non-delivery of possession of the sir lands. That decision was approved in *Murlidhar* v. *Pem Raj* (4), where a similar contract had been made and the sale deed expressly provided that if the vendors failed to deliver possession of the sir lands, they would refund Rs. 1,500. It was held that the contract being contrary to law the vendees, who had failed to obtain possession, were not entitled to recover the sum of Rs. 1,500. In *Kashi Prasad* v. *Kedar Nath Sahu* (5), the parties to a private partition of zamindari lands agreed that if either party was at the time of partition holding sir land in a village which at the partition fell into the share of the other party, he would relinquish his ex-proprietary [701] rights in favour of the party into whose share the village fell. It was held that the agreement could not be enforced. In *Raghubans Sahai* v. *Brijnandan Lal* (6) it was held that an agreement to relinquish ex-proprietary rights in sir land could not be enforced. In *Bharath Singh* v.

(1) (1891) I. L. R. 18 All. 396.
(2) (1909) 6 A. L. J. 555.
(3) (1896) I. L. R. 19 All. 35.
(4) (1899) I. L. R. 22 All. 205.
(5) (1897) I. L. R. 20 All. 219.
(6) (1909) 6 A. L. J. 477.

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Debi Dayal Singh (1) the facts were that a sale deed of zamindari property and a perpetual lease of the sir lands therein were executed on the same day, and Rs. 1,105 were paid to the lessor vendor as nazrana on the lease. It was held that the sum ostensibly paid as nazrana was in reality the price paid for the ex-proprietary rights that arose on the sale and could not be recovered by the vendees, although they had not obtained possession of the sir land. In *Khurshed Ali* v. *Wazir-un-nissa* (2), on a compromise, the defendant agreed to sell certain zamindari property and to relinquish his ex-proprietary right in his sir in consideration of a sum to be fixed by an arbitrator. It was held that the transaction was an agreement to sell ex-proprietary rights when they came into existence and was unlawful. In the present case we have an attempted sale of prospective ex-proprietary rights in sir and khudkasht lands and an agreement to execute a deed of relinquishment in respect of those rights, with a provision that if the vendors fail to carry out their undertaking, they shall be liable for damages at the rate of Rs. 16 per bigha. On the above authorities it appears to me that, whether the transaction is regarded as an attempted sale of ex-proprietary rights or an agreement to relinquish those rights when they arise, it is unlawful, and therefore the claim to damages for failure to deliver possession of the sir and khudkasht lands is not maintainable. I agree that the appeal should be allowed and the suit dismissed.

BY THE COURT.—Order of the Court is, that the appeal is allowed, the decree of the court below is set aside, and the plaintiffs' suit dismissed with costs.

Appeal allowed.

33 A. 702 (= 8 A. L. J. 811=11 I. C. 43).

[702] APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

BALDEO SINGH (*Plaintiff*) *v.* MATHURA KUNWAR (*Defendant*).*

[26th May, 1911.]

Hindu Law—Mitakshara—Succession—Unchastity of mother no bar to her inheriting son's estate.

Held, that unchastity does not preclude a Hindu mother from succeeding to her son's property. *Musammat Ganga Jati* v. *Ghasita* (3), *Dal Singh* v. *Musammat Dini* (4) and *Vedammal* v. *Vedanayaga Mudaliar* (5) followed.

THE facts of this case were as follows :—

One Akbar Singh died in 1901, leaving him surviving his widow, Musammat Mathura Kunwar, and Shib Singh, his son. Shib Singh succeeded to the property, but he also died in 1907. Mathura Kunwar, entered into possession as heir of Shib Singh. The plaintiff, Baldeo Singh, who was the brother of Akbar Singh, came into court on the allegation that Mathura Kunwar was not entitled to inherit her son's property as she had become unchaste during his life-time. The first court did not go into the question of unchastity, holding it to be entirely,

* First Appeal No. 413 of 1909, from a decree of Pirthi Nath, Subordinate Judge of Mainpuri, dated the 22nd of September, 1909.

(1) (1909) 6 A. L. J. 555.
(2) (1910) 7 A. L. J. 779.
(3) (1876) I. L. R. 1 All. 46.
(4) (1910) I. L. R. 32 All. 155.
(5) (1907) I. L. R. 31 Mad. 100.

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immaterial, and dismissed the suit of the plaintiff. The plaintiff appealed. The suit was remanded to the first court for a finding whether Mathura Kunwar had become unchaste at all. The finding was that she had given birth to a son about two years before the death of Shib Singh and some four years after the death of her husband, but that she was chaste during the life of her husband.

Babu *Sital Prasad Ghose* (with him Babu *Surendra Nath Sen*), for the appellants :—

The question was whether Mathura Kunwar, having become unchaste in the life-time of Shib Singh, could retain possession of his property as against his uncle the plaintiff. In *Dal Singh* v. *Musammat Dini* (1) there was an admission made by the vakil for the appellant that the lady in question could not be a *patita* woman. Here she was a *patita* woman. *Ramnath Tolapattro* v. *Durga Sundari Debi* (2) was also cited.

[703] [Babu *Mangal Prasad Bhargava*, for the respondent, referred to *Vedammal* v. *Vedanayaga Mudaliar* (3). The word 'out-caste' had nothing to do with *patita* ; *Musammat Ganga Jati* v. *Ghasita* (4) ; Golap Chandra Sastri, Hindu Law, p. 330.]

Mr. *B. E. O'Conor* (with him Babu *Mangal Prasad Bhargava*), for the respondent, was not called upon.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit brought by the plaintiff, Baldeo Singh who is the paternal uncle of one Shib Singh, deceased, for possession of the estate left by Shib Singh, at his death. The defendant is the mother of Shib Singh. In the ordinary course she would be the next heir to the estate of her son, but the plaintiff claims it on the ground that she became unchaste during the life-time of her son. The question to be determined, therefore, is whether a Hindu mother forfeits her right of inheritance by reason of unchastity. The court below has found that the defendant, Musammat Mathura Kunwar, the mother of Shib Singh, had after the death of her husband formed an immoral intimacy with one Pitam and had a child by him. It is urged that under these circumstances she forfeited her right of inheritance. The court below has held against the plaintiff and dismissed the claim. In our judgment the question raised is concluded by authority. In the case of *Mussammat Ganga Jati* v. *Ghasita* (4), which was a case relating to the right of inheritance to *stridhan*, the learned Acting Chief Justice remarked that " want of chastity in a mother does not deprive her of her right of inheritance." The question before us was fully considered in the case of *Dal Singh* v. *Mussammat Dini* (1). In that case the authorities of Hindu Law on the subject were considered, and it was held that there was no authority for holding that a Hindu woman who after her husband's death had become unchaste is thereby excluded from inheritance to the estate left by her son. The same view was taken by the Madras High Court, in several cases, the last of which is that of *Vedammal* v. *Vedanayaga Mudaliar* (3). The decision of the Bombay High Court is also to the same effect. The Calcutta High Court has, no doubt, taken a different view, but its decision is based on **[704]** grounds which, as pointed out by the Madras High Court, do not apply to a case governed by the Mitakshara. It is admitted that there is no authority in the Mitakshara which, in the case of a mother, requires

(1) (1910) I. L. R. 32 All. 155.
(2) (1878) I. L. R. 4 Cal. 550.
(3) (1907) I. L. R. 31 Mad. 100.
(4) (1875) I. L. R. 1 All. 46.

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33 A. 702=8 A. L. J. 811=11 I. C. 43.

as a necessary condition of succession that she should be chaste. Her case is unlike that of a widow succeeding to her husband's property, where it is laid down that unchastity would deprive her of her right of inheritance. The learned vakil for the appellant relied on the word '*patita*' to be found in the Mitakshara, chapter II, section X, verse 140, but that word was rendered as 'outcaste' in the case of *Dal Singh* v. *Musammat Dini* (1), and its effect was considered by the learned Judges who decided that case. We are not prepared to dissent from the view taken by them, and in the face of the long course of decisions on the point we should not be justified in departing from the rule laid down in these decisions. No doubt it is repugnant to Hindu sentiment that an unchaste woman should inherit property. But in the absence of clear authority in the texts of Hindu law precluding an unchaste mother from succeeding to her son's property, and having regard to the decided cases on the point, we are unable to hold that the decision of the court below is erroneous.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

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33 A. 705 (=11 I. C. 977=3 A. L. J. 821).

[705] MISCELLANEOUS CIVIL.

Before Mr. Justice Tudball.

RUP CHAND (*Plaintiff*) *v.* FATEH CHAND AND ANOTHER (*Defendants*).*

Act No. VII of 1870 (*Court Fees Act*), *section* 7, *clause V* (*b*)—*Court fee—Appeal—Suit for possession—Decree for qualified possession—Appeal seeking to remove the qualification contained in the decree.*

Plaintiff brought a claim for possession of certain property as transferee from a Musammat Gomi, to whom the property had been bequeathed by one Musammat Gomti Kunwar, who had acquired it under a will executed by her husband. The court of first instance granted him a decree for possession, but limited to the life-time of Musammat Gomi. The defendant appealed, and the plaintiff also appealed, seeking to have this condition removed from the decree, and paid a court fee of Rs. 10 on his memorandum of appeal. *Held* that the court fee was sufficient, the plaintiff appellant being in the position of a person in possession of property who sought to clear his title and to obtain a declaration that he had the full right of ownership to the property.

[Ref. 68 I. C. 441=14 L. W. 624=41 M. L. J. 587=1921 M. W. N. 854=45 Mad. 216; 80 I. C. 568=3 Pat. 640.]

ON presentation of the memorandum of appeal the Stamp Reporter reported as follows:—

"The plaintiff brought a suit for possession of mauza Khudda and to recover Rs. 4,695 as mesne profits. The court of first instance gave the plaintiff a decree for possession of mauza Khudda to last only for the life-time of Mussmmat Gomi and dismissed the rest of his claim. The plaintiff is dissatisfied with the above decree, and appeals to this Hon'ble Court. He has paid a court fee of Rs. 10 only on the first part of the relief in appeal, treating it as a declaratory one.

"I beg to submit that the suit has not changed its character in appeal. The object of the appeal is to get a decree for absolute proprietary possession of the property in suit and not a life estate only as has been decreed by the lower court. That being so, an *ad valorem* fee of Rs. 610 is leviable. Rs. 270 having been paid, there is therefore a deficiency of Rs. 340 to be made good by the plaintiff appellant for this court."

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* Stamp Reference in F.A. No 162 of 1911.

(1) (1910) I. L. R. 32 All. 155.

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33 A. 705=11 I. C. 977=8 A. L. J. 821.

The following objections were preferred by—

The Hon'ble Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the appellant :—

"The plaintiff appellant claimed possession of mauza Khudda. The lower court has decreed the claim for possession, and the defendant has appealed against the said decree for possession and has paid *ad valorem* court fee in full. But the Subordinate Judge has added a condition in the decree that the plaintiff's possession shall continue during the life-time of his assignor. By his appeal the plaintiff wishes to get rid of this condition as illegal and *ultra vires*; practically he claims a declaration that the condition so attached to the decree is void, and he has paid a court fee of Rs. 10 for that relief. There is no change in the [706] character of the suit as the office report suggests. He claimed possession and he has got a decree for possession. The defendant has paid the court fee payable for that relief, as he seeks to set aside the decree for possession. The plaintiff cannot and does not claim possession by his appeal, but he seeks to get rid of the condition attached to the decree."

The Stamp Reporter made the following further report :—

"In reply to the objection taken by the learned advocate for the appellant, I beg to submit that in the objection the learned advocate says, 'there is no change in the character of the suit.' This itself shows that *ad valorem* duty is payable The payment of full court fees by the defendant on his memorandum of appeal does not exonerate the plaintiff from liability to pay on his memorandum of appeal the proper court fees leviable under the law. The lower court having decreed the possession in plaintiff's favour to last for the life-time of Musammat Gomi, the defendant could not but pay the *ad valorem* court fees on his memorandum of appeal.

"The object of the present appeal is to get a decree for possession for ever, *i.e.* he, the appellant. may be legally allowed to remain in possession even after the death of Musammat Gomi, and I do not see any reason why he should not be called upon to pay *ad valorem* court-fees, the suit for possession be governed by section 7, clause v (*b*) of Act VII of 1870.

"Even conceding for the sake of argument that the plaintiff does claim a declaration only in this appeal, I would submit that the declaration sought for involves a consequential relief, for if the condition attached is removed, the plaintiff's possession over the property in suit would extend beyond the life-time of his assignor, Musammat Gomi, and he shall remain in possession of the property for ever."

The Taxing Officer's report was as follows :—

"The plaintiff brought a suit in which he claimed possession of certain property—a mauza of the name of Khudda—on the ground that this property had been assigned to him by one Musammat Gomi to whom it had been bequeathed by Musammat Gomti Kunwar, who had acquired it under a will executed by her husband, the original owner of the property. The Subordinate Judge granted a decree for possession, but *limited it to the life-time of the assignor, Musammat Gomi.* The plaintiff appellant now seeks to have this condition set aside, and claims a decree for absolute and unqualified possession. The question is, whether the appeal which bears a 10 rupee stamp is properly stamped. On the one hand it is contended that what the plaintiff appellant claims is possession of the property, *viz.*, possession unlimited in point of time as against the limited possession decreed by the lower court. On the other hand, it is argued for the plaintiff appellant, that he has already got possession, or a decree for possession, and that his position is, therefore, analogous to that of a man who being in possession but finding his title as absolute owner impugned, brings a suit for a declaration that his title is absolute but asks for no consequential relief.

"To my mind it cannot be said that the suit is only one for a declaration without consequential relief. If the plaintiff appellant succeeds, he will take [707] out execution, and be given an unqualified and unlimited possession, whereas if the decree of the lower Court stands, he will be given in execution only a limited possession. The most relevant ruling I can find is 8 B. L. App. 23. It appears to me, therefore, that the appeal should bear an *ad valorem* stamp under section 7, v (*b*)."

The following order was passed by the Taxing Judge.

TUDBALL, J.—This is a reference by the Taxing Officer. The plaintiff in the suit brought a claim for possession of certain property as

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transferee from a Musammat Gomi. Musammat Gomi is a person to whom property had been bequeathed by Musammat Gomti Kuar, a Hindu widow, who had acquired it under a will executed by her husband. The plaintiff was resisted by a person who was also a beneficiary under the will of Gomti Kuar. The lower Court held the plaintiff was entitled to possession, but that that possession should be restricted to the life-time of Musammat Gomi. The defendant has appealed that he has paid full Court fee, as he objects to the decree for possession. The plaintiff has also appealed, and he seeks thereby to set aside so much of the lower Court's decree as declared him to be entitled to possession for the life-time of Musammat Gomi, and he asks the Court on appeal to declare that he is entitled to the absolute ownership of the property and not to a limited interest. He has paid a Court fee of Rs. 10. The Taxing Officer is of opinion that the appeal should bear an *ad valorem* stamp, as in a suit for possession of land under section 7, clause v (b) of the Court Fees Act. I find it difficult to see that the appeal falls under this section and clause. As matters stand now, the plaintiff appellant seems to me to be in the possession of a person in possession of property who seeks to clear his title and to obtain a declaration that he has the full right of ownership to the property. Under the circumstances I think the Rs. 10 paid as for a declaration is sufficient.

Order accordingly.

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33 A. 708 (=8 A. L. J. 854=11 I. C. 145.)

[708] FULL BENCH.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, Mr. Justice Banerji and Mr. Justice Chamier.

BHAGWAN DAS (*Plaintiff*) *v.* KARAM HUSAIN AND OTHERS (*Defendants*).*
[29th May, 1911].

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 82 *and* 100—*Mortgage—Contribution—Equitable lien—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, articles* 62, 120 *and* 132.

The owner of a property which is mortgaged with other properties to secure a single debt acquires by virtue of the provisions of sections 82 and 100 of the Transfer of Property Act, 1882, a charge against such other properties when his property has been sold in execution of a decree on the mortgage and has contributed more than its rateable share of the mortgage debt, and none the less if the owner of such property has neither redeemed the mortgaged property nor has the sale of his property alone discharged the mortgage decree.

A claim to enforce such a charge is governed by article 132 of the first schedule to the Indian Limitation Act, 1908.

Ibn Hasan v. *Brijbukhan Saran* (1), *Muhammad Yahiya* v. *Rashid-ud-din* (2), *Rajah of Vizianagram* v. *Rajah Satrucherla Somasekhararas* (3) and *Bhagwan Das* v. *Har Dei* (4) referred to

Per BANERJI and CHAMIER, JJ. (*dubitante* RICHARDS, C. J.):—
If property against which a charge for contribution would otherwise have accrued has been sold and has realized more than the amount remaining due on

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*First Appeal No. 122 of 1910, from a decree of Kanhaiya Lal, Second Additional Judge of Meerut, dated the 1st March, 1910.

(1) (1904) I. L. R. 26 All. 407.
(2) (1909) I. L. R. 31 All. 65.
(3) (1902) I. L. R. 26 Mad. 686.
(4) (1903) I. L. R. 26 All. 227.

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the mortgage, an equitable lien on the surplus sale proceeds arises in favour of the person entitled to contribution.

A suit to recover contribution in virtue of such a lien is governed by article 62 of the first schedule to the Indian Limitation Act, 1908, if not, perhaps, by article 120.

Berhamdeo Pershad v. *Tara Chand* (1), *Gosto Behary Pyne* v. *Shib Nath Dut* (2), *Kamala Kant Sen* v. *Abul Barkat* (3), *Mahomed Wahib* v. *Mahomed Ameer* (4), *The Rajputana Malwa Railway Co-operative Stores, Limited* v. *The Ajmere Municipal Board* (5) and *Guru Das Pyne* v. *Ram Narain Sahu* (6) referred to.

[Ref. 39 Mad. 62=26 I. C. 219; 63 I. C., 203=19 A. L. J. 581=43 All. 539; 84 I. C. 589.].

THE facts of this case were as follows :—

Amir Husain, the ancestor of the first two defendants, owned shares in three villages,—namely, (1) Bilaspur, khewats 1, 2 and 3, (2) Dandhera and (3) Kheri Dudadhari.

[709] On the 17th of March, 1883, he made a usufructuary mortgage of his property in Kheri Dudadhari in favour of Rai Bahadur Nihal Chand, the predecessor in title of the defendants Nos. 3 to 5. In 1891, the mortgagee purchased the equity of redemption of the mortgagor in execution of a simple money decree and thus became the absolute owner of the property.

On the 29th of August, 1885, Amir Husain made a simple mortgage of the villages Dandhera and Kheri Dudadhari and khewat No. 1 of Bilaspur in favour of one Makhan Lal.

On the 3rd of March, 1887, he mortgaged his interests in all the three villages to the aforesaid Makhan Lal.

On the 20th of June, 1894, the plaintiff purchased at auction the whole of Amir Husain's interest in the village Bilaspur in execution of a simple money decree.

Mansamrath Das, the son of Makhan Lal, first brought a suit on the third mortgage mentioned above, namely, that of the 3rd of March, 1887, and obtained a decree for sale on the 31st of May, 1890. In execution of that decree he caused khewat No. 3 of Bilaspur, the village purchased by the plaintiff, to be sold by auction on the 20th of November, 1903. The proceeds of the sale discharged the decree in full and a surplus of Rs. 165 was received by the plaintiff.

Mansamrath Das obtained a decree for sale on the 5th of September, 1895, on the basis of the mortgage of the 29th of August, 1885, and in execution thereof caused khewat No. 1 of Bilaspur, to be sold by auction on the 20th of June, 1895. The proceeds of this sale were insufficient to satisfy the decree, and therefore, on the 21st of January, 1907, he caused the village Kheri Dudadhari to be sold and Nihal Chand purchased it. After satisfying the decree in full, the sale proceeds left a surplus of Rs. 4,542-14-0 which was paid over to Nihal Chand some time after the 4th of May, 1907, in spite of plaintiff's protests, on the ground that he was the owner of the village sold.

The plaintiff instituted the present suit on the 6th of August, 1909, on the allegations that the proportionate liability of his village Bilaspur for the two mortgages in favour of Makhan Lal was Rs. 9,430-5-0; that by the auction sale of his village Bilaspur a sum of Rs. 14,255 was realized ;

(1) (1905) I. L. R. 33 Cal. 92.
(2) (1892) I. L. R. 20 Cal. 241.
(3) (1899) I. L. R. 27 Cal. 180.
(4) (1905) I. L. R. 32 Cal. 527.
(5) (1910) I. L. R. 32 All. 491.
(6) (1884) I. L. R. 10 Cal. 860.

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that the said village has therefore contributed more than its share of liability and [710] that he is entitled to recover the excess amount so contributed from the villages Dandhera and Kheri Dudadhari. In the plaint, as originally framed, he claimed to recover Rs. 4,659-3-0 and interest by sale of the two villages mentioned above, on which he stated he had a charge under section 82 of the Transfer of Property Act. By a petition dated the 4th of February, 1910, he amended his plaint and abandoned his claim for enforcement of a charge on the village Kheri Dudadhari and prayed for a money decree against the defendants Nos. 3 to 5, the legal representatives of Nihal Chand, for Rs. 2,417-2 0 and interest.

The Court below has dismissed the claim on the ground that the plaintiff acquired no charge on the property of his co-mortgagors and that his suit was time-barred, as it was brought after three years from the date of the sale of his village Bilaspur.

The plaintiff appealed.

Dr. *Satish Chandra Banerji* (with him Dr. *Tej Dahadur Sapru*), for the appellant.

Section 82 of the Transfer of Property Act expressly makes the property liable. Read with section 100 of the same Act, it clearly created a charge by operation of law. The liability is of the property and not of the person. The section was taken in substance from Fisher on Mortgages, p. 543, 5th edition. As to equitable liens generally I rely on Pomeroy's *Equity*, pp. 2465, *et seq.*

[Mr. *Nihal Chand*, on behalf of respondents 1 and 2, admitted a charge on the property by reason of satisfaction of the mortgage of 1887, but stated that his contention would be that section 82 of Transfer of Property Act did not create a charge, it only distributed one, where it existed, among several parcels of property.]

Ibn Hasan v. *Brijbhukhan Saran* (1) was referred to.

STANLEY, C. J., explained what he meant in that case in the subsequent case of *Muhammad Yahiya* v. *Rashid-ud-din* (2). There is a uniform course of rulings in this Court that a charge is created in circumstances like those which exist in this present [711] case; *Bhagirath* v. *Naubat Singh* (3). The entire decree there had not been satisfied by the sale of the property, yet it was held that a charge was created on the other properties. There were also cited *Pancham Singh* v. *Ali Ahmad* (4), *Ibn Husain* v. *Ram Dai* (5), *Balleo Sahai* v. *Baij Nath* (6), *Hari Raj Singh* v. *Ahmed-ud-din Khan* (7), *Shanto Chandar Mukerji* v. *Nain Sukh* (8), *Bhagwan Das* v. *Har Deri* (9), *Rajah of Vizianagram* v. *Raja Satrucherla Somasekhararaz* (10), *Har Prasad* v. *Raghunandan Prasad* (11).

In the case in 26 All. where the provisions of section 95 of the Transfer of Property Act were considered, it was held that article 132 of the Limitation Act would apply and not article 99. To the same effect are *Yakub Ali Khan* v. *Kishan Lal* (12), and *Sagar Mal* v. *Janki Das* (13). If there were no charge on any other property of a person who had purchased part of the equity of redemption the property might be put up for sale. But such purchaser incurs no personal liability.

(1) (1901) I. L. R. 26 All. 407.
(2) (1909) I. L. R. 31 All. 65.
(3) (1879) I. L. R. 2 All. 115.
(4) (1881) I. L. R. 4 All. 58.
(5) (1889) I. L. R. 12 All. 110.
(6) (1891) I. L. R. 13 All. 371.
(7) (1897) I. L. R. 19 All. 545.
(8) (1901) I. L. R. 23 All. 355.
(9) (1904) I. L. R. 26 All. 227.
(10) (1902) I. L. R. 26 Mad. 686.
(11) (1908) I. L. R. 31 All. 166.
(12) (1906) I. L. R. 28 All. 743.
(13) (1904) 1. A. L. J. 270.

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As to the liability of the other set of defendants (Nihal Chand's heirs), it was by sale of the plaintiff's property that the bulk of the decree obtained upon the first mortgage was discharged. For the small balance which remained due the property of Nihal Chand was sold, and he appropriated the entire surplus. We are entitled to a portion of the surplus inasmuch as it represents the property in his hands. That money was payable to us on equitable grounds. The payment of the money out of Court does not put an end to the lien; *Berhamdeo Pershad* v. *Tara Chand* (1). It may be that we had no lien on the day our property was sold. But we acquired it as soon as other property was sold and the mortgage was satisfied. It then attached to the money into which the property had been converted. This is a case of substituted or transmitted security; *Padmanabh Bombshenvi* v. *Khemu Komar Naik* (2). Nihal Chand was not entitled to [712] the whole of the money, but only to part of it *Mahdi Husain* v. *Sukh Chand* (3).

Mr. *Nihal Chand* (for defendants 1, 2, 6).

I do not dispute the liability under the first mortgage, but I submit that after the Full Bench case in 26 Allahabad it is not possible to argue that a person who has satisfied part only of debt can claim a charge; Ghose on Mortgages (ed. 4), p. 332; *Gurdeo Singh* v. *Chandrikah Singh* (4). Even if there can be a charge, the question will remain as to when it will arise, whether upon payment in excess of the plaintiff's *quota* or upon the complete discharge of the debt, as in 36 Calcutta at 217. All the cases were decided with reference to the principle of subrogation; Ghose on Mortgages, p. 372. There may be a right to contribution, but not necessarily a right to a charge. The claim will, therefore, only be for a simple money decree and that is barred by three years' limitation. Section 82, Transfer of Property Act, cannot keep the lien alive.

Munshi *Gokul Prasad* (for respondents 3—5, heirs of Nihal Chand).

The right to contribution arose when the defendant's property was made to pay more than its share. The plaintiff concedes he cannot follow the property. He has a personal right, which came into existence at the latest in 1905. It has become barred now, whether articles 16 or 99, Limitation Act, schedule I, applied; *Davies* v. *Humphreys* (5). The cause of action arose when the property was sold and the plaintiff paid more than his *quota*. *Berhamdeo Pershad* v. *Tara Chand* (6) lays down that money paid that way is not money had and received. The mere fact of our taking the sale proceeds away did not give rise to a new cause of action; *Gosto Behari Pyne* v. *Shib Nath Dut* (7), *Kamla Kant Sen* v. *Abul Barkat* (8), *Jogeshur Bhagat* v. *Ghanasham Dass* (9). Even if it applied, article 132 would not save limitation. It applied to relief against property not to simple money claims; *Ram Din* v. *Kalka Prasad* (10). The article applicable is article 61. Plaintiff had a charge on property, that charge [713] might or might not have been enforced. It might never have been enforced and the money might have been realized by sale of other property; *Ram Kishan* v. *Bhawani Das* (11). The money must be shown to have belonged to the plaintiff alone. No personal suit for contribution lay. The sale on the prior mortgage wiped off the whole charge. Section 95 of the Transfer of Property Act applied to usufructuary as well as

(1) (1905) I. L. R. 33 Cal. 92.
(2) (1894) I. L. R. 18 Bom. 684.
(3) (1911) I. L. R. 33 All. 450.
(4) (1907) I. L. R. 36 Cal. 193, 217.
(5) (1840) 6 M. and W. 153.
(6) (1906) I. L. R. 33 Cal. 92 (111).
(7) (1892) I. L. R. 20 Cal. 241.
(8) (1899) I. L. R. 27 Cal. 180.
(9) (1901) 5 C. W. N. 356.
(10) (1885) I. L. R. 7 All. 502.
(11) (1876) I. L. R. 1 All. 333.

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to simple mortgages; *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam* (1). And it was not necessary to travel outside that section to decide the question of charge.

Dr. *Satish Chandra Banerji*, in reply. There was no question of subrogation. The plaintiff did not claim to step into the shoes of the mortgagee. He only claimed contribution from other properties to equalize the burden on all of them.

[Their Lordships intimated that they did not want to hear him on that point.]

One of the three articles 132, 120, 62, Limitation Act, schedule I, would apply. If article 62 applied, the suit was not barred; Bullen and Leake, Pleadings, 292. The surplus money taken was money received to the use of the plaintiff. We are claiming an equitable lien. The distinction between a common law lien and an equitable lien is that for the latter no possession is necessary. The relationship is of the nature of a trust. Consequently the fact that the money had been paid out to the defendant would not make any difference. The charge would attach to it all the same. Section 295 of the old Code of Civil Procedure itself gave a right of suit for money. Where it could be shown that immoveable property had been converted into something else it could be followed; Transfer of Property Act, section 73. If the claim be rested on the basis of an equitable lien, article 120 would apply and the claim is within time. On the other hand if the plaintiff can claim on the basis of a charge to this money, then, as the Calcutta cases have laid down, article 132 would apply. I rely upon the doctrine of equitable conversion. Conversion into money would not make property any the less immoveable for the purposes of a charge; Mitra on Limitation, ed. 5, Vol. II, pp. 1097-8.

[714] RICHARDS, C. J.—The facts out of which this appeal arose are of a very complicated nature. They are, however, very fully set forth in the judgment of the learned Additional Judge, and I consider it only necessary to state the questions of law which admittedly are the questions which arise and have been argued on behalf of the parties before us. They are as follows:—

(1) Has the owner of a property, which was mortgaged with other properties to secure a single debt, a charge against such other properties when his property has been sold in execution of a mortgage decree and has contributed more than its rateable share, but where the owner of the property claiming the charge has neither redeemed the mortgaged property, nor has the sale of his property alone been the means of discharging the mortgage decree?

(2) If two properties are mortgaged to secure one debt, and both properties are sold in execution of a mortgage decree, has the owner of the property which has borne more than its rateable share a right to a personal decree against the owner of the property that has borne less than its rateable share of the debt, where the latter has actually received the surplus proceeds of the sale of his property?

The plaintiff contends that he has a charge against the property represented by the defendants 1, 2 and 6, which has not been sold, and he seeks to enforce such claim by sale of the property.

The defendants 1, 2 and 6 contend that, inasmuch as the plaintiff did not redeem the property and the mortgage decree was not discharged solely out of the proceeds of the sale of the plaintiff's property, the plain-

(1) (1906) I. L. R. 28 All. 482 (487.)

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tiff has no charge against the property itself, that the only right he ever had was a personal right of contribution, and that the last mentioned right is barred by limitation.

As regards the defendants 3 to 5, the plaintiff, in his plaint, alleged that he had a similar charge which he sought to enforce by sale of certain other property. This position was, however, abandoned, at the trial in the Court below. The plaintiff admitted that the entire property represented by the defendants 3 to 5, [715] was, like his own, sold in execution of the mortgage decrees; but he contends that the surplus proceeds of the sale having been paid over to the defendants without providing for payment to him of the excess for which he alleges his property was made liable, he is entitled to a simple money decree against the defendants 3 to 5.

The defendants 3 to 5 contend that the plaintiff having abandoned his claim against the property, his present claim must be deemed to be a personal claim for contribution, which arose when the plaintiff' sproperty was made liable for more than its rateable share of the mortgage debt, and that it is therefore barred by limitation.

I think the plaint ought to be looked upon as amended and that the plaintiff's claim as against the defendants 3 to 5 should be dealt with as if he had alleged in the plaint that his property had to bear more than its rateble share, and the defendants escaped paying the rateable share which their property would have borne by reason of the fact that the surplus proceeds of the sale of their property was paid over to the defendants 3 to 5 without any regard being had to the plaintiff's claim, and that under these circumstances he is entitled to a personal decree. I propose so to deal with the plaintiff's claim as against the defendants 3 to 5.

The Court below has not come to any finding as to the respective values of the several properties. It has decided the case on a preliminary point holding that the plaintiff had no charge but only a right to sue as a personal claim for the excess, if any, his property was made liable to and that such right was barred by articles 61 and 99 of the first schedule to the Limitation Act. The learned Additional Judge accordingly dismissed the suit against all the defendants.

If we hold that he was wrong in point of law, the case will have to be remanded for disposal.

For the purpose of disposing of the appeal I shall assume that the result of the sale of the plaintiff's property and the distribution of the sale proceeds was that the plaintiff's property had to bear more than the rateable share which it ought to have borne; but that he neither redeemed the mortgage nor paid up the decree, but allowed his own property and the property of the defendants [716] 3 to 5 to be sold. I shall also assume that the property represented by the two sets of defendants has borne less than the rateable share which their property ought to have borne. It also appears from the written statements of the defendants 3 to 5 that after the sale of their property on the 4th of May, 1905, the plaintiff filed an objection to the surplus being paid out and claimed that a portion of the surplus belonged to him and should be paid to him. His objection, however, was disallowed. There seems to me to be no room for doubt that where several properties are mortgaged to secure one debt, the owner of [redacted] property that has been made liable for more than its rateable proportion of the debt has a charge on the other properties. Section 82 of the Transfer of Property Act is a statutory enactment in India of a principle which has long been recognised to be founded on justice and equity. It

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is as follows:—"Where several properties, whether of one several owners, or are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage." It seems to me that the section creates what I may call a stautory charge on the other properties. It creates no personal liability against the owner of the property. In some cases it might be most inequitable to make the owner personally liable. The liability might be greater than the interest in the property. In my opinion article 99 of the Limitation Act has no application whatever to a suit to enforce the right conferred by section 82. It makes no difference whatever, in my judgment that the party claiming the charge did not redeem the mortgage or discharge the mortgage decree before the property was actually sold, nor does it make any difference that the amount of the mortgage or mortgage decree, was not entirely raised out of the plaintiff's property. I am of opinion that in considering whether or not the plaintiff has a charge, he need not and ought not to go outside the provisions of sections 82 and 100 of the Transfer of Property Act. There is, however, if it were needed, abundant authority for the proposition that the owner of property [717] which has had to bear more than its rateable value, has a charge. The cases will be found collected in the case of *Ibn Hasan* v. *Brijbhukhan Saran* (1) and *Muhammad Yahiya* v. *Muhammad Rashid-ud-din* (2).

In the first case a mortgagor, whose property had been made to bear more than its rateable share, sued his co-mortgagors in a suit like the present for the excess. The majority of the court were of opinion that the plaintiffs could not sue because the entire amount of the mortgage had not been satisfied. The question which was decided in that case does not arise in the present, because it is admitted that the result of the sales which have taken place is that the mortgages have been fully paid off and discharged. There are, no doubt, some *dicta* of STANLEY, C. J., which suggest that he considered that it was necessary to sustain the plaintiff's claim that he should have redeemed the property and placed himself in the position of one of several mortgagors who has redeemed the mortgage (section 95 of the Transfer of Property Act). However, it will be seen on a perusal of the judgment that the all-important fact, in the opinion of the Chief Justice, was the fact that the mortgage had not been entirely satisfied. If there was any doubt upon the matter, it is set at rest by the remarks of the learned Chief Justice in the second case. There the suit was a suit exactly like the present. The property of some of the mortgagors had been made liable for the entire mortgage debt. The mortgagee had obtained a decree and had sold the property, and he claimed to be entitled to realize the excess for which his property had been made liable by a sale of the property which had not been sold. The case came before our brother BANERJI and STANLEY, C. J. Our brother BANERJI held that the plaintiff was entitled to a decree. At page 67, STANLEY, C. J., says as follows:—"I agree. In my judgment in *Ibn Hasan* v. *Brijbhukhan Saran*, upon which reliance has been placed by the appellant's learned advocate, I did not decide, or intend to decide that, where a mortga[illegible] has been wholly satisfied, a co-mortgagor who has discharged m[illegible]han his rateable portion of the debt is not entitled to cont[illegible]n from his co-mortgagors. What was decided in that case was that [718]

(1) (1904) I. L. R. 26 All. 407. (2) (1909) I. L. R. 31 All. 65.

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until the entire mortgage debt has been satisfied a claim for rateable contribution could not be enforced." It seems to me that some confusion has arisen from calling suits like the present " suits for contribution." They would be better described as suits to enforce charges for rateable contribution between co-mortgagors. Defendants 1, 2 and 6, no doubt, rely very strongly on the *dicta* of STANLEY, C. J., in *Ibn Hasan* v. *Brijbhukhan Saran*, and contend that section 82 must be read with section 95, and the plaintiff not having paid the decree himself in full and the amount not having been entirely realized out of his own property, he has no charge. In my opinion there is no justification whatever for this contention. In my opinion sections 82 and 95 are quite independent of each other.

The question whether or not the plaintiff is entitled to a simple money decree is not free from difficulty. I have already pointed out that the plaintiff's right originally was not a personal right for contribution. He had a charge on the property which had borne less than its rateable share of the mortgage debt. He could enforce this right so long as the property of the defendants 3 to 5 remained unsold; and any right that he had against that property would attach to the surplus proceeds of sale after the property had been sold. The property, however, having been sold and the surplus proceeds paid out, the plaintiff's right, if any, has now completely changed. In my opinion he has no right now, unless it can be said that the payment out of the surplus proceeds to the defendants 3 to 5 under the peculiar circumstances of the present case gave him a new cause of action. I feel difficulty in seeing what cause of action he has. The surplus proceeds of the sale belonged to the defendants 3 to 5 subject to the plaintiff's charge. No fiduciary relation existed between the plaintiff and the defendants 3 to 5, although it may be that after the plaintiff had filed an objection the payment out of the money to the defendants 3 to 5, the court was wrong in allowing the payment to be made without providing for the plaintiff's charge. It seems to me that this claim can hardly be regarded as a claim for money had and received by the defendants 3 to 5, to the use of the plaintiff. The money was not the plaintiff's money: he merely had a **[719]** charge or lien upon it: see *Guru Das Pyne* v. *Ram Narain Sahu* (1). In that case their Lordships of the Privy Council had to consider whether the claim of the plaintiff was a claim for money had and received. The claim would have been barred if it was a claim for money had and received. Their Lordships held that the suit was not a suit for money had and received. At page 864 their Lordships say:—" When he sold the timber he was selling it as the agent of Moti Dasi, and he received the money for her. The suit is to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their timber, and finding them in the hands of the defendants to make him responsible for the amount." Of course if the claim of the plaintiff, as now put forward against the defendants 3 to 5, can be regarded as a suit to enforce an equitable claim to follow the surplus of the proceeds of the property into the hands of the defendants 3 to 5, the case is an authority in favour of the plaintiff. On the other hand it seems to me that the case is an authority in favour of the defendants that the suit cannot be regarded as a claim for money had and received. The facts of the case were peculiar. It is quite clear that the High Court (whose judgment was affirmed by their

(1) (1884) I. L. R. 10 Cal. 860.

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Lordships) felt justified in giving the plaintiff a decree because they held that the defendant had sold timber which belonged to the plaintiff and received the purchase money. At page 863 their Lordships quote from the judgment of the High Court:—"It is quite clear that in this case the plaintiffs did rely in their plaint upon the fact that the defendant had sold the timber and received the proceeds." Under the circumstances of the case the Court considered that the plaintiff was entitled to a personal decree against Guru Das, and their Lordships, describing the suit as a suit to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their timber in the hands of the defendant, Guru Das, and to make him responsible for the amount, affirmed the decree of the High Court. It seems to me that the facts of the present case are different. No fiduciary relationship of any kind ever existed between the plaintiff and the defendants 3 to 5. There was no fraud in their obtaining payment of the surplus proceeds of [720] the sale of the property. The money was the money of the defendants 3 to 5 subject only to the lien of the plaintiff. The most that can be said in favour of the plaintiff is that the decision of the court that directed or allowed the money to be paid out notwithstanding the plaintiff's objection was incorrect. I am inclined to think that the plaintiff's proper remedy would have been to have instituted a suit for rateable contribution and when the suit was instituted to have applied for an injunction to restrain the payment out of the money pending the hearing of the suit. Both my learned colleagues think that the plaintiff should have a personal decree against the defendants 3 to 5. Notwithstanding the doubts I have expressed, I am not disposed to record a dissentient judgment on the point. The decree that the plaintiff may have against the defendants 3 to 5 will, of course, in no event exceed the amount of the surplus paid out to them.

BANERJI, J.—This appeal arises out of a suit for contribution brought by the plaintiff appellant under the following circumstances:—

Amir Husain, the ancestor of the first two defendants, owned shares in three villages,—namely, (1) Bilaspur, khewat No. 1, (2) Dandhera and (3) Kheri Dudadhari.

On the 17th of March, 1883, he made a usufructuary mortgage of his property in Kheri Dudadhari in favour of Rai Bahadur Nihal Chand, the predecessor in title of the defendants Nos. 3 to 5. In 1891, the mortgagee purchased the equity of redemption of the mortgagor in execution of a simple money decree and thus became the absolute owner of the property.

On the 29th of August, 1885, Amir Husain made a simple mortgage of the villages Dandhera and Kheri Dudadhari and khewat No. 1 of Bilaspur in favour of one Makhan Lal.

On the 3rd of March, 1887, he mortgaged his interests in all the three villages to the aforesaid Makhan Lal.

On the 20th of June, 1894, the plaintiff purchased at auction the whole of Amir Husain's interest in the village Bilaspur in execution of a simple money decree.

Mansamrath Das, the son of Makhan Lal, first brought a suit on the third mortgage mentioned above, namely, that of the 3rd of March, 1887, and obtained a decree for sale on the 31st of [721] May, 1890. In execution of that decree he caused khewat No. 3 of Bilaspur, the village purchased by the plaintiff, to be sold by auction on the 20th of November, 1903. The proceeds of the sale discharged the decree in full and a surplus of Rs. 165 was received by the plaintiff.

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Mansamrath Das obtained a decree for sale on the 5th of September, 1895, on the basis of the motgage of the 29th of August, 1885, and in execution thereof caused khewat No. 1 of Bilaspur to be sold by auction on the 20th of June, 1895. The proceeds of this sale were insufficient to satisfy the decree, and therefore on the 21st of January 1907, he caused the village Kheri Dudadhari to be sold and Nihal Chand purchased it. After satisfying the decree in full, the sale proceeds left a surplus of Rs. 4,542-14-0 which was paid over to Nihal Chand some time after the 4th of May, 1907, in spite of plaintiff's protests, on the ground that he was the owner of the village sold.

The plaintiff instituted the present suit on the 6th of August, 1909, on the allegations that the proportionate liability of his village Bilaspur for the two mortgages in favour of Makhan Lal was Rs. 9,430-5-0; that by the auction sale of his village Bilaspur a sum of Rs. 14,255 was realised; that the said village has therefore contributed more than its share of liability and that he is entitled to recover the excess amount so contributed from the villages Dandhera and Kheri Dudahari. In the plaint, as originally framed, he claimed to recover Rs. 4,659-3-0 and interest by sale of the two villages mentioned above, on which he stated he had a charge under section 82 of the Transfer of Property Act. By a petition, dated the 4th of February, 1910, he amended his plaint and abandoned his claim for enforcement of a charge on the village Kheri Dudadhari and prayed for a money decree against the defendants Nos. 3 to 5, the legal representatives of Nihal Chand, for Rs. 2,417-2-0 and interest.

The court below has dismissed the claim on the ground that the plaintiff acquired no charge on the property of his co-mortgagors and that his suit was time-barred, as it was brought after three years from the date of the sale of his village Bilaspur.

[722] The plaintiff has preferred this appeal and the question to be determined is, whether the whole or any part of the claim is barred by limitation.

The suit embraces two branches, first, the claim against the defendants Nos. 1 and 2, the legal representatives of the original mortgagor, Amir Husain, and defendant No. 6, who is a subsequent mortgagee of the village Dandhera, for enforcement of a charge on that village; and secondly, the claim to obtain a money decree against the defendants Nos. 3 to 5, the legal representatives of Nihal Chand. I shall consider each branch of the claim separately.

As regards the first branch of the claim, I am of opinion that by virtue of the provisions of sections 82 and 100 of the Transfer of Property Act a mortgagor, or his representative in interest, whose property has contributed more than its proportionate share of the mortgage debt, is entitled to a charge on the remainder of the mortgaged property which has not discharged its own share of the debt. Section 82 gives legislative effect to the well-known rule stated in Fisher on Mortgages (6th edition, p. 688) in the following terms:—"If several estates (whether of one or several owners) be mortgaged for or subject equally to one debt, * * * the several estates shall contribute rateably to the debt; being valued for that purpose, after deducting from each estate any other incumbrances by which it is affected." This rule "rests upon the principle that the fund, which is equally liable with another to pay the debt shall not escape because the creditor has been paid out of that other fund alone." (p. 688). The liability to contribute is that of the estates subject to the

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mortgage, and where those estates have passed to a purchaser or to the heirs of the mortgagor, it is not a personal liability. The necessary effect of the provisions of section 82, therefore, is that where one of the mortgaged estates has contributed more than its own *quota* of liability, the owner of that estate is entitled to recover the excess from the other estates subject to the mortgage, and acquires a charge on those estates. This charge is created by the provisions of section 82, read with section 100. I stated my views on the point at length [723] in my judgment in *Ibn Hasan* v. *Brijbhukhan Saran* (1), and I do not think any useful purpose will be served by reiterating them. Section 95 of the Transfer of Property Act was relied upon by the learned counsel for the defendants Nos. 1, 2 and 6, but that section, in my opinion, provides for only one class of cases and does not preclude the acquisition of a charge in any other case to which section 82 applies. (See Ghose on Mortgages, 4th edition, p. 371, and the cases cited in the foot-note.) If, therefore, the plaintiff's property has contributed more than the amount for which it was proportionately liable, he has a charge on the other mortgaged properties which have been relieved of the burden which lay on them. The claim being to enforce that charge, article 132 of the first schedule to the Limitation Act applies, and the claim, as against the defendants Nos. 1, 2 and 6, is clearly within time.

As regards the mortgage of 1887, which was satisfied by the proceeds of the sale of the plaintiff's property alone he has undoubtedly a right to contribution and to enforce the charge which he has acquired is respect of the amount for which he is entitled to contribution, on the property of the defendants Nos. 1, 2 and 6, as the said property was not sold in execution of the decree obtained on the aforesaid mortgage.

As for the mortgage of 1885, it is urged that as by the sale of the plaintiff's property only a part of the amount of that mortgage was realized, the plaintiff has not acquired a charge. In support of this contention the decision of STANLEY, C. J., in *Ibn Hasan* v. *Brijbukhan Saran* (1) has been referred to. All that was held by the learned Chief Justice in that case was that a right of contribution and a charge do not arise until the whole mortgage is discharged. This was explained by SIR JOHN STANLEY in his judgment in the later case of *Muhammad Yahiya* v. *Rashid-ud-din* (2). In the case before us the full amount of the mortgage of 1885 has been satisfied. Therefore, if the plaintiff's property has contributed a larger amount than that for which it was rateably liable he has acquired a charge for the excess amount contributed by him, on Dandhera, the village of the defendants 1 and 2, which contributed nothing. [724] Whether, therefore, the charge came into existence on the 20th of June, 1905, when the plaintiff's property was sold, or on 20th of January, 1907, when the decree upon the mortgage of 1885 was satisfied in full, the claim to enforce the charge is within time, under article 132 of schedule I of the Limitation Act. Article 99 is, in my opinion, applicable to a suit for a personal decree for contribution and not to a suit to enforce a charge. This was so held in *The Raja of Vizianagram* v. *Rajah Satrucherla Somasekhararaz* (3) and *Bhagwan Das* v. *Har Dei* (4). The court below was wrong in applying that article and in holding the claim against the defendants Nos 1, 2 nd 6, to be time-barred.

The second branch of the claim, namely, that directed against the defendants Nos. 3 to 5, the legal representatives of Nihal Chand,

(1) (1904) I. L. R. 26 All. 407 (444).
(2) (1909) I. L. R. 31 All. 65.
(3) (1902) I. L. R. 26 Mad. 686.
(4) (1903) I. L. R. 26 All. 227.

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involves somewhat different considerations. As this part of the claim now stands, the plaintiff does not seek to enforce a charge on immovable property, but prays for a money decree. The ground on which he does so is this :—Upon the sale of his village Bilaspur in 1903 for the realization of the amount of the mortgage of 1887, he acquired a charge on the village Kheri Dudadhari, which was also comprised in that mortgage and was not sold; that this charge was subject to the earlier mortgage of 1885; that a charge also arose when the plaintiff's property was sold in 1905, in execution of the decree obtained on the mortgage of 1885; that, as the village Kheri Dudadhari was comprised in that mortgage and was sold in execution of the aforesaid decree, the plaintiff's charge or lien attached to the surplus sale proceeds, and that, as the surplus sale proceeds were withdrawn from court and appropriated by the predecessor in title of the defendants Nos. 3 to 5, he was liable to repay to the plaintiff that portion of the surplus which is equivalent to the amount for which the plaintiff had a charge. This contention is, in my judgment, well founded. As the village Kheri Dudadhari was also comprised in Makhan Lal's mortgage of 1887 and the whole amount of that mortgage was realized from the property of the plaintiff alone, he acquired a charge on the said village for the excess amount contributed by him. This [725] charge, however, was subject to the prior mortgage of 1885 in which the village Kheri Dudadhari was also included. Similarly, the charge which arose in plaintiff's favour in 1905, when according to him his village contributed more than its share of liability, was subject to the said mortgage. Therefore, in spite of the charge the village was liable to be sold in execution of the decree obtained on the mortgage and was accordingly sold. Had the whole amount of the sale proceeds been appropriated to the discharge of the mortgage, the charge would have been of no effect. But as there was a surplus, the charge attached to the surplus. Had a part only of the property been sold for the satisfaction of the mortgage, the plaintiff would have been entitled to enforce his charge on the remainder of the property; but, as the whole property was sold and the purchaser of it acquired it free from the charge, the plaintiff could not follow it into the hands of the purchaser. His lien would attach to the surplus sale proceeds into which the property was converted. Those proceeds are substituted for the property itself and are therefore subject to the lien to which the property itself was subject. This principle is recognised in section 73 of the Transfer of Property Act. It arises out of equitable considerations, and the lien acquired is an equitable and not a possessory lien. The fact, therefore, of the withdrawal from court of the money to which it attaches cannot extinguish or affect it. The plaintiff is, in my opinion, entitled to follow the money into the hands of the defendants, whose predecessor in title received it with notice of the plaintiff's lien. The plaintiff applied to the court for payment of the surplus sale proceeds, but the court rejected his application, and despite his protests paid over those proceeds to Nihal Chand. So that the plaintiff did all that he could possibly have done under the circumstances. I fail to see on what principles of justice or equity the defendant can claim that the plaintiff has lost his lien on the money and his right to recover it, simply because it has been paid over to the defendant's predecessor in title. In *Berhamdeo Pershad* v. *Tara Chand* (1), certain property was sold under a decree on a first mortgage and after the mortgage was

(1) (1905) I. L. R. 33 Cal. 92.

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satisfied there remained a surplus which [726] was received by the first mortgagee, who also held a third mortgage. The second mortgagee of the porperty then brought a suit claiming to recover the surplus proceeds so withdrawn. It was held that the right of the puisne incumbrancer "to follow the surplus sale proceeds is an equitable right, equity regarding his right as not extinguished or discharged by the sale but as transferred thereby to the surplus sale proceeds, which would be treated as part of his mortgage security, and his right to follow the money or the nature of the suit to enforce such right cannot be affected by the fact that the money had been withdrawn from the court by a party having notice of the plaintiff's right." The principle of this ruling fully applies to the present case and supports the view I have expressed above. I may point out that in suits to which section 73 of the Transfer of Property Act applies, the plaintiff has always been granted a decree for recovery of the surplus proceeds, although the proceeds may have been withdrawn from Court by third parties (see *Gosto Behary Pyne* v. *Shiv Nath Dut* (1) and *Kamala Kant Sen* v. *Abdul Barkat* (2). For the above reason I am of opinion that the plaintiff is entitled to maintain a money claim against the defendants Nos. 3 to 5.

The only question which remains to be considered is whether this part of the claim is time-barred, as argued by the defendants. The determination of this question depends on the date on which the plaintiff's right to sue accrued and the article of schedule I of the Limitation Act which governs the suit. In my judgment the plaintiff's cause of action arose when Rai Nihal Chand withdrew from court the surplus sale proceeds, that is, after the 4th of May, 1907, and the suit is governed by article 62 of schedule I of the Limitation Act. That article provides for suits "for money payable by the defendant to the plaintiff for money received by the defendant to the plaintiff's use," that is, for the class of suits well known as suits for money had and received. Under this category of suits are included actions for money wrongfully received by the defendant to which the plaintiff was in justice and equity entitled. The cases on the point are collected in the judgment of MOOKERJEE, J., in *Mahomed Wahib* [727] v. *Mahomed Ameer* (3), and the latest case in this Court is that of *The Rajputana Malwa Railway Co-operative Stores, Limited*, v. *The Ajmer Municipal Board* (4). In that case a Municipal Board, in disregard of certain lawful orders of the Government of India, levied upon a company trading within municipal limits certain sums by way of octroi duty over and above what they were entitled to. It was held that the suit to recover from the Board the sums so levied was one for money had and received to the use of the plaintiff within the meaning of article 62. The principle of these rulings applies to the present case, and this suit may, in my opinion, be regarded as a suit of the description mentioned in article 62. The learned vakil for the defendants referred to the decision of their Lordships of the Privy Council in *Guru Das Pyne* v. *Ram Narain Sahu* (5). That case seems to me to be distinguishable. Their Lordships observed that when the defendant sold the plaintiff's timber, he was selling it as the agent of Moti Dasi and received the money for her and not for the plaintiff, and therefore article 62 did not apply. Their Lordships held that the suit was

(1) (1892) I. L. R. 20 Cal. 241.
(2) (1899) I. L. R. 27 Cal. 180.
(3) (1905) I. L. R. 32 Cal. 527.
(4) (1910) I. L. R. 32 All. 491.
(5) (1884) I. L. R. 10 Cal. 860.

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one " to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their timber and finding them in the hands of the defendants to make him responsible for the amount," and that it was governed by article 118 of Act IX of 1871, which corresponds to article 120 of the present Act. If, as I hold, article 62 applies, limitation would run from the date on which the surplus sale proceeds were received by Rai Nihal Chand, and the suit, having been brought within three years from that date, is not time-barred. If the claim be regarded as one to enforce an equitable right, it is governed by the six years' rule of limitation provided in article 120, and is within time, whether the cause of action arose on the 20th of November, 1903, and the 20th of June, 1905, when the plaintiff's property was sold, or in May, 1907, when the money was withdrawn. According to the Calcutta High Court a suit of this description is governed by article 132. I, however, express no opinion on the point. If that article applies, the suit is clearly not statute-barred. Therefore, whether we apply **[728]** article 62 or 120 or 132, the claim is within time. Article 61 which provides the limitation for suits "for money payable to the plaintiff for money paid for the defendant," relied upon by the learned vakil for the defendants is clearly inapplicable.

For the above reasons I am of opinion that neither branch of the claim is barred by limitation and the decision of the Court below is erroneous. I would allow the appeal and remand the case to the Court below for trial on the merits.

CHAMIER, J.—I agree with the judgment of my brother BANERJI, and having nothing to add.

BY THE Court.—The order of the Court is that the appeal is allowed, the decree of the Court below is set aside and the case is remanded to that Court under order XLI, rule 23, of the Code of Civil Procedure for trial on the merits.

Appeal allowed.

33 A. 728 (=8 A. L. J. 918=12 I. C. 109).

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice, Piggott.

RUSTAM ALI KHAN AND OTHERS (*Defendants*), *v.* MUSAMMAT GAURA (*Plaintiff*).*

[29th May, 1911].

Act No. XVI of 1908 (*Indian Registration Act*), *sections* 49—*Registration—Evidence of title—Petition of compromise in a mutation case and order thereon.*

Held that a petition of compromise filed in a mutation case before a Court of Revenue and the order of the court thereon can neither effect nor prove a conveyance of the immoveable property to which the mutation proceedings may relate. *Pranal Anni* v. *Lakshmi Anni* (1), *Raghubans Mani Singh* v. *Mahabir Singh* (2), *Kashi Kunbi* v *Sumer Kunbi* (3), *Biraj Mohini Dasee* v. *Kedar Nath Karmakar* (4), *Muthayya* v. *Venkataratnam* (5) and *Sadar-ud-din Ahmad* v. *Chajju* (6) referred to.

[**Ref.** 13 A. L. J. 998=27 I. C. 97 ; **Dist.** 15 I. C. 741 ; 18 I. C. 766=11 A. L. J. 157; 3 P. L. J. 255=46 I. C. 358 ; 18 A. L. J 877=58 I. C. 732]

* First Appeal No 20 of 1911 from an order of E. E. P. Rose, Additional Judge of Jaunpur, dated the 8th of December, 1910.

(1) (1899) I. L. R. 22 Mad. 508.
(2) (1905) I. L. R. 28 Mad. 78.
(3) (1900) I. L. R. 32 All. 206.
(4) (1908) I. L. R. 35 Cal. 1010.
(5) (1901) I. L. R. 25 Mad. 553.
(6) (1908) I. L. R. 31 All. 13.

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THIS was a suit by one Musammat Gaura for a declaration of her title to certain property which had been mortgaged by the plaintiff's sister Musammat Mahtabo and brought to sale in execution of a decree upon the mortgage. The plaintiff's case [729] was that the property in suit had been sold by her father to one Sheo Ghulam and bought back by her from the purchaser. The court of first instance (Munsif of Jaunpur) dismissed the suit, basing its judgment mainly upon certain mutation proceedings which took place after the death of plaintiff's father in the course of which the plaintiff and her two sisters came to a compromise regarding their title to certain property said to be identical with the property in suit. The court held that the compromise and the order passed thereon conferred title on the three sisters to the extent specified therein. On appeal the Additional District Judge disagreed with this view of the court below and remanded the case for trial on the merits. The defendants appealed to the High Court.

Mr. *S. A. Haidar*, for the appellants.

Mr. *Muhammad Ishaq Khan*, for the respondent.

KNOX and PIGGOTT, JJ.—In this case Rustam Ali Khan, the principal defendant appellant, took a mortgage of a half-share in a certain house from one Musammat Mahtabo, and eventually brought the said half-share to sale in execution of his decree. The plaintiff, Musammat Gaura, is own sister of Musammat Mahtabo. She sues for a declaration that the entire house is her property and that no part of it is liable to be sold in execution of the decree obtained by Rustam Ali Khan on his mortgage. The plaintiff's case is that the house in suit did not form part of the estate of her late father, as inherited by her sisters, Mahtabo and Shitabo; she says that, on the contrary, this house had been sold by her father in his life-time to one Sheo Ghulam, and purchased from Sheo Ghulam by the plaintiff herself. The learned Munsif who tried the suit in the first instance fixed four issues; and it may perhaps save the parties trouble hereafter if we take occasion to remark in this place that the issues so fixed hardly seem to cover the whole ground. They take no account of the pleas raised in the fifth paragraph of the written statement filed by Rustam Ali Khan, to the effect that he took his mortgage of half the house from Musammat Mahtabo in good faith, with the knowledge of the plaintiff, and under such circumstances as would justify a finding that the plaintiff was allowing her sister, Mahtabo, to appear as the ostensible owner of half the house. [730] On the issues fixed by him, however, the learned Munsif decided one only, the fourth, which referred to certain proceedings in mutation before a Revenue Court which followed on the death of the plaintiff's father. There was a dispute at the time between the plaintiff and her two sisters. This dispute came before the Revenue Courts in connection with the question of the entries to be made in the revenue registers consequent on the death of the father of these ladies. The plaintiff and her sisters filed before the Revenue Court a petition of compromise, in which they explain how they have settled differences between them in reference to the estate left by their father. It is not denied that this petition deals with matters beyond the scope of the Revenue Court's inquiry; the order actually passed by that court referred only to a certain plot of land Bs. 0-1-19 in area, and as to this it directed simply that the names of the plaintiff (Musammat Gaura) and her sisters Mahtabo and Shitabo, should be recorded in the revenue registers as proprietors of this plot in equal shares. The

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learned Munsif held in effect that this petition of compromise operated to confer upon the three ladies concerned a proprietary right to the extent of one-third each in the house in suit; that the plaintiff was bound by its terms, which were capable of being enforced as they stood, on the strength of the petition itself and of the order passed upon it by the Revenue Court; and that consequently it was not necessary to determine the issue whether the entire house had or had not passed to the plaintiff by purchase from Sheo Ghulam. On appeal from the decree which followed on this finding the learned Additional Judge points out that the petition of compromise relates admittedly to immovable property of a value exceeding Rs. 100; that title in such property could only pass by registered deed or by decree of a competent court; that it did not appear from the facts as laid before him that the order in mutation passed by the Revenue Court referred to the house now in suit at all, and that in any case the petition and the order of the Revenue Court therein could not between them operate so as to transfer proprietary title in the house from the plaintiff to any other person. He therefore set aside the decree of the first court and remanded the case for trial with reference to the remaining issues fixed and to [731] the pleadings of the parties. The defendants come to us in appeal against this order of remand, which, however, seems to be clearly right. Where the law requires a registered instrument in order to the effecting of a certain transfer of property by way of sale, mortgage, exchange or gift, such transfer can only be effected by registered instrument or by decree of a competent court. In none of the numerous rulings to which we were referred, will anything be found to contradict this proposition of law. On the contrary, the principle involved appears distinctly in the ruling of their Lordships of the Privy Council in *Pranal Anni* v. *Lakshmi Anni* (1) and in the judgment of this Court in *Raghubans Mani Singh* v. *Mahabir Singh* (2), where the decree of a competent court made good what would otherwise have been a defective title. Cases in which the weakness of an unregistered petition of compromise, not incorporated in any decree or order by a competent court, to confer title is shown are numerous. We may refer to *Kashi Kunbi* v. *Sumer Kunbi* (3), *Biraj Mohini Dasee* v. *Kedar Nath Karmakar* (4), *Muthayya* v. *Venkataratnam* (5) and *Sadar-ud-din Ahmad* v. *Chajju* (6). This last is particularly in point because dealing with a compromise filed in a mutation case.

It was contended in argument before us that the plot of land referred to in the mutation order of the Revenue Court was identically the same property under a different description as the "house" which forms the subject-matter of the present suit. The point is by no means clear on the evidence as it stands; but it is not material for the determination of this appeal because the order of the Revenue Court in mutation could not in any case operate so as to confer title. The fact is that the learned Munsif would seem to have tried to find a short cut to the decision of this case, by adopting a view of the law and the facts which was not put forward by either of the parties to the case. He says in effect that Musammat Gaura may have been full owner of the entire house in suit in her father's life-time; but that after her father's death she conveyed a one-third share in this house to each of her sisters, and this conveyance he holds to have been

(1) (1899) I. L. R. 22 Mad. 508.
(2) (1905) I. L. R. 28 All. 78.
(3) (1910) I. L. R. 32 All. 206.
(4) (1908) I. L. R. 35 Cal. 1010.
(5) (1901) I. L. R. 25 Mad. 553.
(6) (1908) I. L. R. 31 All. 13.

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at [732] once effected and proved by the petition of compromise and the order in mutation passed thereon by the Revenue Court. This is not a correct view of law; and if the petition of compromise was tendered in evidence as a title-deed, that is to say, as a document by which transfer of ownership was effected between Musammat Gaura and her sisters, it was not admissible in evidence by reason of section 49 of the Indian Registration Act (III of 1877). It would not appear, however, from a perusal of the pleadings that the case thus made out by the learned Munsif was the case set up by the defendant Rustam Ali Khan. The defendant's case is that there was never any real transfer of ownership from the plaintiff's father to Sheo Ghulam, or from the latter to the plaintiff; that the house in suit formed part of the estate of the plaintiff's father at the time of his death, and was treated *as such* by the three daughters when they settled their differences by the compromise in the mutation case. As bearing upon the issues thus raised, the proceedings before the Revenue Courts, including the petition of compromise and the orders passed by the Court, are undoubtedly admissible in evidence, and must be taken into account for what they may be worth in deciding those issues.

The essential issues in the case still remain to be tried, and the learned District Judge was clearly right in remanding the case to the first Court for the purpose. We dismiss this appeal with costs.

Appeal dismissed.

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33 A. 733 (=8 A. L. J. 726=11 I. C. 815.)

[733] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

UJAGAR LAL (*Petitioner*) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Opposite party*).*

[29th May, 1911.]

Act No. I of 1894 (*Land Acquisition Act*), *section* 23—*General principles of valuation.*

Although in ascertaining the market-value of land sought to be acquired under Act No. 1 of 1894 the general principle to be applied is that the value of the land should be calculated with reference to the most lucrative and advantageous way in which the land might be used, if it is apparent that the use of such land for some special purpose, e.g., as building sites, would never be permitted, the land should not be valued as if it could be utilized for such purpose. *Stebbing* v. *Metropolitan Board of Works* (1) referred to.

THIS was an appeal against an award made by the District Judge of Shahjahanpur under the Land Acquisition Act, 1894. The District Judge calculated the value of the land on the basis of the rent theretofore received by the owner. The owner appealed, urging that the land, being situated alongside of a number of shops in a busy grain market, was of great value as a building site. The sole question in the appeal was what was the correct principle of valuation to be applied in existing circumstances.

Maulvi *Rahmat-ullah* (with him Dr. *Satish Chandra Banerji*), for the appellant.

Mr. *A. E. Ryves*, for the respondent.

CHAMIER, J.—This is an appeal against an award made by the District Judge of Shahjahanpur, under the Land Acquisition Act. The learned

* First Appeal No. 105 of 1910 from a decree of B. J. Dalal, District Judge of Shahjahanpur, dated the 7th of January, 1910.

(1) (1870) L. R. 6 Q. B. 37.

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33 A. 733=8 A. L. J. 796=11 I. C. 815.

Judge has calculated the value of the land on the basis of the rent hitherto received by the owner of the land. In appeal it is urged that the land, lying as it does alongside a number of shops in a busy grain market, was of great value as a building site. It is said that 17 shops and a godown or grain store could be built on it, which would bring in not less than Rs. 1,200 per annum, and thus the market value of the land is not less than Rs. 20,000. Mr. Ryves, on behalf of the Secretary of State, admits the general principle that in cases of this kind the value of the land should be calculated with reference to the most lucrative and advantageous way in which the land might be used, but he points out that the Municipal Board of Shahjahanpur, [734] has repeatedly refused to allow any buildings to be erected on the plot in question on the ground that it is required as a *parao* or stand for carts coming to the *ganj*, and that serious inconvenience would be caused to the public if buildings were erected thereon. The appellant contends that the orders of the Board should be disregarded for the purpose of calculating the value of the lands, and that the Board, for whom the land is being acquired, cannot be allowed to use their own orders for the purpose of depreciating the land. It is not suggested that the Board had any idea of taking up the land under the Land Acquisition Act when they refused to allow buildings to be erected on the land, or that they were actuated by any improper motive. It must be taken that they acted in the interest of the inhabitants of the municipality. The appellant made no attempt to have the orders of the Board set aside. In the circumstances it seems to me that the fact that the appellant would never have been allowed to build on the land must be taken into consideration in ascertaining the market value, and that the land cannot be valued as a building site. This view is supported to some exent by the decision of the Court of Queen's Bench in *Stebbing* v. *Metropolitan Board of Works* (1). In that case part of a disused grave yard was taken up for the purpose of a new road. The rector of the parish claimed that the land should be valued as if it was divested of its ecclesiastical character and could be used for any purpose. The Court overruled this contention and held that as the land could not be used by the rector and was practically valueless in his hands, it could not be valued as land which was not subject to any restriction. In the present case it is quite clear that the Board would never have allowed the appellant to build on the land. At the time when it was acquired for the Board, it was of no value whatever as a building site, and in my opinion it would be wrong to value it as such.

It seems to have been contended in the Court below that the land was worth Rs. 25 per square yard owing to its proximity to the *ganj*. There is no evidence to support this extravagant claim,

[735] I would dismiss this appeal with costs.

KARAMAT HUSAIN, J.—I agree.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

(1) (1870) L. R. 6 Q. B. 37.

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33 A. 735=8 A. L. J. 817 =11 I. C. 47.

33 A. 735 (=8 A. L. J. 817=11 I. C. 47).

FULL BENCH.

Before Mr. Justice Banerji, Mr. Justice Karamat Husain and Mr. Justice Chamier.

JODHI RAI (*Plaintiff*) *v.* BASDEO PRASAD *and others* (*Defendants*).*

[30th May 1911.]

Suit against an idol—Description of defendant—Amendment of plaint—Limitation—Practice.

Inasmuch as an idol is a juristic person capable of holding property, a suit respecting property in which an idol is interested is properly brought or defended in the name of the idol, although *ex necessitate rei* the proceedings in the suit must be carried on by some person who represents the idol, usually the manager of the temple in which the idol is installed. *Thakur Raghunathji Maharaj* v. *Shah Lal Chand* (1) overruled.

[Ref. 50 I. C. 525=46 Cal. 877 ; 84 I. C. 91 ; 51 I. C. 953 ; Rel. 71 I. C. 480=21 A. L. J. 148=45 All. 319.]

IN this case certain property was purchased in the name of an idol which was under the sarbarakarship of the defendant Basdeo Prasad. The plaintiff brought this suit for pre-emption against the idol under the sarbarakarship of Basdeo Prasad. The court of first instance (Munsif of Rasra) decreed the suit. The District Judge on appeal set aside the decree holding that the suit was wrongly brought against the idol and should have been against the sarbarakar as such, and that the plaint could not at that stage be amended, as the amendment would involve the introduction into the suit of a third party as against whom the claim was barred by limitation. The plaintiff appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellant :—

The suit has been dismissed on a mere technicality. The defendant raised no objection in the court of first instance which decreed the claim. The lower appellate court has dismissed it, relying on *Thakur Raghunathji Maharaj* v. *Shah Lal Chand* (1). The misdescription is not very material. An idol is after [736] all a juristic person, and its position is similar to that of any other juristic person, for instance a corporation. It is true that there is a special provision for corporations but the case of minors is on all fours with the present one. A minor is a juristic person, but he can sue or be sued only through a next friend or guardian *ad litem*. An idol may not be a sentient being, but it is a juristic person, even though it cannot sign any pleadings itself, just like a minor. The manager of an idol does not sue and cannot be sued in a personal capacity, but only as representing the property attached to the idol. He referred to *Manni Kasaundhan* v. *Crooke* (2) and *Peary Mohan Mukerjee* v. *Narendranath Mukerjee* (3).

Munshi *Gobind Prasad*, for the respondent :—

An idol is not a sentient being like a minor. Suit by or against corporations are specially provided for in the Code. Their case is not similar to that of an idol. The real point is to see who is the person really interested in the suit. The question is no doubt only a technical one, but it may have grave consequences.

Mr. *M. L. Agarwala*, in reply.

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* Second Appeal No. 880 of 1910 from a decree of Sri Lal, District Judge of Ghazipur, dated the 3rd of June, 1910, reversing a decree of Manmohan Sanyal, Munsif of Rasra, dated the 28th of January, 1910.

(1) (1897) I. L. R. 19 All. 330.
(2) (1879) I. L. R. 2 All. 296.
(3) (1905) I. L. R. 32 Cal. 582, 596.

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BANERJI, KARAMAT HUSAIN and CHAMIER, JJ.—This appeal arises out of a suit for pre-emption brought by the plaintiff-appellant under the following circumstances :—

Certain property was purchased in the name of Sri Thakurji, seated in the temple, named Purandar Lal, in the town of Rasra, under the management of Basdeo Prasad. The plaintiff claims pre-emption in respect of that property and he brought the suit against the vendor and the vendee. In the plaint the vendee was described as Sri Thakurji, installed in the temple, known as Purandar Lal, in the town of Rasra, under the sarbarakarship of Basdeo Prasad. In the court of first instance no objection was raised as to the form of the suit, and on the merits the claim was decreed. Basdeo Prasad preferred an appeal and in that appeal for the first time he contended that the first defendant had been wrongly described, and by reason of this misdescription the suit must fail. This plea was upheld by the learned Judge who also refused to allow an amendment on the ground that the effect of the amendment would be to introduce another person on the [737] record, and the claim would therefore be time-barred. In support of his opinion the learned Judge relied on the decision of this Court in *Thakur Raghunathji Maharaj* v. *Shah Lal Chand* (1). In that case a Bench of this Court held that a suit relating to property alleged to belong to a temple cannot be brought in the name of the idol of the temple. The learned Judges in their judgment gave no reason for this opinion beyond the fact that there may be difficulties about realizing costs. With great respect we are unable to agree with the learned Judges. An idol has been held to be a juristic person who can hold property. Therefore, when a suit is brought in respect of property held by an idol, it is the idol who is the person bringing the suit or against whom the suit is brought, the idol being the person beneficially interested in the suit. No doubt, in every suit the party bringing it or the party against whom it is brought must, when he is suffering from an incapacity, be represented by some other person, as in the case of an infant or a lunatic. Therefore, when a suit is brought on behalf of or against an idol, there must be on the record a person who represents the idol, such as the manager of the temple in which the idol is installed. The manager of the idol is not personally interested in the suit, any more than is the next friend or guardian of a minor. As a suit by a minor should be brought in the name of the minor and not of his next friend, so should a suit on behalf of the idol be brought in the name of the idol as represented by the manager, and in a suit against the idol the defendant should be similarly described. It is true that every pleading must be signed by a sentient being ; but this can be done by the manager, just in the same way as in the case of an infant the pleadings are signed by his next friend or guardian for the suit. The first defendant in this suit was, therefore, properly described in the plaint, and the view of the learned Judge in this respect is in our judgment erroneous. If there is any defect in the description of the defendants in suit of this kind, it is nothing more than an irregularity or misdescription. If, for instance, a suit on behalf of an idol is brought in the name of the manager of the idol that would not warrant the dismissal of the suit : but the plaint may be amended [738] by correcting the description. Similarly, in the case of a defendant. Such an amendment

(1) (1897) I. L. R. 19 All. 330.

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would not have the effect of introducing a third party on the record, and no question of limitation would, in our opinion, arise.

We accordingly allow the appeal, set aside the decree of the court below, and remand the case to that court with directions to re-admit it under its original number in the register and dispose of it according to law. Costs here and hitherto will abide the event.

Appeal allowed.

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33 A. 738 (=8 A. L. J. 833=11 I. C. 197).

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Piggott.

JUGAL KISHORE (*Petitioner*) *v.* GUR NARAIN AND OTHERS (*Opposite Parties*).*

[31st May, 1911.]

Act No. III of 1907 (*Provincial Insolvency Act*), *section* 46 (4)—*Act No. IX of* 1908 (*Indian Limitation Act*), *sections* 12 *and* 29—*Appeal—Limitation—Time requisite for obtaining copies.*

The Provincial Insolvency Act was intended to be, and is, so far as matters governed by it are concerned, a complete code in itself and contains its own limitation law. In computing, therefore, the period of limitation prescribed for presenting an appeal under the said Act the time requisite for obtaining a copy of the order complained of cannot be excluded. *Behari Lall Mookerjee* v. *Mungolanath Mookerjee* (1) and *Nagendro Nath Mullick* v. *Mathura Mohun Parhi* (2) referred to. *Beni Prasad Kuari* v. *Dukkhi Rai* (3) distinguished.

[Over: 34 All. 496 (F. B.).]

THE facts of this case were as follows :—

On the 13th of August 1909, the District Judge of Mainpuri made an order for the appointment of a receiver in certain insolvency proceedings under the Provincial Insolvency Act, 1907. An appeal against this order was filed in the High Court on 1st December, 1909, beyond 90 days from the date of the order ; but the appeal would have been within time if the time requisite for obtaining a copy of the order were deducted in computing the period of 90 days.

[739] At the hearing of the appeal, a preliminary objection was taken by

Babu *Girdhari Lal Agarwala*, for the respondents :

The appeal is time-barred. The limitation prescribed for an appeal to the High Court in insolvency proceedings is, under section 46, clause (4), of the Provincial Insolvency Act, a period of 90 days. This is a period of limitation specially prescribed by a special law, and therefore, under section 29, clause (*b*), of the Limitation Act, nothing in that Act can alter or affect this period. The appellant cannot, therefore, get the benefit of section 12, clause (2), of the Limitation Act.

Babu *Binoy Kumar Mukerji*, for the appellant, in reply to preliminary objection :—

The appellant is entitled to a deduction of the time requisite for obtaining a copy of the order, and the appeal is within time. The general provisions of the law of limitation contained in the Limitation Act

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* First Appeal No. 185 of 1909 from an order of L. Marshall, District Judge of Mainpuri, dated the 13th of August 1909.

(1) (1879) I. L. R. 5 Cal. 110.
(2) (1891) I. L. R. 18 Cal. 368.
(3) (1901) I. L. R. 23 All. 270.

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apply, even where a special law provides a special period of limitation for certan suits or appeals; *Behari Loll Mookerjee* v. *Mungolanath Mookerjee* (1). There the provisions of section 12 of the Limitation Act were held applicable to a case under the Bengal Tenancy Act, VIII of 1869, notwithstanding the provisions of section 6 of the Limitation Act of 1877, which were virtually the same as those of section 29 of the present Act. In the following cases other sections of the Limitation Act, as section 14 and section 5 were held applicable to cases for which periods of limitation were prescribed by special or local Acts; *Guracharya* v. *The President of the Belgaum Town* (2), *Khetter Mohun* v. *Dinabashy* (3), *Reference under section* 39 *of* (*Madras*) *Act V of* 1882 (4), *Beni Prasad Kuari* v. *Dukkhi Rai* (5). The principle of these rulings, which is set forth at page 279 of the report in I. L. R. 23 All. applies to the present case; section 12 and sections 14 and 5 stand on the same footing, so far as the scope of section 29 is concerned. The case of *Girija Nath* v. *Patani Bibee* (6) was as to the applicability of section 7 of the Limitation Act. It did not overrule **[740]** or dissent from in any way the case in I. L. R. 5 Calcutta. In the case of *Nagendro Nath Mullick* v. *Mathura Mohun Parhi* (7) it was decided that section 14 of the Limitation Act did not apply to suits under Act X of 1859, for the reason that that Act was a Code complete in itself and unaffected by the general laws of limitation or procedure. Where an enactment is a complete codification and embodies in itself its own laws of limitation, procedure, stamp, &c., there the provisions of the Limitation Act will have no application. Act X of 1859 is such a complete Code; it provides for periods of limitation by sections 30 to 33, 152, 154 and 158; for stamps by sections 156, 161; and provides elaborately for the procedure to be followed in cases under the Act. But the Provincial Insolvency Act is not such a Code. The only provisions for limitation in it are those contained in section 46, clause 4, and section 22, and they cannot be said to be exhaustive or to contain the whole law of limitation applicable to cases under the Act. In the matter of procedure the Act has to be supplemented by the Civil Procedure Code at every step. The reasons given in the case of *Beni Prasad Kuari* v. *Dharaka Rai* (8) for holding that the N.-W. P. Rent Act of 1881 was not a complete Code, apply with equal force to the Provincial Insolvency Act. There are cases in which it has been held that the time requisite for obtaining copies will not be deducted; but it has been held in those cases that it was not neces sary to file copies of the decree or order appealed from; *In the matter of petition of Sita Ram* (9), *Kumara Akkappa* v. *Sithala Naidu* (10), *Fazal Muhammad* v. *Phul Kuar* (11). In the case of an appeal under the Provincial Insolvency Act, it is necessary to file copy of the order appealed from. Section 47 lays down that the procedure is to be the same as in the case of civil suits. If the time requisite for obtaining a copy be not deducted, great hardship may result to the appellant, who may be deprived of his right of appeal through no fault of his own. An order may be passed, an appeal from which lies under section 46 to the District Judge, a day or two before the court closes for the long vacation, and

(1) (1879) I. L. R. 5 Cal. 110.
(2) (1884) I. L. R. 8 Bom. 529.
(3) (1883) I. L. R. 10 Cal. 265.
(4) (1887) I. L R. 10 Mad. 210.
(5) (1901) I. L. R. 23 All. 270.
(6) (1889) I. L. R. 17 Cal. 263.
(7) (1891) I. L. R. 18 Cal. 368.
(8) (1901) I. L. R. 23 All. 277, (279).
(9) (1892) I. L. R. 15 All. 14 (19).
(10) (1897) I. L. R. 20 Mad. 476 (477).
(11) (1879) I. L. R. 2 All. 192.

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although the appellant may apply for a copy at once, yet he may not get it till [741] after the re-opening of the court when his appeal would be time barred. The Legislature could not have intended such a result, by which an appellant would be punished for no fault of his own.

Should the court be disposed to decide the point against the appellant, an opportunity should be given to him to file an affidavit to show why he brought the appeal to be filed after the expiry of 90 days. He was under the impression that he would get the benefit of the period requisite for obtaining the copy, and under the circumstances the court may extend the time.

Babu *Girdhari Lal Agarwala*, in reply : —

The whole policy of the Provincial Insolvency Act is to expedite the proceedings and prevent delay. The provisions of section 46, clause (4) should, therefore, be strictly enforced. The Act is a complete Code in itself.

KNOX and PIGGOTT, JJ.—A preliminary objection is taken to the hearing of this appeal to the effect that it is time-barred. In support of the objection reliance is placed upon the provisions of section 46 of the Provincial Insolvency Act No. III of 1907. That section in clause (4) lays down that the " periods of limitation for appeals to the District Court and the High Court under this section shall be thirty days and ninety days respectively." It is admitted that the order appealed from falls within the provisions of section 46. The date on which the order was passed was the 13th of August, 1909. The memorandum of appeal was not presented until the 1st of December, 1909. The period of ninety days had thus expired before the appeal was presented to this Court. But the appellant seeks to call to his aid the provisions of section 12 of Act No. IX of 1908 and wishes to extend the 90 days allowed by section 46 of Act No. III of 1907 by 19 days, the time occupied in obtaining the copy of the order appealed from. The question we have to consider is whether we can apply to the Provincial Insolvency Act of 1907 the provisions contained in parts II and III of Act No. IX of 1908. Section 29 of Act No. IX of 1908 lays down that nothing in this Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or application, by any special or local law now or hereafter in force in British India. Act No. III of 1907 is such a special law, and at first sight it would seem that the provisions of [742] section 29 of Act No. IX of 1908 effectually prevent our applying to the period of limitation specially prescribed in Act No. III of 1907 any of the general provisions contained in Act No. IX of 1908. The question has been several times before the different courts in this country. At one time the Calcutta Court, for instance, was prepared to apply the general provisions of the limitation of the time to special or local laws. In this connection we may refer particularly to *Behari Lal Mookerjee* v. *Mungolanath Mookerjee* (1). But the later trend of rulings in that court has been in the opposite direction ; vide *Nagendra Nath Mullick* v. *Mathura Mohun Parhi* (2). In this court there is only one case that we know of bearing upon the point, namely, *Beni Prasad Kuari* v. *Dukhi Rai* (3). In this case the learned Judges who decided the question held that section 5 of the Indian Limitation Act of 1877 did apply to a suit under section 93 (*a*) of the local law, North-Western Provinces Act No. XII of 1881. This case, however, proceeds upon a very special line of reasoning. The learned Judges hold that section 5 of the Indian Limitation Act did

(1) (1879) I. L. R. 5 Cal. 110.
(2) (1891) I. L. R. 18 Cal. 368.
(3) (1904) I. L. R. 23 All. 270.

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33 A. 738=8 A. L. J. 833=11 I. C. 197.

not extend any period of limitation. It seems that the period prescribed for the suit had expired on a day when the court was closed, and it was held that nevertheless the suit might be instituted on the day when the court re-opened. It was further held that it is impossible to consider that the Rent Act of 1881 constituted by itself a complete code so as to render inapplicable the provisions of the Limitation Act generally to a case under the Rent Act. The Provincial Insolvency Act sets out in its preamble that it is expedient to consolidate and amend the law relating to insolvency in British India as administered by courts having jurisdiction outside the Presidency towns and the town of Rangoon. We think that the Provincial Insolvency Act was intended to be, and is, so far as matters governed by it are concerned, a complete code in itself and retains its own limitation law. If we hold otherwise, it is easy to conceive that cases would occur where we should be asked to apply a section like section 6 of Act No. IX of 1908 to insolvency proceedings. This could never have been contemplated. Finally, there is no doubt that if we were to [743] allow the appellant the period occupied in obtaining the copy of the order appealed against, we should be altering the special period of limitation contained in section 46, clause (4). A good deal of argument on behalf of the appellant turned on the hardship which would arise if we did not allow this period for which he is in no way responsible and which was entirely beyond his control. The answer is that he can always present his petition of appeal and ask for time under the special circumstances to obtain and file subsequently a copy of the order under appeal. As it happens in the present case the appellant had in his hands the copy on the 9th of September, 1909. This Court re-opened after the long vacation on the 26th of October, 1909, and the appeal was not presented until the 1st December, 1909 The special case of hardship owing to the closing of the Court for vacation is moreover met by the provisions of section 10 of the General Clauses Act No. X of 1897. The preliminary objection succeeds and the appeal fails and is dismissed with costs.

Appeal dismissed.

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33 A. 743 [=15 C. W. N. 1005=10 M. L. T. 173=(1911) 2 M. W. N. 132=13 Bom. L. R. 826=14 C. L. J. 313=8 A. L. J. 1164=21 M. L. J. 1151=12 I. C. 15=38 I. A. 181].

PRIVY COUNCIL.

SADIQ HUSAIN (*Defendant*) v. NAZIR BEGAM AND ANOTHER (*Plaintiffs*)*.

[14th, 15th June and 21st July, 1911.]

[*On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.*]

Arbitration—Arbitrator refusing to act—Compromise of suit and decree in terms of compromise—Compromise stating matters in dispute and nominating arbitrators to decide them—Power of Court on arbitrator refusing to act—Civil Procedure Code, 1882, sections 375, 506, 508, 510—Court determining matters referred to arbitration.

Section 510 of the Code of Civil Procedure (Act XIV of 1882), which provides that "if an arbitrator refuses to act the Court may in its discretion appoint a new arbitrator .....or make an order superseding the arbitration, and in such case shall proceed with the suit" is applicable even if the person appointed arbitrator has not accepted office before refusing to act. When he has been nominated by the parties his refusal to act is signified as clearly by his refusal to

Present:—Lord MACNAGHTEN, Lord SHAW, Lord MERSEY and Mr. AMEER ALI.

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33 A. 748=
15 C. W. N.
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L. T. 173=
(1911) 2 M.
W. N. 132=
13 Bom. L.
R. 826=14 C.
L. J. 313=8
A. L. J. 1161
=21 M. L.
J. 1151=12
I. C. 15=
33 I. A. 181.

accept nomination as by any other course he could pursue; and any other construction would defeat the provisions of the Act.

Pugardin Ravutan v. *Moidinsa Ravutan* (1) and *Bepin Behari Chowdhry* v. *Annoda Prosad Mullick* (2) disapproved of.

[744] In the present case the parties had compromised the suit, and had stated in the instrument of compromise the matters in dispute, and had each nominated therein a person as arbitrator to decide them. A decree in terms of the compromise was made by the Court and the matters were referred to the arbitrators named for their decision. One of them refused to act, and the party whose nominee he was declined to make another nomination. The District Judge in the exercise of his discretion under section 510 of the Code thereupon himself determined the matters submitted to the arbitrators, thus practically superseding the arbitration. His decision was confirmed by the Court of the Judicial Commissioner.

Held (reversing the decision of the Courts in India) that the District Judge should, under section 510, have appointed a new arbitrator, which he had power to do notwithstanding that the arbitrator refusing to act had not first consented to do so, and he was not precluded from making such appointment by the fact that the party whose arbitrator had refused to act declined to assist the Court by suggesting another name. The Court could not "proceed with the suit," which had been put an end to by the compromise, the decree on which was final; and it had no power except by consent of parties to itself decide the matters referred to arbitration. That rights having been remitted to one tribunal, had been decided by another, was a fatal objection to the procedure adopted.

[Ref: 23 M. L. J. 290=1912 M. W. N. 1091=16 I. C. 478]

APPEAL from a judgment and decree (27th November, 1906) of the Court of the Judicial Commissioner of Oudh, which affirmed an order (5th September, 1906) of the District Judge of Lucknow.

The questions for decision in this appeal arose out of the compromise of a suit brought by the respondents Musammat Nazir Begam and Musammat Kaniz Zohra Begam against the appellant.

The facts were that one Agha Hasan Khan died on the 27th of December, 1901, leaving as his hears his widow the first respondent, a daughter, the second respondent, and a son, the appellant. The estate of the deceased was governed by the Shia Muhammadan law, in accordance with which it was, for the purpose of determining the shares of those inheriting, divided into 24 parts, of which the widow took three, the daughter seven, and the son fourteen parts. Disputes arose between the heirs as to their shares, and the suit abovementioned was on the 25th of April, 1903, brought in the Court of the Subordinate Judge of Lucknow for the administration of Aga Hasan Khan's estate, in defence of which the appellant put in his written statement. On the 1st of August, 1905, the parties settled the suit by a compromise, the material portion of which was as follows:—

[745] "*Paragraph* 10.—The division of the zamindari property between the parties will be effected in this way that instead of allotting detached portions of zamindari property (in a share), some *ek-ja* (lit: in one place) zamindari property situate in one district of as nearly as possible the same value will be allotted to the share of the plaintiffs in accordance with the proposal of the defendant which will be declared by the 1st of September, 1905, but subject to this condition that the plaintiffs would under all circumstances get a 6-anna 8-pie share in village Dadra, pargana Partabgarh, district Bara Banki.

"Maulvi Muhammad Nasim and Sheikh Ali Abbas, two pleaders of the Court, would ascertain the fact that the property proposed by the defendant is with regard to the plaintiffs' share, yielding as far as possible equal profits and is *ek-ja* (situate in one place), that is to say, the share allotted to the plaintiffs in each of the villages as proposed by the defendant includes the whole of the share possessed by the defen-

(1) (1882) I. L. R. 6 Mad. 414. (2) (1891) I. L. R. 18 Cal. 324.

dant therein, provided the profits arising out of that share do not exceed those of the plaintiffs' share.

"If after examination both the gentlemen should decide that there is some defect in the defendant's proposal as regards the equality of profits and situation of the property, they would be authorized to make such proposal as they may think proper to remove that defect, and that proposal would be final for the parties.

"If Maulvi Muhammad Nasim and Sheikh Ali Abbas differ in their opinions the decision of Syed Nabi-ullah, barrister-at-law, on the points in which they differed would be binding on the parties.

"The defendant would before the 1st of October, 1905, deliver to the plaintiffs possession over the zamindari which may fall to the share of the plaintiffs, and the plaintiffs would be entitled to the profits of *kharif* 1313 Fasli. If the defendant fail to deliver over possession, the plaintiffs would be entitled to obtain possession by getting the decree executed through Court.

"If by the 1st of September, 1905, the defendant does not submit his proposal in respect of the partition of zamindari to Maulvi Muhammad Nasim, plaintiffs' pleader, the plaintiffs would be at liberty to apply to the Court to have a Commissioner appointed for partition, and according to the partition made by the Commissioner the plaintiffs would be entitled to recover possession through Court."

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33 A. 743=16 C. W. N. 1005=10 M. L. T. 173==(1911) 2 M. W. N. 132=13 Bom. L. R. 826=14 C. L. J. 315=8 A. L. J. 1164=21 M. L. J. 1151=12 I. C. 16=38 I. A. 181.

On the 2nd of August, 1905, a decree was made by the Subordinate Judge in terms of the compromise; and on the 31st of August the defendant, in accordance with the compromise, submitted his proposal of the zamindari property to be allotted to the plaintiffs.

The decree of the Subordinate Judge stated that—

"It is ordered that in terms of the compromise . . . plaintiffs' claim be decreed under sections 157 and 375 of the Civil Procedure Code; and as regards costs the Court orders that parties do bear their own costs."

[746] On the 17th of August, 1906, the District Judge made an order referring the suit to arbitration, and appointed Maulvi Muhammad Nasim, and Sheikh Ali Abbas arbitrators according to the terms of the compromise. On the 21st of August, 1906, Maulvi Muhammad Nasim refused to act as arbitrator, and on the 23rd of August the plaintiffs applied to the District Judge praying the Court to withdraw the order of reference to arbitration and to deal with the matter itself. The plaintiffs declined to appoint another arbitrator, and on the 28th of August, 1906, the District Judge made an order that he would scrutinize the list of properties proposed by the defendant and decide thereon. He said:—

"The provisions of chapter XXXVII, and especially section 510, Civil Procedure Code, do not apply here because there is no point in issue and speaking technically no reference to arbitration. In my opinion the decree-holder cannot be compelled to appoint a fresh arbitrator and is entitled on the failure of one of the persons named in clause 10 to demand the decision of the Court on the question which was referred to arbitration.

"The decree embodying the compromise of course stands good. Only the provisions of clause 10 have become incapable of execution. If the parties had agreed to the appointment of a substitute for Muhammad Nasim it would have come nearest to carrying out the original intention of clause 10. But it would not be a competent order to direct decree-holder against his will to nominate a fresh arbitrator. Even under section 510 the Court can only appoint where there has been an acceptance followed by a refusal, not where the arbitration has never been accepted."

The District Judge accordingly came to a decision on his scrutiny of the list, and on the 5th of September, 1906, he passed an order allotting to the plaintiffs jointly seven villages, not the villages proposed by the defendant. And as the order was appealed from he added the following observations to his order of the 5th of September:—

"The parties entered into a compromise on the 2nd of August, 1905, by which

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they agreed among other matters that there should be a partition of the zamindari property, in the following terms: -

"The plaintiffs' share consisting of various fractions in the various villages was to be calculated in terms of rupees representing their share of the profits, and totalled. Then the defendant was to draw up a list of villages yielding profits equal to this total, as nearly as might be. It was further provided that these villages should be as far as possible situate at one place.

"The defendant proposed to allot to plaintiffs all the villages in Gonda and some in Bara Banki. The plaintiffs objected that it was not practicable to give them the whole of their share in Gonda, but it was practicable to give the whole of it in Bara Banki. I upheld this objection and assigned them certain villages in Bara Banki nearly equivalent to the total profits due to them."

[747] From that decision the defendant appealed to the Court of the Judicial Commissioner and MR. E. CHAMIER (1st Additional Judicial Commissioner) and MR. L. G. EVANS (2nd Additional Judicial Commissioner) affirmed the order of the District Judge with the observation in the course of their judgment, that—

"It seems impossible to make any division of the property which will comply with the compromise more literally than that adopted by the learned Judge."

On this appeal,

De Gruyther, K. C., and *S. A. Kyffin* for the appellant contended that the Courts in India ought to have appointed an arbitrator in the place of Maulvi Muhammad Nasim who had refused to act. Those Courts had no jurisdiction to settle the matters in dispute as stated in paragraph 10 of the compromise. Section 510 of the Civil Procedure Code (Act XIV of 1882) gives the Court power to appoint another arbitrator in the place of one who "refuses or neglects to act." Here one of them after being appointed arbitrator, did, "refuse" and did "neglect to act." Reference was made to *Pugardin Ravutan* v. *Moidinsa Ravutan* (1), which, it was submitted, had been wrongly decided on the construction of section 510; and to sections 506 and 508 of the Civil Procedure Code, 1882. That the Courts should take up and decide what the arbitrators ought to have themselves decided was a wrong procedure: they had no power to do so without the consent of the parties.

Sir *Erle Richards*, K. C., and *B. Dube* for the respondent Zohra Begam contended that the decision of the Courts below was right. They had power under section 244 of the Code of Civil Procedure to give effect to the compromise in the execution of the decree; see sub-section (2) of that section and the case of *Ghulam Khan* v. *Muhammad Hasan* (2). They had, without consent of the parties, no power to appoint another arbitrator in the place of Maulvi Muhammad Nasim. Reference was made to *Pugardin Ravutan* v. *Moidinsa Ravutan* (1) and *Bipin Behari Chowdhry* v. *Annoda Prosad Mullick* (3). In the present case, as in those cases, the arbitrator who is said to have refused to act had never accepted the office of arbitrator, or [748] consented to act: *Sadha Sookh* v. *Shiva Dyal* (4). Section 510 of the Code applied to cases where the machinery for carrying on a reference to arbitrators appointed by the parties had broken down; in such a case the Court has power to take the suit in hand, and that was the view taken, and it was submitted rightly taken, by the Courts below. Reference was made to the Civil Procedure Code, 1882, sections 213, 392, 396, 506, 514 and 523; and also to section 375 and the case of *Biraj Mohini Dasi* v. *Srimati Chinta Moni Dasi* (5) to

(1) (1882) I. L. R. 6 Mad. 414.
(2) (1901) I. L. R. 23 Cal. 167.
(3) (1891) I. L. R. 18 Cal. 324.
(4) (1866) 1 Agra 109.
(5) (1901) 5 C. W. N. 877.

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show that when a decree had been passed by consent of parties, the question as to whether or not the compromise decree was valid could not be gone into on an appeal against that decree. The Civil Procedure Code, 1908 section 5, schedule II, was also referred to. Whether on the construction of this compromise all the property allotted to one party ought to be in one district was a question on which their Lordships were also asked to intimate their opinion.

De Gruyther, *K. C.*, replied, referring to sections 506—510. No suit was "pending" within the meaning of the Civil Procedure Code, and the Court had no power itself to decide the reference. Sections 524, 525 and 526 of the Civil Procedure Code were also referred to.

1911, *July* 21*st*.—The judgment of their Lordships was delivered by LORD SHAW :—

This appeal is presented from an order, dated the 27th of November, 1906, made by the Court of the Judicial Commissioner of Oudh, which affirmed an order, dated the 5th of September, 1906, made by the District Judge of Lucknow.

It appears that one Mirza Agha Hasan Khan died on the 27th of December 1901. He was survived by a widow, a daughter and a son. They were heirs of the deceased under the Muhammadan Law of the Shia sect, and the property fell to be divided amongst them in certain proportions. Mirza Agha Hasan Khan's property, however, was situated in various districts, and while the arithmetical division of the shares fell to be determined by law, it was considered by the heirs that it would be to their advantage that, instead of a large variety of fractional portions of property being taken by each heir in subjects situate, it might be, at a [749] considerable distance from each other, an arrangement should be carried out by arbitrators whereby the shares falling to the ladies should be consolidated in one district, and other arrangements for convenience of management entered upon. Accordingly a compromise and agreement in this sense was drawn up.

In April, 1903, the respondents had brought a suit claiming administration of the estate, and on the 1st of August, 1905, the compromise was made, and on the following day, namely, the 2nd of August, 1905, the decree which raises the crucial question in this case was pronounced by the Subordinate Judge of Lucknow, which bore that "It is ordered that in terms of the compromise herewith annexed, marked 'A' . . . . plaintiffs' claim be decreed under sections 157 and 375, Civil Procedure Code ; and as re ards costs, the Court orders that parties do bear their own costs." Section 157 seems to have no bearing upon the procedure and to have appeared in the judgment by mistake, but section 375 deals with the matter of compromise of suit and provides that "if a suit be adjusted wholly or in part by any lawful agreement or compromise . . . . such agreement, compromise, or satisfaction shall be recorded and the Court shall pass a decree in accordance therewith, so far as it relates to the suit, and such decree shall be final so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise, or satisfaction."

As has been pointed out, the agreement or compromise in this case went by its nature beyond the actual matter of suit between the parties. But it is also clear that the decree thus, so to speak, ratifying the compromise, was a final decree. The Court has discharged itself of the *lis*

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between the parties, and by their own agreement thus ratified the settlement of the points upon which they had agreed fell to be made by the tribunal of arbitration to which the parties had consigned it.

By the agreement two arbitrators were appointed to settle, allocate, &c., the respective rights of parties. One of these, for reasons which need not be entered upon (he was the advocate for the respondents), refused to act as arbitrator. Thereupon the respondents, on the 23rd of August, 1906, presented a petition in the Court of the District Judge, narrating this fact and averring that [750] "owing to his refusal to act, it has become necessary that the honourable Court should itself examine the schedule and bring it in conformity with the terms of the compromise, or, failing that, it should appoint a commissioner and direct,' &c. The respondents declined to nominate another arbitrator on their behalf; and, in fact, it seems clear that they held, not only that this declinature was within their rights, but that it was also not in the power of the Court to nominate another arbitrator to supply the gap which had been caused by the declinature. The Court accordingly was asked to take the matter into its own hands. Before seeing how the Civil Procedure Code and the Indian decisions bear upon the point, it may be added that the District Judge acceded to the view presented and to all intents and purposes superseded the arbitration and entered upon the scrutiny of the lists of properties and the determination of the allocation—in short, performed the duties of the tribunal of arbitration as if the agreement of compromise had authorized that procedure. This was confirmed in the Court of the Judicial Commissioner of Oudh by the order appealed from.

By section 510 of the Code of Civil Procedure, 1882 (Act XIV) it is provided that "if the arbitrator, or, where there are more arbitrators than one, any of the arbitrators . . . dies, or refuses or neglects or becomes incapable to act . . . the Court may in its discretion . . . . appoint a new arbitrator . . . . or make an order superseding the arbitration, and in such case shall proceed with the suit." What had happened in the present case was that after the arbitrator had been appointed he refused to accept office as such, or to act. It appears, however, that the Courts in India have construed this section of the Code as meaning that the section can only apply if the arbitrator who refuses had accepted office before refusing. These decisions are, *Pugardin Ravutan* v. *Mondinsa Ravutan* (1) and *Bepin Behari Chowdhry* v. *Annoda Prosad Mullick* (2). In both of these cases it was held that the Court has power, under section 510, to appoint a new arbitrator in the place of another only when that other had first consented to act and thereafter refused or become incapable. In their Lordships' opinion this is not a [751] proper construction of section 510 of the Code. It appears to their Lordships that, when an arbitrator is nominated by parties, his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue. His refusal to act necessarily follows, for he has not performed the first action of all, namely, to take up the office by signifying his assent to his appointment. Their Lordships do not enter at length into the matter as it appears that any other construction would open the way to an easy defeat of the provisions of the Statute. Nor do their Lordships doubt that the decisions referred to proved in the present case an embarrassment to the Courts below and have probably prevented the District Judge doing what would have supplied all that was required,

(1) (1882) I. L. R. 6 Mad. 414.

(2) (1891) I. L. R. 18 Cal. 324.

namely, to appoint another arbitrator instead of the one who had declined to accept nomination. Had that been done the tribunal of arbitration would have been set up and the proceedings would have gone forward. Further more, the appointment was in the hands of the District Judge, and he was in no way precluded from making it by the fact that the party whose arbitrator had declined refused to assist the Court by suggesting another name. In their Lordships' opinion the procedure of the Courts below in this particular, and the decisions upon which they manifestly proceeded, were erroneous.

What was done, however, was (apparently under the same section which was held to make it incompetent to appoint a fresh arbitrator), to adopt the other course of superseding the arbitration and entering upon the determination of the matters submitted by the agreement. It was this latter which was done, and not proceeding with the suit. To "proceed with the suit" (to use the language of section 510) was in this case in their Lordships' view, impossible. The suit was at an end, something different from and going much beyond the suit had been entered upon. The decree of the 2nd of August, 1905, was not a decree for partition nor for administration. It was simply a decree ordering the agreement and compromise of parties to be carried into effect, and that decree was final. It put an end to the suit, and that was the very object of the compromise. The alternative in section 510 is impossible, because there is no suit now pending with which the Court can proceed. All that the Courts in India could [752] do was to take advantage of the sections of the Code which enabled them to keep the machinery of arbitration going. This could have been done, and, had it not been for the decisions cited, would in all probability have been done, by simply naming a fresh arbitrator. Parties who agree to set up a tribunal of arbitration are not bound to submit the case referred to another tribunal, such as a District or other Judge. It may be regretted that the supersession of the arbitration and the interposition of the Judge himself to settle the points referred to arbitrators should not have been assented to. But the objection which has been taken—that the rights having been remitted to one tribunal have been settled by another—is, in their Lordships' opinion, a fatal objection.

Their Lordships' will accordingly humbly advise His Majesty that the appeal be allowed and the decrees of the Courts below reversed with costs. The respondent, Kaniz Zohra Begam, must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant :—*Watkins and Hunter.*
Solicitors for the respondents :—*Barrow, Rogers and Nevill.*

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33 A. 752=11 I. C. 218=3 A. L. J. 896.

33 A. 752 (=11 I. C. 218=8 A. L. J. 896.)

APPELLATE CIVIL

Before the Hon'ble Mr. H. G. Richards, Chief Justice and Mr. Justice Banerji.

MANOHARI (*Defendant*) *v.* MUHAMMAD ISMAIL AND OTHERS (*Plaintiffs.*)*

[1st June 1911.]

Civil Procedure Code (1882), *sections* 13, 539—Res judicata—*Suit for declaration of trust and of property comprised in it—Party to such suit not competent subsequently to deny existence of trust.*

Held that a person who had been a party to a suit under section 539 of the Code of Civil Procedure, 1882, in which suit the existence of a waqf and the property comprised therein had been declared, was not competent in a subsequent suit for ejectment of the defendant from a part of the waqf property to plead that the property was not waqf. *Ghazaffar Husain Khan* v. *Yawar Husain* (1) referred to.

[753] THE fact out of which this appeal arose were as follows:—

One Qazi Amin-ud-din was the owner of 14 shops under a mosque in Kairana and of another 35 shops in close proximity to the mosque. The plaintiffs respondents alleged that these shops had been made waqf by the Qazi in favour of the mosque, and they sued the defendant, appellant, who was in possession of some of them, for ejectment and mesne profits. Qazi Amin-ud-din was succeeded by his granddaughter Musammat Salima Bibi, and a nephew Zahir-ud-din, who got his property under his will. Zahir-ud-din died and was succeeded by his son Fazl-ullah. In 1882, Salima Bibi and Fazl-ullah mortgaged some of these shops to one Naurang Lal; they created three more mortgages of them the same year in favour of Aman Singh, son of Naurang Lal. On the 14th of September, 1884, they motgaged a half share of the 35 shops to Dalip Singh, the husband of the appellant in this case. Dalip Singh brought a suit on his mortgage and obtained a decree on the 29th of February, 1882. The waqf was set up in defence, but the waqfnama was held to be a forgery by the first Court, and that decision was upheld by the High Court, on appeal. On the 20th of August, 1894, a half of 18 shops was put up for sale and purchased by the decree-holder Dalip Singh. On the 29th of January, 1895, Dalip Singh purchased the other half share of these 18 shops from Fazl-ullah alone, together with a half of another four shops. Subsequently there was a partition between Dalip Singh and one Haidar, a purchaser from Fazl-ullah of the other half of the above 4 shops, and Dalip Singh got two entire shops instead of a half of four shops. Thus the defendant came to be in possession of 20 shops.

On the 8th of September, 1905, a suit was brought by some of the Muhammadan residents of Kairana under section 539 of the old Code of Civil Procedure for a declaration that the shops were waqf property and for the appointment of trustees and settlement of a scheme of management. The present appellant was also made a party to the suit. The claim was decreed by the Additional Judge of Meerut on the 18th of June, 1906, and the present plaintiffs respondents in this case were appointed trustees. The present appellant appealed to the High Court, but the decision of the Judge was confirmed on the 25th of July, 1908.

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*First appeal No. 298 of 1909 from a decree of Soti Raghubans Lal, Subordinate Judge of Meerat, dated the 18th of June 1909.

(1) (1909) I. L. R. 28 All. 112.

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[754] The present suit was by members of the committee of trust for ejectment of Musammat Manohari, who denied the waqf. The Subordinate Judge held that the question of waqf was *res judicata* because of the above mentioned decision and decreed the suit. The defendant appealed.

Dr. *Satish Chandra Banerji* for the appellant :—

The trustees have been entrusted with the waqf property. The Muhammadan community is the beneficiary, and it cannot be said that the *cestui qui trust* and the trustees are identical. The trustees do not claim under the original parties. They are to hold the property and administer it for the community. They hold a legal estate, the community has only got an equitable one. A suit under section 539 of Act XIV of 1882 is to be brought by persons who are not trustees. The words "under whom they claim" in section 13 of that Act implied some privity between the two. It could not be so here.

The first suit was to keep property safe from any beach of trust not to eject trespassers. That suit was by the plaintiffs as members of the Muhammadan community, this one is by plaintiffs as trustees. The test is whether they claim under the plaintiff in the first suit, not whether they can put forward the same claims as the others. A trustee does not necessarily derive his title from the *cestui qui trust* but he claims under the creator of the trust. The District Judge holds that position here. Any Muhammadan could bring a suit under section 539, but every Muhammadan could not administer the waqf. Where the waqf was in question, an ordinary suit had to be brought, not one under section 539; *Jamal-ud-din* v. *Mujtaba Husain* (1). That section contemplated an existing trust. The words "contentious or not" were probably put in to overrule *Mohi-ud-di* v. *Sayid-ud-din* alias *Nawab Mean* (2). The District Judge had no jurisdiction to decide the question under section 539. *Ghazaffar Husain Khan* v. *Yawar Husain* (3) was also referred to.

Maulvi *Ghulam Mujtaba*, for the respondents.

RICHARDS, C. J., and BANERJI, J :—This appeal arises out of a suit for ejectment from certain shops and also for mesne profits. [755] It is not necessary to state the facts in any detail. The plaintiff's claim was that the shops in question were the subject of a waqf created by one Qazi Amin-ud-din ; that in the year 1905 a suit was instituted by certain Muhammadans of Kairana, where the shops are situate, under section 539 of Act No. XIV of 1882: that as the result of that suit, the plaintiffs were appointed trustees, and it was ascertained that the waqf in fact existed and that the shops in question were part of the waqf property. The defendant appellant was a party to the proceedings under section 539 and the plaintiffs contended that they were now entitled to recover possession of the shops from her together with mesne profits. The defendant pleaded that there was no waqf and that she was the representative of a transferee for value and was therefore entitled to remain in possession. The main issue in the case accordingly was, whether or not the defendant could go behind the proceedings under section 539 and re-open the case. The learned Subordinate Judge held that the defendant could not go behind these proceedings and overruled this defence.

There was another claim put forward by the defendant, namely, that certain improvements had been made in the shops and that she was entitled to compensation for such improvements as a condition of possession

(1) (1903) I. L. R. 25 All. 631.
(2) (1893) I. L. R. 20 Cal. 810.
(3) (1905) I. L. R. 28 All. 112.

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being taken from her. The learned Subordinate Judge overruled this claim also, with the result that the plaintiff's claim for possession and mesne profits for three years in respect of nine shops was decreed; as regards the rest of the claim it was dismissed. The defendant alone has appealed, and it is argued on her behalf that the proceedings under section 539 cannot operate as *res judicata*. It is said that the present plaintiffs were no parties to that suit, and that the present plaintiffs cannot be said to claim "under the plaintiffs" in the previous suit. It was further argued that section 539 only applies to a case in which the existence of the trust is not denied; that in the suit brought in 1905 the present defendant denied the existence of the trust, and that therefore the declaration that the shops in question were waqf property as against the present appellant was *ultra vires*, and that accordingly she is not bound by the decision. In the case of *Ghazaffar Husain Khan* v. *Yawar Hussain* (1), [756] a suit was instituted under section 539. Amongst other parties to that suit were certain alienees of the property alleged to be waqf. These alienees (just as in the suit of 1905) pleaded that there was no waqf and that they ought not to have been impleaded in the suit. It was held by the court that the alienees were proper parties and that the court was entitled, as against them, to ascertain what the trust property consisted of. STANLEY, C. J., had some doubt as to whether or not the trustees appointed in the suit would be obliged to bring a separate suit for possession in the event of the defendants who were in actual possession not surrendering it up. This we take to be the meaning of the following passage in the judgment of STANLEY, C. J., at page 116 :—" I see no good reason for holding that under that section the Court cannot, as it did in this case, determine of what the trust properties consisted or find that particular alienations of it could not be maintained, provided all proper parties are present before it. If transferees or mortgagees who have been impleaded in a suit instituted under section 539, do not accept the findings of the court in that suit, it may be necessary for the trustees appointed by the court to manage the trust property, to institute a suit for recovery of possession. As to this I express no opinion." This case is a direct authority that persons who dispute the existence of the trust can be made parties to a suit under section 539, and of course it necessarily follows that they will be bound by the decision arrived at in the suit.

The words in section 13 " parties under whom they claim " are very wide. It is, however, unnecessary for us to decide whether or not the present plaintiffs can be said to claim under the plaintiffs in the suit of 1905. The question between the defendant appellant and the plaintiffs as to the property being waqf could be and was decided once and for all in the proceedings instituted in 1905, and the present suit is merely carrying into effect the decree that was pronounced against the defendant appellant in that suit. In our opinion the learned Subordinate Judge was correct in holding that it is not open in this suit for the defendant appellant to re-open the question as to whether or not the shops in question were waqf property, though not necessarily on the ground of *res judicata*. As to the question [757] of compensation, even if we assume that improvements were made by the husband of the appellant for which they had not been amply compensated by the user, we are not satisfied that such improvements were made in the *bona fide* belief that he was

(1) (1905) I. L. R., 28 All. 112.

absolutely entitled to the shops. There is a large amount of documentary evidence which goes to show that the defendant's husband had at least notice that the property was alleged to be waqf property.

The result is that we dismiss the appeal with costs.

Appeal dismissed.

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33 A. 757 (=8 A. L. J. 877=11 I. C. 52).

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Before the Hon'ble Mr. H. G. Richards, Chief Justice, Mr. Justice Banerji and Mr. Justice Chamier.

INCHA RAM AND OTHERS (*Defendants*) *v.* BANDE ALI KHAN AND ANOTHER (*Plaintiffs*).*

[10th June, 1911].

Land-holder and tenant—Presumptions as to land-holder's rights in the abadi *of an agricultural village—House site occupied by a person not an agriculturist nor one of the customary village servants or artizans—Adverse possession.*

In a village which was not a purely agricultural village, but in which, on the contrary, some two-thirds of the inhabitants were non-agriculturists, certain persons, father and son, were in possession of a house site in the *abadi*. They carried on the occupation of inn keepers and sellers of tobacco, and there was no evidence of the origin of their possession or that they ever paid rent to the zamindar or acknowledged his title in any way. The site was sold by the son, and some time after such sale, the house or shop thereon having fallen down, the zamindar sued to eject the purchasers.

Held that in the circumstances of the case the defendants and their predecessors in interest, were properly held to have acquired a title to the site by adverse possession. *Chajju Singh* v. *Kanhia* (1) and *Bhaddar* v. *Khair-ud-din Husain* (2) referred to.

[Ref. 14 I. C. 324, 22 I. C. 891.]

THIS was a suit for possession of a plot of land, the site of a house in the *abadi* of a village brought by the zemindars of the village. In the plaint it was alleged that the plot in question was situate in mauza Kamalganj, which was an agricultural [758] village, that there had been a dilapidated shop on the site, that the defendants 1 and 2 had taken possession of the plot and erected a shed thereon. They claimed that defendant No. 3 had no right to sell the plot in question to the defendants 1 and 2, and that the plaintiffs were entitled to possession. The defendants pleaded (1) that the shop was situate in a new *ganj* which had been established by Mr. Redcock, a Collector, and that the persons who occupied houses and shops in this *ganj* were the owners of their shops; (2) that the shop in question was situate in Qasba Kamalganj, and that Qasba Kamalganj belonged to Government, and that the zemindars had no right to the houses and shops. Lastly they pleaded limitation. The court of first instance decided in favour of the defendants that the suit was barred by limitation, inasmuch as the defendants had been in adverse possession. On appeal the learned Subordinate Judge found that the village was an agricultural village and having arrived at this finding he reversed the decree of the court of first instance and decreed the plaintiff's suit. In second appeal to the High Court the Court was of opinion that the case ought

* Second Appeal No. 1069 of 1908 from a decree of Prem Behari Lal, Subordinate Judge of Farrukhabad, dated the 19th of September, 1908, reversing a decree of Shekhar Nath Banerji, Munsif of Fatehgarh, dated the 20th of May, 1908.

(1) Weekly Notes, 1881, p. 114.

(2) (1906) I. L. R. 29 All. 133.

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not to be decided on the mere finding that Kamalganj was an agricultural village. Two issues were remitted for determination by the Subordinate Judge. The issues were:—

(1) Are the plaintiffs or the defendants Nos. 1 and 2 owners of the land in dispute?

(2) Have the defendants or their predecessors in title been in adverse possession of the property in dispute for upwards of 12 years prior to the institution of this suit?

The finding returned was in favour of the appellants. The case was then referred to a larger bench by RICHARDS, C. J., and BANERJI, J.

Dr. *Satish Chandra Banerji* (with him Babu *Girdhari Lal Agarwala*), for the appellants:—

A zamindar stands on the same footing as any other plaintiff. When he brings an action in ejectment he must prove a subsisting title. The title of a zamindar can be extinguished by adverse possession. The appellants are not tenants; they do not belong to the class of artisans or handicraftsmen who usually find a place in agricultural villages; they have never paid rent in cash [759] or kind to the zamindar, and have never acknowledged his title. No presumption in favour of the zamindars arises in such a case: *Bhaddar* v. *Khair-ud-din Husain* (1), *Nazir Hasan* v. *Shibba* (2). Possession is *prima facie* exclusive and adverse, and the person out of possession must prove that the defendant's possession is of a permissive character, that he came in as a tenant or as a licensee; *Ramchandra* v. *Narayan Mahadev* (3). Tenants in an agricultural village claim under the zamindar and even where they do not pay rent, they render services of various kinds to the zamindar. Their possession, therefore, under ordinary circumstances, cannot be adverse to the zamindar. But this is not an agricultural village and the defendants are not tenants. Reference was made to the Gazetteer of Farrukhabad district.

Mr. *W. A. Porter* (with him Maulvi *Gulam Mujtaba*), for the respondents:

The court below has found that Kamalganj is an agricultural village. The plot in suit admittedly lies within the ambit of the zamindari. There is a presumption that the zamindar is in possession of the entire village site, and all residents of houses thereon are there with his permission or license; *Chajju Singh* v. *Kanhia* (4). In any case, it would be for the defendants to establish their plea of adverse possession by proving that they had actually denied the zamindar's title more than twelve years before suit. There can be no presumption made in favour of squatters whom the zamindar allows to stay on and does not care to turn out. If the law were as the Subordinate Judge laid it down, the title of the zamindars to the bulk of their property in the *abadi* would at once become insecure, if not positively bad; *Jankishun Singh* v. *Moti Chand* (5), *Framji Cursetji* v. *Goculdas Madhowji* (6), *Panna* v. *Nazir Husain* (7), *Saadu* v. *Behari Singh* (8).

The finding that the defendants have been in adverse possession is one of mixed law and fact, and the High Court is not bound to accept it in second appeal; *Lachmeswar Singh* v. *Manowar Hossein* (9).

(1) (1906) I. L. R. 29 All 133.
(2) (1904) I. L. R. 27 A l. 81.
(3) (1886) I. L. R. 11 Bom. 216.
(4) Weekly Notes, 1881, p. 114.
(5) (1906) 3 A. L. J. 627.
(6) (1892) I. L. R. 16 Bom. 388.
(7) Weekly Notes, 1902, p. 60.
(8) (1906) I. L. R. 30 All. 262.
(9) (1891) I. L. R. 19 Cal. 258.

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[760] Dr. *Satish Chandra Banerji*, was not heard in reply.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs claimed possession of a plot of ground. In the plaint it was alleged that the plot in question was situate in mauza Kamalganj, which was an agricultural village, that there had been a dilapidated shop on the site, that the defendants 1 and 2 had taken possession of the plot and erected a shed thereon. They claimed that defendant No. 3 had no right to sell the plot in question to the defendants 1 and 2, and that the plaintiffs were entitled to possession. The defendants pleaded (1) that the shop was situate in a new *ganj* which had been established by Mr. Redcock, a Collector, and that the persons who occupied houses and shops in this *ganj* were the owners of their shops; (2) that the shop in question was situate in Qasba Kamalganj, and that Qasba Kamalganj belonged to Government, and that the zamindars had no right to the houses and shops. Lastly they pleaded limitation. The court of first instance decided in favour of the defendants that the suit was barred by limitation, inasmuch as the defendants had been in adverse possession. On appeal the learned Subordinate Judge found that the village was an agricultural village and having arrived at this finding he reversed the decree of the court of first instance and decreed the plaintiff's suit. In second appeal to this Court the learned Judges were of opinion that the case ought not to be decided on the mere finding that Kamalganj was an agricultural village. Two issues were remitted for determination by the Subordinate Judge. The issues were:—

(1) Are the plaintiffs or the defendants Nos. 1 and 2 owners of the land in dispute? and

(2) have the defendants or their predecessors in title been in adverse possession of the property in dispute for upwards of 12 years prior to the institution of this suit?

These issues came before Mr. Gauri Shankar, Subordinate Judge, who had succeeded Mr. Prem Behari.

I think that the facts have now been ascertained pretty clearly, and it remains to consider what should be the decision of the court upon the ascertained facts. It appears that many years ago, before the Mutiny, Mr. Redcock established a *ganj* at Kamal-[761] ganj. The zamindars appear to have voluntarily given up all claim to the sites and the houses situate in that *ganj*. The occupiers have been accustomed to deal with the sites and houses as their own absolute property. It has been found, however, contrary to the allegation of the defendants that the site in question is not situate in the *ganj* established by Mr. Redcock. Mr. Prem Behari found that Kamalganj was an agricultural village. He does not give any reasons for his finding, nor does it appear what Mr. Prem Behari considered to be an "agricultural village." His finding on this question is very unsatisfactory. We must take it, however, that in Kamalganj there are agriculturists living in the *abadi* who are the tenants of the zamindars. Beyond this I do not think we are bound by the finding of Mr. Prem Behari. The real facts, I think, have been fairly ascertained by Mr. Gauri Shankar when determining the issues referred to him by this Court. He says that according to the evidence of the plaintiffs own witnesses two-thirds of the population of Kamalganj are non-agriculturists. Various businesses are carried on there. Some persons even carry on the business of commission agents. It is quite clear that Kamalganj is not an ordinary agricultural village.

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I now come to the history so far as it could be ascertained, of the piece of land in dispute. The first person found in possession was one Chingi. The origin of Chingi's possession has not been ascertained, nor is there any evidence as to who was there before him. Chingi was succeeded by his son Nanhe. After the death of Chingi the site was sold on the 12th of December, 1901. The transfer was effected by a registered sale-deed. Nanhe executed it on behalf of himself and as the certificated guardian of his minor son and two minor sisters. The sanction of the District Court was obtained to the transfer. It has been clearly found that neither Chingi nor Nahne, nor the defendants 1 and 2 were ever at any time agriculturists. The main business of Chingi and Nanhe was that of inn-keepers and sellers of tobacco. The court finds, and I think it was perfectly justified in finding, that neither Chingi, Nanhe, nor the defendants Nos. 1 and 2 ever paid rent in cash or kind. In the Full Bench case of *Chajju Singh* [762] v. *Kanhia* (1), it is laid down that " the zamindars of a village are, as a rule, and presumably, the owners of all the house sites in their village." I entirely agree with this proposition. In the ordinary agricultural village there are a number of persons occupying the *abadi*. In a great many cases it would be impossible for the zamindar to prove the origin of the occupation or the payment of rent either in cash or kind. The agriculturists pay no rent for their houses as such. There are persons carrying on certain trades who invariably reside in the village without payment of rent. In my opinion in an ordinary agricultural village there is a very strong presumption that the sites of the houses belong to the zamindar. I think it would be wrong as a general rule to hold that a zamindar loses his proprietary title in a site within the ambit of a zamindari by reason merely of the fact that he is unable to prove that the person who last held the land or his predecessors in occupation were agriculturists or carried on some one of the recognized village trades, or the payment of rent in cash or kind. In many cases it might be that a person who was either an agriculturist or village trader and as such, in occupation of a site, has given possession to some relative or friend. If it were held that the moment any person who was not an agriculturist or village trader began to acquire a title against the zamindar, the position of the began to occupy a village site without the express premission of the zamindar, he latter would be well-nigh intolerable, and he would be driven to perpetually harass the occupiers of the village to the detriment of the whole village community.

There is no doubt that in many villages the occupiers have acquired certain rights and privileges by usage, but the zamindar remains proprietor subject to the usage.

Great reliance was placed by Dr. *Banerji* on behalf of the defendants in the case of *Bhaddar* v. *Khair-ud-din Husain* (2). In that case the suit of the plaintiff in which he sought to recover possession of the site of a house within the municipal limits of the city of Allahabad was dismissed by the court of first instance. A Bench of this Court set aside the decree of the court of first appeal which had reversed the decree [763] of the court of first instance. The learned Judges restored the decree of the court of first instance. Independent judgments, however, were delivered by STANLEY, C. J., and RUSTOMJEE, J., and the reasons given by each of the Judges are not quite the same. STANLEY, C. J., held that either a title had been acquired by adverse possession or that leave and

(1) Weekly Notes 1881, p. 114.

(2) (1906) I. L. R. 29 All. 183.

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licence to build the house must be inferred: whichever view was accepted, the plaintiff's suit failed. I have referred to this case because I do not think that we ought to lay down any hard and fast rule as to the presumption which arises in any particular case. I my opinion this question of adverse possession ought to be decided on the facts proved, and surrounding circumstances of each case. I think the finding of Mr. Gauri Shankar is a finding that the defendants and their predecessors in title have acquired a title by adverse possession. I think that we ought to accept this finding unless we think that the finding is a finding which could not legally be arrived at upon the evidence. In other words, the question is whether or not there was evidence before the court which would justify the finding of adverse possession. The learned Subordinate Judges says: —" Possession is *prima facie* evidence of ownership and is presumed to be adverse unless it is proved to have been otherwise." I think that this is hardly a correct way of approching the consideration of the case. It seems to me that *prima facie* the zamindars are in possession of the whole of their zamindari. The possession *prima facie* of all the occupiers of houses and sites in the *abadi* is the possession of the zamindar. But this presumption is capable of being rebutted. It is a very strong presumption in the case of an ordinary agricultural village. The presumption is not so strong in the case of a village like the present where the large majority of the population are non-agriculturists.

In the circumstances of the present case I do not think that it was necessary that the defendants should prove that they expressly set up adverse possession more than twelve years before the institution of the suit as contended by Mr. *Porter* for the respondents. In considering the nature of the possession of Chingi and Nanhe, I think that the court below was entitled to take into consideration the fact that the majority of the population [764] were non-agriculturists. It was entitled to take into consideration the fact that the occupiers of shops in the *ganj* established by Mr Redcock had become the actual owners, and that there would be a natural tendency for others to assert a similar right, although they did not occupy the new *ganj*. I think also that the court was entitled to consider the circumstances of the sale of the present site in 1901. It was sold in the most public way for a considerable sum of money. The leave of the court was obtained to the sale, and the defendants 1 and 2 openly purchased the site. The circumstances of this sale tend to show that people generally in the district would look upon Nanhe as the owner of the site.

Lastly, I think that the court was entitled to consider the long continued user of the premises for purposes which were not part of the ordinary machinery of an ordinary agricultural village.

In my opinion on the evidence the court was quite justified in finding that the defendants and their predecessors had been in adverse possession for more than twelve years before the institution of the suit. I would therefore allow the appeal with the exception mentioned in the finding of Mr. Gauri Shankar dated the 8th April, 1911.

BANERJI, J. —I agree in the order proposed by the learned Chief Justice. No doubt, in an agricultural village the zamindar is presumably the owner of all the sites in the *abadi*; but it does not follow from this that adverse possession cannot be acquired of any particular plot of land. Each case must be determined with reference to its own peculiar circumstances. In the case of an agricultural tenant or a handicraftsman or trader whose presence is necessary for the requirements of the village, the presumption

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is that his occupation of the site of his house is with the permission of the landlord. In their case the quantum of evidence required to prove adverse possession would be greater than in the case of other persons. But where, as in this case, it is not proved that the occupation of the site in question was with the leave and licence of the landlord, but it is proved that the occupier belonged to a class of persons, such as an inn-keeper, who ordinarily found no place in an agricultural village, that he [765] never acknowledged the landlord's title and never paid rent or any other due to him for the occupation of the site, the ordinary rule that every plaintiff against whom limitation is pleaded must prove a subsisting title not barred by limitation will, in my opinion, apply even when the plaintiff happens to be the zamindar. In the case before us the court below has found on evidence which it was entitled to take into consideration that the possession of the defendants and their predecessors in title was adverse to the plaintiffs. That finding must be accepted in second appeal. I am unable to agree with the contention of the learned counsel for the respondents that the finding should be held to be erroneous in law, simply because the land in suit lies within the ambit of the plaintiff's zamindari. In veiw of the finding the claim must be held to be time barred, except as to the strip of land mentioned in the judgment of the learned Subordinate Judge.

CHAMIER, J.—I also agree in the order proposed by the learned Chief Justice. The facts have been stated fully by him and I will not repeat them.

The ordinary rule is that a plaintiff in a suit for possession of property against whom limitation is pleaded must prove a subsisting title not barred by limitation; and this he generally does by evidence that he has title and that he has been in possession within limitation. I apprehend that the rule applies as much to a zamindar suing for possession of land lying within his zamindari as to any other person. In the case of waste land and in some other cases possession by the plaintiff beyond limitation may be presumed to have continued until the contrary is proved. There can be no doubt that in the case of a suit by a zamindar for possession of land in an *abadi* which has been occupied by an agricultural tenant or by a person belonging to the village community such as the village *lohar*, the barber and the like, the zamindar is entitled to rely on the presumption, the strength of which varies with the circumstances of the case, that such person held possession by leave or licence of the zamindar. This presumption may, perhaps, be made, in other cases also. Where such a presumption can be made, the burden of proving adverse possession lies on the defendant, and even when the presumption [766] cannot be made, very little evidence is required in some cases of the kind to shift the burden of proof on to the defendant. But in the present case the circumstances were peculiar. It has been held that the village was an agricultural village, but two-thirds of the inhabitants are said to have been non-agriculturists. There seems to have been no proof and no ground for presuming that the zamindar had been in possession of the land at any time during the last forty years, or that the defendants or their predecessors held under him in any sense, and I think that the case might have been disposed of on that ground. Assuming, however, that the burden of proof lay on the defendants to prove that their possession was adverse, I think that the lower appellate court was right in inferring from the proved facts that the possession of the defendants and the

persons through whom they claim, has been adverse to the zamindars for considerably more than twelve years.

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BY THE COURT.—The order of the Court is that the appeal is allowed, the decree of the lower appellate court is set aside and the decree of the court of first instance restored, save to the extent of the strip of land mentioned in the finding of Mr. Gauri Shankar, dated the 8th of April, 1911. The appellant will have his costs in all courts.

Appeal allowed.

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33 A. 767 (=11 I. C. 186=8 A. L. J. 889.)

[767] MISCELLANEOUS CIVIL.

Before Mr. Justice Tudball.

AISHA AND ANOTHER (*Defendants*) *v.* FAIYAZ HUSAIN (*Plaintiff*).*

[10th June, 1911.]

Act No. VII of 1870 (*Court Fees Act*), *schedule II, article* 17 (*vi*)—*Court fee—Suit for restitution of conjugal rights.*

Held, that the court fee payable in respect of a suit for restitution of conjugal rights is a fee of ten rupees under article 17, clause (vi), of the second schedule to the Court Fees Act, 1870. *Zair Husain Khan* v. *Kurshed Jan* (1), referred to.

ON a memorandum of appeal being filed the Stamp Reporter made the following report :—

"Article 15, schedule II, of Act VII of 1870, which governed suits for the recovery of a wife, was repealed by the present Code of Civil Procedure, schedule V. The case in my humble opinion is now governed by article I, schedule I, of Act No. VII of 1870, and the court fee is leviable *ad valorem* on the value of the subject-matter in dispute.

"The valuation of the suit and of the appeal to the lower appellate court was Rs 1,150 and that, I submit, should be the valuation of this appeal, it not being open to the appellants to put their own valuation on the appeal.

"That being so, a fee of Rs 85 is payable. Rupees 13-12-0 having been paid, there is therefore a deficiency of Rs. 71-4-0 to be made good by the defendants appellants for this Court.

"As to sufficiency or otherwise of the fee paid in the lower Court report will be submitted on receipt of record."

The following objections were raised by Babu *Balram Chandra Mukerji* for the appellant :—

"This was a suit for restitution of conjugal rights. The plaintiff, as will appear from the plaint, valued his suit for the purposes of jurisdiction at Rs. 1,100 and paid a court fee of Rs. 10. The defendant did object, but he was overruled. On appeal a similar court fee was paid in the lower Appellate Court without any objection. No doubt, the clause in the Court Fees Act prescribing a fixed Court fee of Rs. 5 for such suits has been repealed by the Civil Procedure Code, but there is nothing to show that it does not come under article 17, clause (vi) of the Court Fees Act. The mere fact that a suit is valued at a certain amount for the purposes of jurisdiction would not necessarily mean that that [768] amount was the value of the subject-matter of the suit. In no case has it ever been held that a wife could be valued. In fact, there are cases both in this and other High Courts where it has been

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* Stamp reference in S. A. No. 580 of 1911.

(1) (1906) I. L. R. 28 All. 545.

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held that a wife cannot be valued. A plaintiff can only put some value on his plaint or relief so as to give jurisdiction. In the case of *Zair Husain Khan* v. *Kurshed Jan* (1) AIKMAN, J., says:—'It appears to me that it would be more accurate to characterize a suit of this nature as one, the subject-matter of which does not admit of being satisfactorily valued.' 'Subject-matter in dispute' is quite a different thing from the value of the suit or relief. The point will be more clear by referring to Indian Law Reports, 13 Calcutta, 232, and 18 Calcutta, 378, where it was held that the mere fact that a suit for restitution of conjugal rights is valued at Rs. 25,000 will not enable a party to appeal to the Privy Council. The distinction between the words 'subject-matter in dispute' and 'relief' must be borne in mind. At any rate the point might be settled by an authoritative decision. I submit the court fee paid is sufficient."

The Stamp Reporter made the following further report:—

"The learned vakil for the appellant objects to the correctness of the office report, the case is therefore submitted under section 5 of Act No VII of 1870 to the Taxing Officer for decision.

"In continuation of my report dated the 12th May last, I beg to submit that before Act No. V of 1908, the present Code of Civil Procedure, came into force, there was a fixed fee of Rs. 5 prescribed by article 15, schedule II, of the Court Fees Act for a suit for restitution of conjugal rights, and therefore there could not be an occasion for a decision of the question as to whether such a suit could or could not be valued for purposes of Court fees. There have been cases in which it was decided that such a suit could be valued for purposes of jurisdiction, and that the value is, as a rule, the value which the plaintiff chooses to put upon it. The full bench case in 28 Allahabad, 545 in which the whole case-law on the subject was reviewed and on which the learned vakil for the appellant also relies, is conclusive authority on the point so far as these Provinces are concerned. Just before the passage quoted by the learned vakil for the appellant from that judgment, AIKMAN, J. is reported to have observed, at p. 548 of the report. 'In the case before us the suit has been valued, and therefore I think that it is scarcely correct to say that such a suit is incapable of being valued.'

"Now, I submit that if the subject-matter of a suit can be valued in money for purposes of jurisdiction, there is no reason why it cannot be valued for purposes of Court fees. The value of the subject-matter in dispute is the value of the suit or relief. The fact that the subject-matter in dispute in a suit does not admit of satisfactorily being valued, does not mean that the matter in controversy [769] cannot at all be valued. That being so, article 17, clause (vi) of schedule II does not apply. The only article left in the Court Fees Act which can apply to a suit like this is article 1 of schedule I of the Act.

"Besides that, to my mind it is not right to say that the Legislature in repealing article 15, Schedule II, intended that the suits which were theretofore governed by that article should thenceforward be governed by another article in the same schedule, namely, article 17, clause (vi), which requires a higher fixed fee to be paid."

The Taxing Officer referred the case to the Taxing Judge:—

"The plaintiff in this suit sued for restitution of conjugal rights, and obtained a decree. Against this decree the defendant has appealed. The appeal bears a Rs. 10 stamp. The office contends that it should bear an *ad valorem* stamp, calculated on the value of the suit as shown by the plaintiff for the purpose of jurisdiction. The defendant, on the other hand, contends that the case comes under schedule II, clause 17 (vi), of the Court Fees Act as a suit 'where it is not possible to estimate at a money value the subject-matter of the suit.' In *Akhmannessa Bibi* v. *Mahomed Hatem* (2) it has been held that a suit for restitution of conjugal rights is incapable of being valued. This ruling was dissented from in *Zair Husain Khan* v *Khurshed Jan* (1) a Full Bench decision. In both cases the decision was with reference to section 19 of the Bengal Civil Courts Act the Calcutta High Court holding that such a suit could not be valued for purposes of jurisdiction, and this Court holding that it could, and that the value of the suit was the value which the plaintiff chose to put upon it. The

(2) (1904) I. L. R. 31 Cal. 849.
(1) (1906) I. L. R. 28 All. 545.

1911
JUNE 10.

MISCELLANEOUS CIVIL.

33 A. 767=
11 I. C. 186=
8 A. L. J. 869.

question whether a suit for restitution of conjugal rights was or was not one, of which the subject-matter could not possibly be estimated at a money value, was not considered. I may observe, however, that the reasoning of AIKMAN, J., who delivered the Full Bench ruling, clearly indicated that the fact that a suit can be valued for purposes of jurisdiction is not conclusive on the point now at issue. for he says .—' I am of opinion that the Legislature took it for granted that a money value of some kind, it may be an arbitrary value, can be placed on all suits. Now if all suits are capable for purposes of jurisdiction of a money valuation and if suits so capable of valuation are not suits in which the value of the subject-matter cannot be estimated in money, then it would seem that there are no suits falling under schedule II, article 17 (vi).

" It is clear that the subject-matter of a suit for restitution of conjugal rights cannot be satisfactorily valued in money. On the other hand, it cannot be said that the subject-matter, *viz.*, restitution of certain rights, can in no circumstances have a money value. Conceivably the plaintiff might be willing to take a certain sum in lieu thereof. The question would therefore seem to be whether in article 17 (vi) 'estimate at a money value' is to be taken to mean 'estimate satisfactorily' at a money value. Having regard to the character of the other suits which are bracketed in article 17 with the suits referred to in clause (vi) thereof, all suits, it will be observed, are as capable of a money valuation as suits for restitution of conjugal rights, but all incapable of a satisfactory valuation. I venture myself to opine that 'estimate' should be construed as 'estimate satsifactorily.'"

[770] The following order was passed by TUDBALL, J.—

This is a reference by the Taxing Officer. The plaintiff in the suit sued for restitution of conjugal rights and obtained a decree. The defendant has appealed affixing a court fee stamp of Rs. 10, under article 17, clause (vi), of the second schedule to the Court Fees Act. The office report is to the effect that it should have an *ad valorem* stamp calculated on the value of the suit, as given by the plaintiff, for the purposes of jurisdiction. It has, no doubt, been held by this court in the case of *Zair Husain Khan* v. *Khurshed Jan* (1) that a suit of this nature may be arbitrarily valued by the plaintiff for the purpose of jurisdiction. The office suggests that this being so, an *ad valorem* fee must be paid, but it is obvious that the valuation placed by the plaintiff for the purposes of jurisdiction is entirely an arbitrary one, enabling him thereby to select the *forum* for the trial of the suit. But at the same time it is equally clear that it it not possible to estimate at a money value the subject-matter of the present suit. The valuation for the purpose of jurisdiction is clearly an arbitrary valuation pure and simple. Prior to the coming into force of the present Code of Civil Procedure Act V of 1908, in such suits, there was a fixed court fee of Rs. 5. Under section 156 of Act V of 1908, article 15 of schedule II to the Court Fees Act is repealed. The present class of suits, therefore, is not one which prior to that Act was such that an *ad valorem* fee was taken upon it. If every plaintiff can for the purpose of jurisdiction put an arbitrary value on the subject-matter in suits in which the value of such subject-matter cannot be estimated in money, and if by reason thereof an *ad valorem* court fee must be calculated in such suits, unless they fall within some specified article, then clause (vi), article 17, schedule II to the Court Fees Act is quite useless. It cannot, however, be presumed that it was retained for no purpose whatever.

It is clear to my mind, that the present suit does fall within clause (vi) of article 17 of schedule II. The proper court fee is Rs. 10.

(1) (1906) I. L. R. 28 All. 545.

1911
JUNE 14.

REVISIONAL CRIMINAL.

33 A. 771=3 A. L. J. 925=11 I. C. 589=12 Cr. L. J. 405.

33 A. 771 (=8 A. L. J. 925=11 I. C. 589=12 Cr. L. J. 405.)

[771] REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox.

EMPEROR v. MANIK RAI AND OTHERS*

[14th June, 1911.]

Criminal Procedure Code, section 106—Security to keep the peace—"Offence involving a breach of the peace"—Mischief by removing land-mark—Act No. XLV of 1860 (Indian Penal Code), section 434.

Held that an offence "involing a breach of the peace" mentioned in section 106 of the Code of Criminal Procedure, does not mean only an offence which necessarily involves a breach of the peace or of which a breach of the peace forms an ingredient, but includes such an offence as in common knowledge is ordinarily or very probably the occasion of a breach of the peace, as, for example, the removal of a land-mark. *Baidya Nath Majumdar* v. *Nibaran Chunder Gope* (1), *Arun Samanta* v. *Emperor* (2), *Raj Narain Roy* v. *Bhagabat Chunder Nundi* (3), *Muthiah Chetty* v. *Emperor* (4), dissented from.

[Ref: 42 All. 345=18 A. L. J. 300=55 I. C. 304=21 Cr. L. J. 288; 72 I. C. 79=24 Cr. L. J. 319=90 & A. L. R. 191; 72 I. C. 955=24 Cr. L. J. 491; Fol: 75 I. C. 398 =25 Cr. L. J. 71.]

IN this case Manik Rai and others were convicted under section 434 of the Indian Penal Code of the offence of removing a land-mark and were sentenced to a fine of Rs. 25 each. They were also bound over under section 106 of the Code of Criminal Procedure to execute bonds to keep the peace for one year. The Sessions Judge of Ghazipur referred the case to the High Court, being of opinion that the offence punishable under section 434 of the Indian Penal Code was not an offence involving a breach of the peace within the meaning of section 106 of the Code of Criminal Procedure.

Munshi *Haribans Sahai*, for the accused.

KNOX, J.—The accused have been convicted of an offence under section 434, Indian Penal Code, and they have been sentenced to pay a fine of Rs. 25 each. They have also been ordered under section 106 of the Code of Criminal Procedure to execute a bond for keeping the peace for one year. The case has been sent up by the Court of Session, Ghazipur, with a recommendation that that portion of the order, which was made under section 106 of the Code of Criminal Procedure, be set aside. In support of this reference my attention has been called to several rulings, namely, *Baidya Nath Majumdar* v. *Nibaran* [772] *Gope* (1), *Arun Samanta* v. *Emperor* (2), *Raj Narain Roy* v. *Bhagabat Chunder Nandi* (3), *Muthiah Chetti*, v. *Emperor* (4). That the offence of removing a land-mark is in several districts in this provinces too often followed by serious riots and loss of life, is a matter of common experience. I do not say that in every case in which a land-mark is removed, the offences of grievous hurt, *et cetera* necessarily follow. But if the offence is such an offence that it is as a matter of experience, often followed by breaches of the peace, and if the evidence shows, as in this case it does, that the accused were prepared to accompany the removal of the land-mark by a breach of the peace and were only prevented from doing so by the other side running away, I am of opinion that the offence is one which comes within the terms used in section 106 of the Code of Criminal Procedure "offence involving a breach

*Criminal Reference No. 216 of 1911.

(1) (1902) I. L. R. 30 Cal. 98.
(2) (1902) I. L. R. 30 Cal. 366.
(3) (1908) I. L. R. 35 Cal. 315.
(4) (1905) I. L. R. 29 Mad. 190.

of the peace." The word "involve"—in my opinion connotes the inclusion, not only of a necessary, but also of a probable feature, circumstance, antecedent condition or consequence. I notice in the Calcutta cases that the word "necessarily" is inserted by learned Judges between the word "offence" and the word "involving". This is not the view taken by this Court. The object of the section, as we understand it, is to prevent breaches of peace taking place and not merely to follow up breaches of the peace which have taken place. The Madras Court considers that the words "involving breach of the peace" in this section require that breach of peace should be an ingredient of the offence proved, and that before that section is put in force, there must be a finding that a breach of peace has occurred. This again is not the view taken by this Court. With every respect for the learned Judges who decided the above cases, I prefer to follow the rulings of this Court. I see no reason for interfering and direct that the record be returned.

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REVISIONAL CRIMINAL.

33 A. 771=8 A. L. J. 928 =11 I. C 589 =12 Cr. L. J. 405.

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33 A. 773 (=12 I. C. 300=8 A. L. J. 927=12 Cr. L. J. 532).

[773] REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox and Mr. Justice Piggott.

EMPEROR *v.* RAM PRASAD AND ANOTHER.*

[15th June, 1911.]

Act No. XLV of 1860 (*Indian Penal Code*), *section* 297—*Trespass on burial ground—Ploughing up burial ground—Joint owner.*

Where a person entered upon a grove for the purpose of demarcating his share therein and in doing so dug up certain graves and exposed the bones of the persons buried there in spite of the remonstrances of the relations of the buried persons, *held* he was properly convicted of an offence under section 297 of the Penal Code, and none the less because he happened to be part owner of the grove. *Queen-Empress* v. *Subhan* (1) referred to.

[Rel. 73 I. C. 935=21 A. L. J. 455=45 All. 529.]

ONE Ram Prasad, a Bania, who had acquired a share in a village named Sindhauli, went to a bagh situated therein for the purpose of demarcating his share in it. In the course of the demarcation he had dug up certain graves in the bagh and exposed the bones of the persons buried there, in spite of the remonstrances of the relations of the persons buried. For this Ram Prasad, and his servant Bhagwan Das were convicted of an offence under section 297 of the Indian Penal Code. Against their conviction and sentence they applied in revision to the High Court.

Mr. *A. H. C. Hamilton*, for the applicants.

The Government Advocate (Mr. *A. E. Ryves*) for the Crown.

KNOX and PIGGOTT, JJ. :—Ram Prasad and Bhagwan Das, who have been convicted of an offence under section 297 of the Indian Penal Code, and have been fined under that section, and in addition were bound over to keep the peace under section 106 of the Code of Criminal Procedure, have put in a petition of revision and ask this Court to revise the conviction and sentence on the ground that the facts do not constitute an offence under section 297, of the Indian Penal Code. The second plea contained in the

* Criminal Revision No. 198 of 1911 from an order of B. Lindsay, additional Sessions Judge of Meerut, dated the 3rd of February, 1911.

(1) (1896) I. L. R. 18 All. 395.

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REVISIONAL CRIMINAL.

33 A 773=12 I. C. 300=8 A. L. J. 927=12 Cr. L. J. 532.

petition of revision was not pressed. The facts found are that the accused went to a grove in Sindhauli to demarcate a certain share in the grove which had been purchased by the petitioner, Ram Prasad, a Bania, who has acquired a share in the village of Sindhauli. In the course of the demarcation the petitioner had dug up certain graves, which were in this bagh, and exposed the bones of the persons buried there, in [774] spite of the remonstrances of the relations of the persons buried. The persons buried were Syeds, residents of the village of Sindhauli. There is nothing to show that the particular portion in this grove had been either by act of court or act of private parties set apart and allotted to Ram Prasad as the particular share of the grove to which he individually was entitled. We mention this to show that the question has not risen before us in this case as to what rights, if any, the residents in the village who have been in the habit of burying their dead in the grove may or may not have acquired even as against the proprietor of the portion of the land in which the grove lies. The argument before us has taken the line that Ram Prasad, the petitioner (and Bhagwan Das, his servant), being a joint owner in this grove, had not even on the facts proved, committed any trespass on the land in question. We have heard all that the learned Counsel could urge on behalf of the petitioners. No precedent was cited to us in support of the contention that a person who enters upon land belonging to himself with the intention of doing a wrongful act to a joint owner does not commit trespass. We know of no authority which carries the case so far as this. It appears to us that a joint owner of land who enters upon the land with the intention or knowledge that he was about to do an act which was wrongful to his fellow owners, does commit trespass. We are not in any way concerned with what is known in the Penal Code as a criminal trespass. That is a separate form of trespass which has its own express definition. One of the Judges of this Bench had to consider the case on a previous occasion, namely, *Queen-Empress* v. *Subhan* (1), in which a person went upon a property with the knowledge of the owner and apparently with his wish that certain graves should be ploughed. The case is, of course, not exactly in point, but it was there held that trespass could be committed on the land entered upon with the knowledge and consent of the owner. We find no reason to interfere with the view taken by the learned Judge of the court below, and we dismiss this petition.

Application rejected.

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33 A. 775 (=13 I. C. 922=13 Cr. L. J. 170).

[775] REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

EMPEROR *v.* MURLI SINGH.*

[15th June, 1911.]

Criminal Procedure Code, section 107—Security to keep the peace—Circumstances in which the performance of religious ceremonies may amount to a wrongful act likely to occasion a breach of the peace.

* Criminal Revision No. 214 of 1911, from an order of F. U. Allen, District Magistrate of Bareilly, dated the 31st of March, 1911.

(1) (1896) I. L. R. 18 All. 395.

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REVISIONAL CRIMINAL.

33 A. 775=13 I. C. 922 =13 Cr. L. J. 170.

Held that persons who performed religious ceremonies in a place not set apart for the purpose and where no such ceremonies had been performed before, and who did so with the deliberate intention of triumphing over, insulting, and wounding the religious feeling of their neighbours, committed a wrongful act and one which might probably occasion a breach of the peace or disturb the public tranquillity within the meaning of section 107 of the Code of Criminal Procedure.

THE facts of this case were briefly as follows :—

Certain Muhammadans, residents of the Kathgarh mohalla of the city of Bareilly took exception to the performance, in the house of one Bajrang Das in the said mohalla, of certain religious rites or ceremonies accompanied by the blowing of a conch. A prosecution was instituted against Bajrang Das for an offence under section 298 of the Indian Penal Code, but he was acquitted by the Sessions Court. Some Hindus of the neighbourhood thereafter proceeded to perform ceremonies of some kind involving the blowing of a conch in a grove or orchard near the house of Bajrang Das. This innovation was strongly resented by the Muhammadans who lived near, and the police authorities found that there was a serious danger of a breach of the peace. Proceedings under section 107 of the Code of Criminal Procedure were taken against both parties, which resulted in the Muhammadans being discharged, and in five Hindus being bound over to keep the peace for a period of one year. The Hindus appealed to the District Magistrate, who set aside the order, except as against one man, Murli Singh, who was found to be the man in possession of the grove or orchard in which the obnoxious proceedings had taken place. Murli Singh applied in revision to the High Court.

Mr. *D. R. Sawhny*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

[776] PIGGOTT, J.—This is an application in revision against an order of the District Magistrate of Bareilly, which had the effect of confirming an order passed by a Subordinate Magistrate whereby the applicant was bound over under section 107 of the Criminal Procedure Code to keep the peace for one year. The facts found are simple. Some months previous to the institution of the present proceeding certain Muhammadan residents of the Kathgarh mohalla of Bareilly city took exception to the performance in the house of one Bajrang Das in the said mohalla of certain religious rites or ceremonies accompanied by the blowing of a conch. A prosecution was instituted against Bajrang Das for an offence under section 298 of the Indian Penal Code, which resulted in his acquittal by the Sessions Court. Some Hindus of the neighbourhood, not satisfied with the victory thus gained, proceeded further and began to perform ceremonies of same sort involving the blowing of a conch in a grove or orchard situated near the house of Bajrang Das. This innovation was strongly resented by the Muhammadans of the neighbourhood and the police authorities found that there was serious danger of a breach of the peace. Proceedings were instituted against both parties, that is to say, against the Hindus and Muhammadans both ; but the Joint Magistrate came to the conclusion that the Muhammadans before him had done nothing to justify their being bound down to keep the peace. He accordingly discharged them and bound over five Hindus for a period of one year. The latter appealed to the District Magistrate, who found on the evidence that it was not proved as regards four out of the five appellants before him that they had been guilty in the past of any such conduct as would justify him in inferring

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33 A. 775=13
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that they personally were likely to do any wrongful act that might probably occasion a breach of the peace or disturb public tranquillity. He accordingly set aside the order passed by the first court as against these four persons. He held that Murli Singh, who was admitted before him to be in possession of the grove or orchard in which the obnoxious proceedings had taken place, was a proper subject for the order passed by the Joint Magistrate. I have to consider in the first place whether the blowing of a conch in the grove or orchard under the circumstances [777] found by the lower court was or was not a wrongful act. The blowing of a conch in a public place for one's personal amusement, or with any other lawful and innocent motive, and without any intention of thereby annoying or hurting the religious feelings of any other persons, is not a wrongful act. The blowing of a conch in connection with ceremonial acts of worship, in accordance with established usage, in a place fixed for the occasional or periodical performance of such ceremonies or worship, will not as a rule be a wrongful act, even though there may be persons within hearing of the sound who find their religious feelings hurt in consequence. In the present case I take it from the findings before me that certain Hindus of Bareilly commenced to perform ceremonies involving the blowing of a conch in a place in no way set apart for the purpose, and where no such ceremonies had hitherto been performed, and that they did it with the deliberate intention of triumphing over insulting and wounding the religious feelings of their Muhammadan neighbours. I hold that this was a wrongful act. As there can be no doubt that it was also an act likely to provoke a breach of the peace and disturb the public tranquillity, any persons found to be responsible for such conduct were proper subjects for an order under section 107, Criminal Procedure Code. As regards Murli Singh personally, the view taken by the District Magistrate is that, whoever may or may not have blown the conch, and whoever may or may not have been present on any particular occasion when it was blown, the circumstances of the case as a whole just fied the inference that the objectionable proceedings could not have been started, and could not have been continued in that grove or orchard, without conduct amounting to abetment of the said proceedings on the part of the person in possession of the grove. This is in my opinion a conclusion which it was fairly open to the District Magistrate to arrive at on the facts before him, and I decline to interfere with it in revision.

I have already said enough to dispose of Murli Singh's application with reference to the grounds of revision set forth in his petition to this Court. I am disposed however to add a few words regarding matters which were made the subject of a [778] considerable amount of discussion before me at the hearing. Murli Singh is a jail darogah in the public service in these Provinces; and though he was on leave at Bareilly at the time of the proceedings now before me in revision. I may take it that he either has returned, or is likely very shortly to return, to his duties at a station a considerable distance from Bareilly. It has been suggested before me that as matters stand it is difficult to see what practical purpose is served by the existence of the security bond which Murli Singh has furnished in this case, or what effect could be given to the provisions of that bond in the event of disturbance occurring at Bareilly (no matter what the immediate cause of the disturbance might be) while Murli Singh was engaged in watching over the comfort and security of the convicts in a jail two hundred miles distant. Exception was also taken to the actual

finding of the District Magistrate regarding Murli Singh's possession over the grove in question, and it was pointed out to me that in the order of the Joint Magistrate and in the evidence upon which it proceeds, the place in question is spoken of as the grove of Jai Singh; also that a Hindu of that name was one of the persons who appeared along with Murli Singh as appellant before the District Magistrate. In his petition addressed to this Court Murli Singh does not suggest any such line of argument as this; and in any case I cannot permit myself in revision to go behind the express finding of the District Magistrate that the possession of Murli Singh over this grove was not merely a fact, but an admitted fact, in his Court. This is no case of a clerical error, for the District Magistrate's order shows clearly that he understood the admission as to possession to be made in respect of Murli Singh, a jail darogah on leave. The actual result of the admission was that the District Magistrate holds a security bond as to the practical utility of which there certainly seems room for doubt, while the man Jai Singh, who was spoken of as the owner of the grove or orchard in the first Court, and who appears to be a permanent resident of Bareilly, has been discharged without security. I do not feel it incumbent on me to take upon myself duties and responsibilities which section 125, Criminal Procedure Code, lays upon the District Magistrate. I have thought the matters above referred [779] to worth nothing for the information of the said Magistrate or his successor in office. The order against Murli Singh, at the time when it was passed, was in my opinion a proper and legal order upon the facts found, and I shall not interfere with it. The application is dismissed.

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REVISIONAL CRIMINAL.

33 A. 775=13 I. C. 922=13 Cr. L. J. 170.

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33 A. 779 (=8 A. L. J. 931=12 I.C. 112.)

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Tudball.

BAHORAN UPADHYA (*Defendant*) *v.* UTTAMGIR (*Plaintiff*) *

[16th June, 1911.]

Act (Local) No. II of 1901 (Agra Tenancy Act), section 21—Occupancy holding—Mortgage—Suit by mortgagor to recover possession—Illegal contract—Restitution of benefit.

Held that the mortgagor of an occupancy holding who has put the mortgagee in possession cannot recover possession upon the ground merely that the mortgage is void under the provisions of the Agra Tenancy Act, 1901, without repaying to the mortgagee the money which he has received from him. *Fasih-ud-din* v *Karamat-ullah* (1) followed.

[Dist. 17 I. C. 522; 25 I. C. 182; 40 All. 228; Ref. 32 I. C. 593; 78 I.C. 1022; 43 I.C. 514.]

THIS appeal arises out of a suit brought by the plaintiff respondent for possession of an occupancy holding which he mortgaged to the defendant appellant under a mortgage deed, dated the 5th of August, 1905, by which a principal sum of Rs. 499 was secured. The grounds on which the claim was put forward were, that the land mortgaged was the cultivatory holding of the plaintiff; that under the provisions of the Agra Tenancy Act the mortgage of such land was void; that there was no consideration for the mortgage, and that it was nominal and fictitious. It is admitted that under the mortgage the mortgagee obtained possession of the property and that he is still in possession. The court of first

*Appeal No. 95 of 1910 under section 10 of the Letters Patent.

(1) Weekly Notes, 1888, p. 128.

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33 A. 779=8 A. L. J 931 =12 I. C. 112.

instance decreed the suit simply on the ground that the property mortgaged was the cultivatory holding of the plaintiff, and the mortgage of it was void. The defendant appealed to the lower appellate court and raised two contentions; first, that the holding was a fixed rate tenancy, and secondly, that the court of first instance should have ordered the plaintiff to refund the mortgage money before obtaining back possession of the property. On the first point the lower appellate court found that the tenancy was an occupancy holding. On the second point it [780] held that, as a mortgage of such a holding was prohibited by section 21 of the Agra Tenancy Act, the plaintiff was entitled to recover possession without refunding the money which he had obtained from mortgagee. It accordingly dismissed the appeal. A second appeal was preferred to this Court but it was dismissed by the learned Judge before whom it came on for hearing.

Mr. *M. L. Agarwala*, for the appellant.

Babu *Sital Prasad Ghosh*, for the respondent.

BANERJI and TUDBALL, JJ:—This appeal arises out of a suit brought by the plaintiff respondent for possession of an occupancy holding which he mortgaged to the defendant appellant under a mortgage deed, dated the 5th of August, 1905, by which a principal sum of Rs. 499 was secured. The grounds on which the claim was put forward were, that the land mortgaged was the cultivatory holding of the plaintiff; that under the provisions of the Agra Tenancy Act the mortgage of such land was void; that there was no consideration for the mortgage, and that it was nominal and fictitious. It is admitted that under the mortgage the mortgagee obtained possession of the property and that he is still in possession. The court of first instance decreed the suit simply on the ground that the property mortgaged was the cultivatory holding of the plaintiff, and the mortgage of it was void. The defendant appealed to the lower appellate court and raised two contentions; first, that the holding was a fixed rate tenancy, and secondly, that the court of first instance should have ordered the plaintiff to refund the mortgage money before obtaining back possession of the property. On the first point the lower appellate court found that the tenancy was an occupancy holding; on the second point it held that, as a mortgage of such a holding was prohibited by section 21 of the Agra Tenancy Act, the plaintiff was entitled to recover possession without refunding the money which he had obtained from the mortgagee. It accordingly dismissed the appeal. A second appeal was preferred to this court, but it was dismissed by the learned Judge before whom it came on for hearing. From the decision of the learned Judge of this court this appeal has been preferred under the Letters Patent, and the contention raised before us is that the decree in the plaintiff's favour should have been made conditional upon his restoring [781] to the defendants the benefit which he, the plaintiff, had obtained under the mortgage, that is, upon his paying back the mortgage money. We are of opinion that this contention is well founded. If as a matter of fact, the plaintiff received from the defendant the amount of the mortgage, he should not be allowed to recover possession of the mortgaged property unless he restores to the defendant the benefit which he, the plaintiff, derived from the mortgage. It is true that under the Agra Tenancy Act the mortgage of a cultivatory holding is void, but the person who made the mortgage cannot, on principles of equity, be allowed to take back the property unless he put the defendant mortgagee into the position

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in which he was before the mortgage and restore to him the money which he received from him. This was so held in *Fasih-ud-din* v. *Karamat-ullah* (1). That was a case in which the proprietary rights and interests in a mahal, purporting to include the vendor's interest in his sir land, were sold, and the vendor expressly stipulated that he would not claim occupancy rights in the sir. He subsequently sued for possession of the sir as an exproprietary tenant. It was held that as the plaintiff asked for possession without tendering that portion of the purchase money which was the price of the interest in the sir it would be violating every principle of equity and good conscience to decree the claim. It was contended in that case that the appellant was entitled to a decree for possession without offer or tender or payment of the portion of the purchase money given for the sir. The learned Judges, EDGE, C. J., and BURKITT, J., observed :—"We are here administering the law and are bound to administer that law as far as we can according to equity and good conscience, and it seems to us that if we were to pass a decree in favour of the plaintiff in this case, we would be violating every principle of equity and good conscience by allowing a man by means of fraud to keep in his pocket the purchase money which he had obtained from his vendee and get back by the assistance of the court possession of the property which that purchase money represented. In *Bhikham Singh* v. *Har Prasad* (2), which was the converse of the case last mentioned, the principle laid down in that case was approved of. In Second Appeal No. 200 [782] of 1911, decided by one of us on the 8th of April last, the facts were exactly similar to the facts of the present case. It was held that the plaintiff was not entitled to recover possession without paying the money which he had received from the defendant as consideration for the mortgage made by him. A similar view was held by KARAMAT HUSAIN, J., in Second Appeal No. 1030 of 1909, decided on the 10th of June, 1910. The principle of the ruling of the Bombay High Court in *Jeji Bhai Laldas* v. *Nagji Gulab* (3), is also to the same effect. The learned vakil for the respondent has referred us to the decision of this court in *Madan Lal* v. *Muhammad Ali Nasir Khan* (4). That case, in our opinion, is perfectly distinguishable from the present case. There the tenant of the occupancy holding in question did not make a voluntary transfer of it, but his rights were sold by auction in execution of a decree and were purchased by his wife who subsequently transferred them to the defendant. This transfer was in violation of the provisions of the Tenancy Act and did not confer any title on the auction purchaser. The tenant subsequently relinquished his holding, and thereupon the landholder brought a suit to recover possession of the land from the transferee. The plaintiff in that case had derived no benefit, of which he could be held liable to make restitution. That case, therefore, has no bearing upon the question before us. In our judgment, if the plaintiff received the mortgage money from the defendant, he is not entitled to recover possession of the property mortgaged by him from the mortgagee unless he restores to the mortgagee the mortgage money received by him. On the principle that he who seeks equity must do equity, he cannot be allowed to retain the mortgage money in his own hands and at the same time to take back the property. The case of the mortgagee under similar circumstances seeking to recover possession from the mortgagor is different. This was pointed

(1) Weekly Notes, 1888, p 128.
(2) (1896) I. L. R. 19 All. 35.
(3) (1909) 11 Bom. L. R. 698.
(4) Weekly Notes, 1906, p. 182.

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out in *Bhikham Singh* v. *Har Prasad* (1) and in *Dipan Rai* v. *Ram Khelawan Rai* (2). In the present case, however, the plaintiff alleged that he had not received any part of the mortgage money. This point was not considered by the court below and no finding was arrived at in regard to it. We must, [783] therefore, obtain from the court below a finding on the following issue, which we refer to that court under the provisions of order XLI, rule 25, of the Code of Civil Procedure:—

Was the amount secured by the mortgage of the 5th of August, 1905, or any part thereof, paid by the defendant to the plaintiff?

The Court will take such additional evidence relevant to the above issue as may be tendered by the parties. On receipt of the finding ten days will be allowed for filing objections.

Issue referred.

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FULL BENCH.

Before The Hon'ble Mr. H. G. Richards, Chief Justice, Mr. Justice Banerji and Mr. Justice Chamier.

MUHAMMAD MUZAMIL-ULLAH KHAN (*Defendant*) v. MIHU LAL AND ANOTHER (*Plaintiffs*) AND CHOKHEY SINGH AND OTHERS (*Defendants*).*

[17th June, 1911.]

Hindu law—Joint family property—Mortgage by father alone—Subsequent sale by father to a third party - Suit by mortgagees for sale—Competence of purchaser to rely on invalidity of the mortgage.

The head of a joint Hindu family mortgaged in 1886 property belonging to the joint family, but neither for legal necessity nor to pay an antecedent debt. In 1898 the mortgagor sold the same property to a third person. The purchaser remained in possession for more than twelve years, when the mortgagees instituted a suit for sale on their mortgage,

Held by RICHARDS, C. J., and BANERJI, J., that in view of the fact that the purchaser had acquired a title to the property by adverse possession as against all the members of the family, it was open to him, notwithstanding that his title was originally acquired from the mortgagor alone, to set up as a defence the invalidity of the mortgage.

Per CHAMIER, J., according to the ruling of the majority of the Full Bench in *Chandradeo* v. *Mata Prasad* (3) the mortgage made by the father alone was void, and, this being so, it was open to the purchaser, who was in possession of the property, to rely upon its invalidity, whatever the weakness of his own title might be.

Chandradeo v. *Mata Prasad* (3) *Balgobind Das, Narain Lal* (4), *Brijbasi Lal* v. *Gopal Das* (5), *Kali Shankar* v *Nawab Singh* (6) and *Bhagirathi Misr* v. *Sheobhik* (7) referred to.

[Dist. 35 All. 368; Ref. 62 I. C. 813=63 I. C. 40; 42 All. 50; 65 I. C. 107; 45 All. 692; Fol: 74 I. C. 325=21 A. L. J. 610.]

[784] THIS appeal, coming first before STANLEY, C. J., and GRIFFIN, J., was sent, by order of the Chief Justice, to a Bench of three

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* Second Appeal No. 712 of 1910 from a decree of D. R. Lyle, District Judge of Aligarh, dated the 30th of May, 1910, reversing a decree of Jagat Narain, Additional Subordinate Judge of Aligarh, dated the 2nd of March, 1910.

(1) (1896) I. L. R 19 All. 35.
(2) (1910) I. L. R. 32 All 383.
(3) (1909) I. L. R 31 All. 176.
(4) (1893) I. L. R. 15 All. 339.
(5) Weekly Notes, 1908, p. 200.
(6) (1909) I L. R. 31 All 507.
(7) (1898) I. L. R. 20 All. 325.

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Judges. The facts of the case appear from the following order, as well as from the judgments of the Full Bench.

"The question raised in this appeal is of such importance as to justify us in recommending that the appeal be laid before a larger Bench. Property in two villages Kamrahwa and Abhaipur was hypothecated by an instrument of the 21st of July, 1886, by one Padam Singh in favour of the plaintiffs respondents, Lala Mithu Lal and Lala Hulas Rai. Padam Singh is dead, and his sons and grandsons are in possession and enjoyment of the village of Abhaipur. The other village, Kamrahwa, was purchased by the defendant appellant from Padam Singh in the year 1888. The plaintiffs instituted the suit out of which this appeal has arisen to enforce payment of their mortgage, and among the defences set up by the defendants, first party, was the plea that the bond was not executed for legal necessity. The Court of first instance held that no legal necessity for the mortgage was proved and dismissed the plaintiffs' suit *in toto*. The plaintiffs appealed, but in the course of the appeal they gave up their claim against Abhaipur and pressed their claim against the village of Kamrahwa only. The lower appellate court held that the question of legal necessity did not arise so far as regards the property in Kamrahwa and gave a decree to the plaintiffs to be realised out of the property in Kamrahwa. From this decree the present appeal has been preferred. The principal grounds of appeal being (1) that the Court below was in error in holding that the plea of want of legal necessity was not open to the appellant; (2) that the Court below having found that there was no legal necessity, it should not have passed a decree without a finding on the question of legal necessity; (3) that Kamrahwa and Abhaipur having been both mortgaged to secure the plaintiffs' debt, it was not open to the plaintiffs to give up their claim against one of the villages and so throw the entire burden on the village purchased by the appellant alone. An issue was referred by this Court to the lower appellate court as to the existence of legal necessity for the loan. The finding on that issue is in the negative. It appears to us that an important question is involved in this appeal, that is, whether a transferee from the head of a Hindu family who had previously mortgaged joint family property without legal necessity, stands in a better position than his transferor, and can set up the case that a prior mortgage of the property transferred to him was made without legal necessity. We accordingly refer the matter to the Chief Justice with the recommendation that the appeal be laid before a larger Bench."

Mr. *A. E. Ryves* (with him The Hon'ble *Nawab Muhammad Abdul Majid* and Maulvi *Muhammad Ishaq*), for the appellant.

Dr. *Satish Chandra Banerji* (with him Munshi *Gulzari Lal*) for the respondents.

RICHARDS, C. J.—This appeal arises out of a suit to enforce a mortgage, dated the 21st of July, 1886. The mortgage comprised [785] property in a village called Kamrahwa and also in a village called Abhaipur Rampur. The mortgage was made by one Padam Singh, who was a member of a joint Hindu family. In the year 1888, the same Padam Singh sold the village of Kamrahwa to the defendant appellant. Padam Singh is long since dead. His sons and grandsons are in possession of the village of Abhaipur, while the defendants have ever since the sale of Kamrahwa been in possession of the same. When the suit was instituted, the plaintiffs sought to sell both villages; but, it having been found that there was no legal necessity for the mortgage, the plaintiffs abandoned their claim against Abhaipur and sought to realize the amount of their mortgage entirely out of the village of Kamrahwa. The court of first instance dismissed the suit. The lower appellate court decreed the suit against the village of Kamrahwa. It has to be admitted, having regard to the authorities, that Padam Singh, as a member of the joint Hindu family and in the absence of necessity, was incompetent to make the mortgage of the 21st of July, 1886, in favour of the plaintiffs. It is, however, contended on behalf of the plaintiffs that the defendants' title has the same flaw, and that they ought not to be allowed to set up the fact that Padam Singh was incapable of making the mortgage. It seems to me that the

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point is concluded by authority. In the case of *Balagobind Das* v. *Narain Lal* (1) the facts were in principle very similar. A son, who, just as in the present case, was a member of a joint Hindu family, mortgaged his undivided interest. Subsequently simple money decrees were obtained against him. His interest was put up for sale on foot of these simple money decrees and purchased by the father. It was held in a suit to enforce the mortgage that the father was entitled to set up the defence that the mortgage was invalid, notwithstanding that he himself was the purchaser at the auction sale of the son's interest. At page 351 of the report their Lordships say:—"In the present case the interest has passed to Naunidh (the father) not by survivorship but by purchases at sales in execution of decrees. Although it is not the same interest as he would acquire by survivorship, it is sufficient to entitle him to set up the invalidity of [786] the mortgage deed." It must be remembered in considering the present case that, although originally the defendants acquired their state by virtue of a deed of sale from Padam Singh, they haue long since by limitation acquired title not only against Padam Singh but against the rest of the joint family. In other words the defendants now represent not only the interest of Padam Singh in the village of Kamrahwa but also the interests of the rest of the joint family. The case is in principle just the same as if the sale to the defendants had not been by Padam Singh alone but by the whole joint family. See *Brijbasi Lal* v. *Gopal Das* (2). I would allow the appeal.

BANERJI, J.—This appeal arises in a suit brought by the plaintiffs respondents for sale upon a mortgage executed in 1886 by Padam Singh, deceased, in respect of shares in two villages, namely, Kamrahwa and Abhaipur Rampur. The village Kamrahwa was sold by him to the defendant appellant in 1888. The defendants to the suit were the son and grandsons of Padam Singh and the subsequent transferee of Kamrahwa. The son and grandsons of Padam Singh contended that the mortgage was not made for family necessity. The Court of first instance found that there was no necessity for the mortgage of the family property and totally dismissed the suit. The plaintiffs appealed, but in the lower appellate court they abandoned their claim in respect of the village Abhaipur Rampur and pressed it in respect of the village Kamrahwa only. The learned Judge held that so far as that property was concerned the question of legal necessity did not arise, and accordingly passed a decree for sale of the village Kamrahwa. From this decree the present appeal was preferred. It has been found by the lower appellate court on an issue referred to it that there was no family necessity for the loan. The question we have to determine is whether it is open to the transferee from the mortgagor to question the validity of the mortgage on the ground that it was not made for family necessity.

In view of the authorities and of the circumstances of this case the question should, I think, be answered in the affirmative. It was held by a majority of the Full Bench in *Chandradeo* [787] *Singh* v. *Mata Prasad* (3) that the father in a joint Hindu family governed by the Mitakshara law cannot execute a mortgage of the joint family property except for family necessity or to meet an antecedent debt, and the mortgage is invalid even in respect of the father's share in the family property. See

(1) (1893) I. L. R. 15 All. 339.
(2) Weekly Notes, 1908, p. 200.
(3) (1909) I. L. R. 31 All. 176.

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also *Kali Shankar* v. *Nawab Singh* (1). In *Balgobind Das* v. *Narain Lal* (2) their Lordships of the Privy Council held that the mortgage by a co-parcener in joint family property of his undivided share without the consent of his co-sharers is invalid and that the invalidity of the mortgage could be set up by the purchaser at auction of the mortgagor's interests. Following this ruling, it was held in *Bhagirathi Misr* v. *Sheobhik* (3) that a purchaser from one co-sharer in joint family property was entitled to contest the validity of the mortgage made by another co-sharer of his undivided share. In *Brijbasi Lal* v. *Gopal Das* (4) a mortgage was made by a member of a joint family of a portion of the family property. It was found that the mortgage was not made for the benefit of the family, and that it was made without the consent of the co-parceners. It was held that a purchaser from the co-parcenary body was not precluded from questioning the validity of the mortgage. This decision was upheld in appeal under the Letters Patent (L. P. A. No. 74 of 1908, decided on the 26th March, 1909). These cases are authorities for the proposition that a transferee of joint family property is entitled to contest the validity of a transfer made by one of the members of the family. In the present case it has been found that the mortgage made by Padam Singh was not made for family necessity, that his son did not assent to it and that it is invalid as against his son and grandsons. No question arises in this case as to whether the mortgage by Padam Singh was void or voidable, inasmuch as it was not a mortgage of his undivided share of the family property. It, being a mortgage without family necessity, is invalid according to the ruling of the Full Bench in *Chandradeo Singh* v. *Mata Prasad*, referred to above. In view of the authorities mentioned above, it is open to a transferee of the property to question the validity of such a [788] mortgage. We have now to consider whether a transferee from the mortgagor himself can do so. Ordinarily he cannot. A mortgagor cannot be allowed to question the validity of his own mortgage and thereby derogate from his own grant. A transferee from him who stands in his shoes has no higher right. In the present case, however, the appellant must be deemed to be a transferee not only from Padam Singh but from the whole of the joint family. The transfer to him was made more than twelve years ago and he has been allowed to remain in possession. It must, therefore, be presumed that the sale to him was for family necessity and with the assent of the other members. It is, therefore, a valid sale, and the appellant represents the other members of the family also. As such, he can set up the invalidity of the plaintiff's mortgage and is not estopped from doing so. For the above reasons I agree in allowing the appeal.

CHAMIER, J. —The plaintiffs in the suit out of which this appeal arises having abandoned their claim against the village Abhaipur Rampur, the facts may be stated thus :—

Padam Singh, who with his son and grandson constituted a joint Hindu family, mortgaged a village called Kamrahwa belonging to the family to the plaintiffs Two years later he sold the village to the defendant appellant. In the present suit the plaintiffs seek to enforce the mortgage against the village. The defendant appellant pleads that the mortgage is invalid as it was not made for family necessity. On an issue remitted to the lower appellate court, it has been found that there was no family

(1) (1909) I. L. R. 31 All 507.
(2) (1893) I. L. R. 15 All. 339.
(3) (1898) I. L. R. 20 All. 325.
(4) Weekly Notes, 1908, p. 200.

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necessity for the mortgage. The question for decision is, whether it is open to the defendant appellant to challenge the validity of the mortgage on the ground stated. None of the cases cited seems to me to be exactly in point. In *Balgobind* v. *Narain Lal* (1) a son in a joint family mortgaged his share in the family property. Subsequently the son's interest in the property was put up for sale in execution of a money decree obtained against him and was purchased by the father, the only other member of the joint family. It was found that the father had no notice of the mortgage at the time of his purchase. Their Lordships of the Privy Council held that the interest acquired [789] by the father was sufficient to enable him to set up the invalidity of the mortgage. There is a clear distinction between that case and the one before us. There the father who challenged the mortgage had acquired the rights of the only other member of the family by a purchase which was open to no objection, for it is settled law that the undivided interest of a member of a joint family in the family property can be sold, and the purchaser can, if necessary, work out his rights by partition. Moreover, the father had no notice of the mortgage. In the present case the question whether the defendant appellant had notice of the mortgage at the date of his purchase, has not been gone into, but, apart from that, it is to be noticed that he claims under a transfer which seems to be invalid for the same reason that the mortgage to the plaintiff is invalid.

The case of *Brijbasi Lal* v. *Gopal Das* (2) is also distinguishable, for the person who set up the invalidity of the mortgage in that case was a person who had acquired title by means of a transfer made by all the members of the family. He was in as good a position as the father in the case of *Balgobind* v. *Narain Lal*. In the case of *Bhagirathi Misr* v. *Sheobhik* (3) the plaintiff claimed title under a sale of family property made by a father in a joint family and under a purchase at auction made in execution of a decree passed on a mortgage made by the father. The defendant claimed under a mortgage of the property made by the son, the only other member of the joint family. It seems to have been assumed that the sale and mortgage made by the father were good. If that assumption was correct, the plaintiff was no doubt entitled to a declaration that the mortgage made by the son was invalid.

In the first and second cases, and in the third also, if the assumption made was correct, the persons who set up the invalidity of the mortgage claimed the property under a valid transfer. To use the words of their Lordships of the Privy Council, they had acquired an interest in the property sufficient to enable them to challenge the mortgage. If the mortgage in question in these cases were absolutely void, there was no necessity to consider whether the persons who challenged them [790] and who were in possession of the property had acquired a sufficient interest or not. A person in possession of property can always resist a claim against the property on the ground that no right or title has passed to the claimant or that an assignment to the claimant was made to defraud the person in possession or was illegal or void or opposed to public policy, but where an assignment is sufficient in law to pass title to the claimant and is only voidable at the instance of a third party, the person in possession cannot, as a rule, challenge the validity of the assignment unless a trial of its validity is necessary for his protection against the claim of another

(1) (1893) I. L. R. 15 All. 389.
(2) Weekly Notes, 1908, p. 200.
(3) (1898) I. L. R. 20 All. 325.

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person. If the mortgage to the plaintiffs in the present case was not void altogether, but only voidable at the instance of the son and grandsons, it seems to me extremely doubtful whether the defendant appellant, claiming under a sale by the father alone, which was apparently in itself voidable, if not void, can set up the invalidity of the mortgage. The language used by their Lordships of the Privy Council in the case of *Balgobind* v. *Narain Lal*, suggests that in their opinion the mortgage by the son was voidable only and not absolutely void. In that view it seems to me doubtful whether the defendant appellant who claims under the father alone is entitled to set up the invalidity of the mortgage. He may possibly be regarded as occupying a stronger position than that of a transferee from the father alone because he has held possession of the property adversely to the whole family since 1888. I need not consider this point, for I feel bound to hold that the appeal should be allowed on another ground. The majority of the Full Bench in the case of *Chandradeo Singh* v. *Mata Prasad* (1) seem to have held that a father in a joint Hindu family governed by the Mitakshara cannot execute a mortgage of the joint family property except for family necessity or to meet an antecedent debt, and that the mortgage is in any other circumstances invalid even in respect of the father's share. I prefer the opinion of the minority in that case. The question is, I understand, being taken up to the Privy Council in another case. Meanwhile we are bound by the opinion of the majority, and in accordance therewith I feel bound to hold that [791] the mortgage to the plaintiffs conferred no title upon them. If that is so, it follows that the defendant appellant is entitled to resist the plaintiffs' suit on the ground that the mortgage is invalid. For this reason I agree with the order proposed by the learned Chief Justice.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decree of the lower appellate court is set aside and the decree of the court of first instance restored with costs.

Appeal allowed.

33 A. 791 (=11 I. C. 269=8 A. L. J. 935).

REVISIONAL CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

MUAZZAM ALI SHAH AND ANOTHER (*Judgment-debtors*) *v.* CHUNNI LAL (*Decree-holder*).*

[19th June, 1911.]

Act (Local) No. III of 1899 *(Court of Wards Act), sections* 16, 19 *and* 49*—Decree on contract made while a debtor was ward of Court—Collector not made a party—Execution of decree.*

C obtained a decree for money against *M* based upon a contract entered into by the latter after he had become a ward of the Court of Wards. In execution of the decree certain movable property belonging to *M* was attached. Upon objection taken that a certificate that the claim was notified under section 16 of the Court of Wards Act, 1899, should be obtained from the Collector, *held*, that the decree was bad, inasmuch as the suit and proceedings in execution were a fraud upon the court, and that as soon as it was brought to the notice of the court that the judgment-debtor was a ward of court, the court should have of its own motion then and there made the Collector a party and waited for such defence as the Collector might put forward.

[Dist. 80 I. C. 650.]

* Civil Revision No. 13 of 1910.

(1) (1909) I. L. R. 31 All. 176.

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IN this case a decree for money was passed against the defendant in a suit on a contract entered into when he was a ward of Court. In execution of decree an objection was raised to the effect that under section 19 of the Court of Wards Act, 1899, the decree-holder should apply for a certificate that the claim was notified under section 16. The court below (Munsif of Meerut) overruled the objection and directed that execution should proceed.

The judgment-debtor applied in revision to the High Court.

Mr. *A. E. Ryves* and Mr. *W. Wallach*, for the applicants.

Mr. *M. L. Agarawala*, for the opposite party.

[792] KNOX and KARAMAT HUSAIN, JJ.:—One Lala Chunni Lal, who is respondent, has obtained a decree against one Syed Muazzam Ali Shah. The decree is for money due upon a contract entered into by the said Syed Muazzam Ali Shah after he had become a ward of the court. The decree-holder having obtained the decree has tried to execute it by attachment and sale of the judgment-debtor's moveable property in a certain kothi in the Meerut Cantonment. Objection was taken apparently to the effect that under section 19 of the Court of Wards Act (Act III of 1899), the decree-holder should apply for a certificate from the Collector that the claim was notified under section 16.

The Munsif of Meerut held that it was too late to take this objection, but the learned Munsif appears to have overlooked the fact that the suit and proceedings in execution are a fraud upon the Court. Under section 49 of Act III of 1899 this suit should have been brought in the name of the Collector in charge of the property and not otherwise. As soon as it was brought to the notice of the Court that the judgment-debtor was a ward of court, the Court should have of its own motion then and there made the Collector a party and waited for such defence as the Collector might put forward. The learned counsel for the decree-holder suggests that the property which he was seeking to attach was property not under the superintendence of the Court of Wards. It is difficult to conceive the existence of such property; but in any case, looking to the terms of sections 32 and 49 of Act III of 1899, we have no hesitation in saying that the order of the court below was in error. It is set aside, and the application is allowed with costs in both courts.

Application allowed.

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33 A. 793 (=11 I. C. 260=8 A. L. J. 944).

[793] APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

PHUNDAN LAL AND OTHERS (*Defendants*) *v.* ARYA PRITHI NIDHI SABHA (*Plaintiff*) AND MUSAMMAT SUBARNI AND OTHERS (PRO FORMA *Defendants*).*

[19th June, 1911.]

Hindu law—Gift in favour of "the Thakurji in his Thakurdwara"—No temple built or idol installed—Gift void for uncertainty

* Second Appeal No. 870 of 1910 from a decree of E. M. Nanavutty, Additional Judge of Bareilly, dated the 29th of March, 1910, modifying a decree of Girraj Kishore Datt, Subordinate Judge of Bareilly, dated the 29th of June, 1907.

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Held, that a dedication, not to any particular deity which was subsequently to be installed in a temple, but to "the Thakurji in his Thakurdwara," without mentioning the particular Thakurji to whom the property was dedicated, was void for uncertainty. *Bhupati Nath Smrithitirtha* v. *Ram Lal Moitra* (1), *Mohar Singh* v. *Het Singh* (2) and *Chaturbhuj* v. *Chatarjit* (3) distinguished.

[Ref. 73 I. C. 991=17 L. W. 31=46 Mad. 300=1923 M. W. N. 111.]

THE facts of this case were as follows:—

One Hulas Rai executed a deed of endowment on the 30th of May, 1903, in respect of eight shops of his in favour of Sri Thakurji, the idol to be installed in a house of his, to which the deed of endowment did not relate. He appointed himself manager and superintendent of the property. He was subsequently converted to the Arya Samaj creed and gave up the idea of his turning his house into a *thakurdwara*. Some time later he made a gift in favour of the Arya Samaj of his eight shops and two houses, in one of which he had originally intended to set up the idol. Hulas Rai had been dispossessed by certain Hindus of the locality in the meanwhile, and he brought a suit under section 9 of the Specific Relief Act for delivery of possession of the shop and the house. The suit was decreed on the 14th of July, 1905. He got possession on the 17th August, 1905, and on the 27th of August, 1905, he put up the Arya Samaj in possession. They are the plaintiffs in the suit. Hulas Rai died on the 11th of December, 1905. The plaintiffs were dispossessed by the defendants, and hence the suit. The Subordinate Judge dismissed the claim in respect of the shops, but decreed it as to the houses. The District Judge held that the house was not complete when the idol was installed, and that the idol was not installed but put in surreptitiously. He decreed the suit in its entirety.

[794] Pandit *Ramakant Malaviya* (with him Munshi *Gokul Prasad*), for the appellants.

Hulas Rai could not revoke the gift after he had once dedicated the property. The deed operated even if the installation was not complete. There was no vagueness about the expression Thakurji, it always meant the god worshipped in the family. *Mohar Singh* v. *Het Singh* (2), *Chaturbhuj* v. *Chatarjit* (3), *Bhupati Nath Smrithitirtha* v. *Ram Lal Moitra* (1).

Munshi *Ishwar Saran* (with him Dr. *Satish Chandra Banerji*), for the respondents.

Having given up the old faith it became impossible for him to set up the idol. The object of the gift having failed, the property reverted back to the donor. Tudor on Charities, pp. 105, 106.

RICHARDS, C. J., and BANERJI, J.—The suit out of which this appeal has arisen was brought by the plaintiff, who is the President of the Arya Samaj at Agra, for possession of two houses and eight shops, which originally belonged to one Hulas Rai. On the 30th of May, 1903, Hulas Rai executed a document by which he made a gift of the eight shops in favour of "Sri Thakurji of the thakurdwara, called after his name, situated in Kasba Puranpur." Subsequently he became a convert to the doctrines of the Arya Samaj. On the 4th of February, 1905, he made a gift of two houses and the shops to the Samaj. He died on the 11th of December, 1905, and after his death disputes arose about the possession of the property. Finally the plaintiff brought the suit which has given rise to this appeal. It has been found that at the time of the execution of the document of the 30th May, 1903, no thakurdwara was in existence, and of course

(1) (1909) I. L. R. 37 Cal. 128.
(2) (1910) I. L. R. 32 All. 387.
(3) (1911) I. L. R. 33 All. 253.

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there was no Thakurji in the thakurdwara. It is common ground that during his life-time Hulas Rai did not build any thakurdwara, or temple, though, no doubt, he was building houses with the intention of converting one of them into a thakurdwara, prior to his conversion. The question is, whether, under these circumstances, the gift which he made on the 30th of May, 1903, can operate as a complete and effectual gift of the eight shops and can prevail as against the subsequent document of the 4th of February, 1905. [795] If the dedication was complete, it is clear that he could not revoke it and make another gift. We are of opinion that in the present instance the first dedication was not valid. It was not a dedication to any particular deity which was subsequently to be installed in a temple. It was a dedication to the Thakuriji in his thakurdwara without mentioning the Thakurji to whom the property was dedicated. As we have already said, there was no Thakurji and no thakurdwara, therefore the dedication was bad on the ground of uncertainty. This case is distinguishable from the case of *Bhupati Nath Smrithitirtha* v. *Ram Lal Moitra* (1), *Mohar Singh* v. *Het Singh* (2) and *Chatarbhuj* v. *Chatarjit* (3). In all those cases the gift was in favour of the deity named in the deed of dedication and it was held that although the image of the deity had not been installed and consecrated, the endowment was nevertheless valid. We dismiss the appeal with costs.

Appeal dismissed.

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33 A. 795 (=8 A. L. J. 1009=11 I. C. 268).

APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

BHUP (*Defendant*) v. RAM LAL (*Plaintiff.**)

[20th June, 1911.]

Act (Local) No. II of 1901 (Agra Tenancy Act) sections 95, 167—Civil and Revenue Courts—Jurisdiction—Dispute between rival claimants to a tenancy.

Section 95 of the Tenancy Act was not intended to apply to the case of disputes between rival claimants to a tenancy. It was intended to apply to questions arising between the landlord on the one side and the tenant on the other. *Prima facie* the Civil Court is the proper court to try all questions, and it is only when suits are expressly excluded from its cognizance that its jurisdiction is ousted. *Kali Charan* v. *Musammat Ulmi* (4) referred to.

[Fol. 15 I. C. 33; 29 I. C. 568; Ref. 35 All. 14; 60 I. C. 613; 79 I. C. 367=21 A. L. J. 899; 78 I. C. 1008.]

THIS was an appeal under section 10 of the Letters Patent from a judgment of KARAMAT HUSAIN, J.

The facts of the case are stated in the judgment under appeal, which was as follows:—

"The admitted facts of the case are, that Mawashi was an occupancy tenant and that on his death the names of his widow, Musammat Sarupi, and Bhupan, alleged to be the adopted son of Mawashi, were entered as occupancy tenants. Ram Lal applied that his name be entered as the occupancy tenant for he was the adopted son of Mawashi. The zamindar was made a party to this application and opposed it. The Court of Revenue came to the conclusion that Bhupan was [796] the adopted son of

*Appeal No. 27 of 1911 under section 10 of the Letters Patent.

(1) (1909) I. L. R. 37 Cal. 128.
(2) (1910) I. L. R. 32 All. 387.
(3) (1911) I. L. R. 33 All. 253.
(4) (1910) 7 A. L. J. 658.

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Mawashi and that he was in possession of the holding. On these findings it rejected Ram Lal's application. Ram Lal then instituted the suit which has given rise to this appeal, on the allegation that he was the adopted son of Mawashi, and that he had been in joint cultivation of the holding with Mawashi until his death. He sought two reliefs :—that it might be declared that he was in lawful possession, as the heir of Mawashi, over his occupancy holding, and (2) that in consequence of the Revenue Court's order the plaintiff be held to be out of possession and possession might be awarded to him. The suit was resisted by Bhupan, who alleged that he and not the plaintiff was the adopted son of Mawashi ; that he was in possession as the heir of Mawashi, and that the suit was not cognizable by a Civil Court.

"The court of first instance held that the suit was cognizable by a Civil Court, but dismissed it on the ground that the plaintiff was not the adopted son of Mawashi. The plaintiff appealed to the lower appellate court, and the last plea in the memorandum of appeal was that the plaintiff was the nearest male collateral of the deceased ; was joint with the deceased, and was, therefore, under the Tenancy Act, entitled to succeed Mawashi. The lower appellate court in substance found that the defendant was not the adopted son of Mawashi, that the plaintiff, though not the adopted son of Mawashi, was his nearest collateral, and had been in possession of the occupancy holding with Mawashi up to the time of the latter's death. On these findings, the lower appellate court reversed the decree of the court of first instance and gave the plaintiff a decree for possession as a tenant without declaring the class of his tenancy. The defendant has preferred the second appeal to this Court, and it is argued by his learned counsel that the lower appellate Court was wrong in granting the plaintiff a decree for possession as a tenant without specifying the class of the tenancy. In support of this contention reliance is placed upon *Dori Lal* v. *Sardar Singh* (1).

"In this case the dispute is between two rival claimants of succession to an occupancy tenant and the right of the zamindar is in no way in question. Such a case, therefore, in my opinion, is within the exclusive jurisdiction of a Civil Court, and section 95 of the Tenancy Act, or section 167 of the same has no application to the case before me. Section 95 of the Tenancy Act deals with questions which arise between a landholder and his tenant, and has nothing to do with a dispute between two persons, each of whom claims to be the heir of an occupancy tenant. Section 167 does in no way oust the jurisdiction of the Civil Court, when the dispute is between two persons as to their right to succeed to an occupancy holding. That being so, the ruling relied on by the learned counsel has no application. The remarks of the lower appellate Court towards that end of its judgment, "I therefore hold that the plaintiff is entitled to possession as a tenant without declaration of his class," in my opinion, mean that the lower appellate court's decree entitles the plaintiff to possession of the holding against the defendant who was a trespasser. It did not establish any relation between him and the zamindar. The result is that the appeal fails and is dismissed with costs "

[797] Mr. *Nihal Chand*, for the appellants :—

No civil suit is maintainable. Section 95 of the Agra Tenancy Act read with section 167, barred the suit. The landlord is always a necessary party to suits of this kind and he had not been impleaded. The judgment of the Revenue Court, to which the plaintiff had at first gone and where his suit had been rejected operates *res judicata*. He relied on *Sheo Narain* v. *Parmeshar Rai* (2), *Ajudhia Rai* v. *Parmeshar Rai* (3), *Subrani* v. *Bhagwan Khan* (4) *Niadar* v. *Baru Mal* (5), *Dori Lal* v. *Sardar Singh* (1).

Dr. *Tej Bahadur Sapru*, for the respondents, was not called upon.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of a suit instituted in a Civil Court for a declaration of the plaintiff's title to a certain occupancy holding or in the alternative for possession. The plaintiff's title was based upon his being the adopted son of one Mawashi, who admittedly was, prior to his death, the occupancy tenant. The defendant was a rival claimant to the tenancy. He also

(1) (1908) 5 A. L. J. 514.
(2) (1895) I. L R 18 All. 270.
(3) (1895) I. L. R. 18 All. 340.
(4) (1896) I. L. R. 19 All. 101.
(5) (1902) I. L. R. 24 All. 153.

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claimed to be the adopted son of Mawashi. The court of first instance dismissed the suit holding that the plaintiff had not made out his adoption. The court of first appeal agreed with the finding of the court of first instance that the plaintiff had not made out the adoption, but it found that the plaintiff was a collateral relative who had been joint in the cultivation of the holding, that he had been in possession, and that therefore his title was superior to that of the defendant, and it gave a decree for possession against the defendant, whom it held not to be the adopted son of Mawashi. On second appeal to a Judge of this Court the decision of the court of first appeal was confirmed. The present appeal has been instituted under the Letters Patent. It appears that prior to the institution of the present suit an application in the Revenue Court was made by the plaintiff for mutation of names. In the course of those proceedings the very same question of adoption was raised and considered, with the result that the plaintiff was unsuccessful. The [798] argument which has been addressed to us was chiefly one based upon the contention that having regard to the provisions of sections 95 and 167 of the Agra Tenancy Act the suit was not maintainable in the Civil Court. Section 95 provides that at any time during the continuance of a tenancy *either the tanaholder* or *the tenant* may sue for a declaration as to any of the matters specified in the section. Clause (*a*) is the name and description of the tenant of the holding. Section 167 provides that no Civil Court shall take cognizance of any suit or application of the nature specified in the fourth schedule. Amongst the suits and applications specified in schedule IV are proceedings under section 95. It is argued on behalf of the appellant that the plaintiff's proper and only course was an application or suit in the Revenue Court for a declaration as to the name and description of the tenant. It is further argued that the proceedings that took place in the Revenue Court were proceedings of this very nature. In our opinion section 95 was not intended to apply to the case of disputes between rival claimants to a tenancy. It was intended to apply to questions arising between the landlord on the one side and the tenant on the other. *Prima facie* the Civil Court is the proper court to try all questions, and it is only when suits are expressly excluded from its cognizance that its jurisdiction is ousted. It certainly does not appear to us that the provisions of section 95 coupled with the provisions of section 167 exclude the jurisdiction of a Civil Court in questions between rival claimants to tenancies. The very words of the section itself in which it says the "landlord or tenant" may sue, seems to demonstrate that the intention of the section was to provide a tribunal for questions arising between a landlord and tenant. The section does not provide for possession, it only provides for a declaration; this also goes to show that the section contemplated the case of a landlord and a tenant and an existing tenancy. A number of cases have been cited by the learned counsel on behalf of the appellant. Many of these cases were decided on the constructions of the provisions of Act No. XII of 1881. The provisions of that Act are by no means the same as the provisions of the present Tenancy Act. Practically the same question [799] arose in the case of *Kali Charan* v. *Musammat Umi* (1). In a quite recent case, namely, F. A. No. 164 of 1910, the same question in principle arose and was decided by one of us and Mr. Justice TUDBALL. The only other question which was urged in the appeal was that the zamindar was a necessary party to the suit inasmuch as if the occupancy tenant had

(1) (1910) 7 A. L. J. 658.

died leaving no heirs, as defined by section 22 of the Tenancy Act, the tenancy would be extinguished for the benefit of the zamindar. In our opinion there is no force whatever in this contention. It would be quite wrong that the zamindar should be brought into a dispute between rival claimants to a tenancy with which he had nothing to do. The zamindar is, of course, not bound by any decree which might result in litigation between two rival claimants. In our opinion the decision of our learned brother was quite correct, and we dismiss the appeal with costs.

Appeal dismissed.

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APPELLATE CIVIL.

33 A. 795=8 A. L. J. 1009 =11 I. C. 263.

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33 A. 799 (=8 A. L. J. 1925=11 I. C. 116).

FULL BENCH.

Before The Hon'ble Mr. H. G. Richards, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr. Justice Karamat Husain, Mr. Justice Tudball, Mr. Justice Chamier and Mr. Justice Piggott.

DURGA PRASAD AND OTHERS (*Plaintiffs*), *v.* HAZARI SINGH, (*Defendant*).*

[2nd June, and 10th July, 1911.]

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 201—*Evidence—Presumption—Record of plaintiff's name as co-sharer—Act No. I of* 1872 (*Indian Evidence Act*) *section* 4.

Held by RICHARDS, C. J., KARAMAT HUSAIN, TUDBALL, CHAMIER and PIGGOTT, JJ. KNOX, J. *dissenting*), that in a suit instituted under the provisions of chapter XI of the Agra Tenancy Act, 1901, where the plaintiff is recorded as having proprietary title entitling him to institute the suit, the Revenue Court is not competent to go behind the record, receive evidence and itself try the question of proprietary title. *Bechan Singh* v. *Karan Singh* (1) followed. *Waris Ali Khan* v. *Parsotam Narain* (2) overruled.

[Ref: 31 All. 250 ; 43 All. 177 =18 A. L. J. 1008=59 I. C. 639 ; 63 I. C. 976=19 A. L. J. 732 ; 64 I. C. 964=20 A. L. J. 6 ; 66 I. C. 125 ; 44 All. 413 ; Dist : 71 I. C. 992 ; Fol : 74 I. C. 914=75 I. C. 663;]

THIS was a suit brought under the provisions of chapter XI of the Agra Tenancy Act, 1901, by recorded co-sharers for profits. **[800]** The court of first instance gave the plaintiffs a decree. The lower appellate court reversed the decree upon two grounds ; first, that the court was not bound to presume, under section 201 of the Agra Tenancy Act, that the plaintiffs, whose names were recorded as co-sharers, had the proprietary right entitling them to institute the suit, and, secondly that the matter was *res judicata* in consequence of the decision of the Revenue Court in a previous suit for profits. The plaintiffs appealed to the High Court. At the first hearing of this appeal, the following order was made by the Bench, referring to a larger Bench the main question raised in the appeal.

RICHARDS, C. J., and BANERJEE, J.—A question arises in this appeal whether in a suit instituted under the provisions of chapter XI of the Agra Tenancy Act, and where the plaintiff is recorded as having a proprietary right entitling him to institute the suit, it is open to a Revenue Court to go behind the record and try the question whether or not the plaintiff has the proprietary title in respect of which he is recorded. We think that having regard to the conflict of authority in this Court on this question it

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* Second Appeal No. 902 of 1910 from a decree of E. M. Nanavutty, Additional Judge of Bareilly, dated the 30th of April, 1910, reversing a decree of Raghunath Prasad, Assistant Collector, first class, of Pilibhit, dated the 29th of September 1909.

(1) (1903) I. L. R. 30 All. 447. (2) (1910) I. L. R. 32 All. 427.

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is desirable that the question should be referred to a larger Bench. We accordingly refer the following question, *viz*, whether in a suit instituted under the provisions of chapter XI of the Agra Tenancy Act, and where the plaintiff is recorded as having proprietary title entitling him to institute the suit, the Revenue Court is competent to go behind the record, receive evidence and itself try the question of proprietary title.

Babu *Balaram Chandra Mukerji*, for the plaintiffs appellants:

The sole question in this appeal is the construction of words "shall presume" in section 201, clause (3) of the Agra Tenancy Act, and whether a Revenue Court can go behind a record of proprietary title in the revenue papers. The words "shall presume" are not defined either in the Act itself or in the General Clauses Act. They are defined in the Evidence Act but there is nothing to show that that definition applies to this Act. The Evidence Act is much older than the Tenancy Act The latter did not exist in its present form when that enactment was made. The definitions contained in one Act are not ordinarily to be applied to another. They have nothing to do with each other, [801] and they are not *in pari materia*. *M. Pandah Gazi* v. *Jennuddi* (1) the definitions of the words 'moveable' and 'immoveable' contained in the Registration Act were not given effect to. In *Umachurn Bag* v. *Ajadannissa Bibee* (2) the definition of the word '*lakhiraj*' in a Local Act was similarly not applied. The term 'shall presume' denotes a rebuttable presumption in the Evidence Act and not a conclusive one, inasmuch as the term 'conclusive proof' is separately defined and used in that Act, *e.g.* in section 112. The words 'conclusive proof' are nowhere used in the Tenancy Act. On the other hand, the proviso to clause (3), section 201, itself denotes that the presumption is not rebuttable in a Revenue Court. Clause (3) is very clear. Whenever the Legislature intends the words to mean that the presumption is a rebuttable one, it uses the words 'until the contrary is proved,' as, for instance, in section 44 of the United Provinces Land Revenue Act. A rebuttable presumption is raised in favour of all revenue entries under section 44, Land Revenue Act, and if it were meant to raise the same presumption, clause (3) of section 201 would be superfluous. Sections 57 of Act III of 1901 and 108 of Act II of 1901, may be compared for a further use of the clause 'until the contrary is proved' or 'until the contrary is shown.' In clause (3), section 201, the two words 'shall presume' stand apart by themselves without any qualifying clause. The legislature certainly could not have intended that they should only create a rebuttable presumption in a Revenue Court. The proviso to clause (3) leaves no doubt so far as the Revenue Courts are concerned. The defendant is required under that proviso to obtain a declaration from a Civil Court, inasmuch as the Revenue Courts cannot go behind the recorded entry. In that case, section 177 of the Act would apply. Even then the appellate Court would be a Revenue Court and a declaration from a Civil Court can make all its proceedings void. The Legislature could not have intended that the question should be fought out in the Revenue Courts, before the Assistant Collector and the District Judge and possibly even before the High Court under the proviso to section 177, and then the whole matter should be decided by the decree of a Munsif [802] which would again be subject to two appeals. The presumption in the Revenue Courts is therefore conclusive and irrebuttable. A fraudulent entry is seldom possible in revenue papers, and if it is effected, it would only be

(1) (1878) I. L. R., 4 Calc., 665.

(2) (1885) I. L. R. 12 Calc. 430.

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so on account of the negligence of the defendant. The law not only expressly provides for, but it actually enjoins the corrections of entries in the *khewat*, and it would be a gross default on the part of the defendant if he did not choose to contest the entry of the plaintiff's name in the papers.

Munshi *Govind Prasad* for the defendant respondent :—

The Evidence Act applies to the Revenue Courts. The latter are as much bound by it as the Civil Courts. If the words " shall presume " be taken to denote a conclusive presumption, this construction would conflict with the concluding portion of the section, which says that a suit can be brought. Section 201 consists really of two portions. Clause (1) provides for a suit in the Civil Court, also for a trial by the Revenue Court itself. Clause (2) contains a separate provision. The Legislature could not have meant that the Revenue Court should not adopt the procedure under clause (3) also, that is, if the plaintiff is recorded as a proprietor, the Revenue Court can try the question if it chooses, and if he is not recorded, it can also try it or refer the plaintiff to a Civil Court. Clause (3) has been enacted in order to provide for a case where the defendant does not raise the question of proprietary title. The proviso even then gives him a right of suit in the Civil Court. In such a case the plea of *res judicata* cannot be raised against the defendant in the subsequent civil suit. The plaintiff must prove his title *prima facie*, even if the defendnat be absent. He must produce some evidence such as the revenue record, even if the plea is not raised, and the defendant is not there to contest his title. In clause (1) it is expressly stated "if the defendant pleads that the plaintiff has not such proprietary right. Clause (2) contemplates a dispute of title. Clause (3) contains no such provision. What could happen if the defendant were absent? Section 201 applies only when the plaintiff's title is denied. That is the preamble of the section. The proviso to clause (3) does not apply when the defendant **[803]** enters a plea of title and an issue is raised. The court is bound to raise an issue when the defendant pleads title. If that is done, the provisions of section 177 apply. If the defendant were bound to see to the correctness of the revenue records so far as his rights were concerned, it would inflict considerable hardship. Clause (3) uses very guarded words. Besides, if a judgment were obtained from a Civil Court, the Revenue Court might ignore it.

Babu *Balram Chandra Mukerji* in reply referred to *Dil Kunwar* v. *Udai Ram* (1), *Dhanka* v. *Umrao Singh* (2), *Banwari* v. *Niadar* (3), *Durga Shankar* v. *Gur Charan* (4), *Bhawani Singh* v. *Dilawar Khan* (5), *Gobindi* v. *Saheb Ram* (6), *Niaz Ali* v. *Govind Ram* (7) and *Bechan Singh* v. *Karan Singh* (8).

RICHARDS, C. J.—This reference arises out of an appeal in a suit, in which a recorded co-sharer sued the lambardar for profits. The appeal coming before a Bench consisting of myself and my brother BANERJI, we thought it desirable, having regard to the conflict of authority in this Court, to refer a question which arises in the appeal for determination by a Full Bench. The question is, whether, in a suit like the present, the

(1) (1906) I. L. R. 29 All. 143.
(2) (1907) I. L. R. 30 All. 58.
(3) (1906) I. L. R. 29 All. 158.
(4) Weekly Notes, 1906, p. 1.
(5) (1909) I. L. R. 31 All. 253.
(6) (1909) I. L. R. 31 All. 257.
(7) Weekly Notes, 1908, p. 187.
(8) (1908) 5 A. L. J. 495.

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plaintiff being a recorded co-sharer, the Revenue Court is competent to go behind the record, receive evidence and try the question of proprietary title between the parties, or is bound to dispose of the suit on the assumption that the plaintiff has the proprietary title in respect of which he is recorded. Section 201 of the Agra Tenancy Act is as follows :—

"(1) If in any suit instituted under the provisions of chapter XI, the plaintiff is not recorded as having the proprietary right entitling him to institute such suit, and the defendant pleads that the plaintiff has not such proprietary right, the court shall proceed, *mutatis mutandis*, as directed in section 199.

"Provided that if the court adopts the procedure allowed by clause (*a*) of sub-section (1) of that section, the plaintiff shall be the party required to institute a suit in the Civil Court.

[804] "(2) The provisions of section 200 shall apply, *mutatis mutandis*, to any appeal in such suit.

"(3) If the plaintiff is recorded as having such proprietary right, the court shall presume that he has it.

"But nothing in this sub-section shall affect the right of any person to establish by suit in the Civil Court that the plaintiff has not such proprietary right."

I have never had the least doubt as to the meaning and proper construction of the section, nor do I see anything wrong with its drafting. The same question exactly arose in the case of *Bechan Singh* v. *Karan Singh* (1). In that case my brother BANERJI and I both delivered judgments, and I do not think that I can add very much to what was there stated. The question again came up in the case of *Waris Ali Khan* v. *Parsotam Narain* (2). A contrary view was taken by the majority of the Bench consisting of STANLEY, C. J., GRIFFIN and TUDBALL, JJ. TUDBALL, JJ., delivered a dissenting judgment in which I fully concur. At page 440 of the report, STANLEY, C. J, quotes the remarks of Lord BROUGHAM in the case of *Crawford* v. *Spooner* (3) :—" We cannot fish out what possibly may have been the intention of the Legislature; we cannot aid the Legislature's defective phrasing of the Statute; we cannot add and mend, and by construction make up deficiencies which are left there. If the Legislature did intend that which it has not expressed clearly; much more if the Legislature intended something very different; if the Legislature intended something pretty nearly the opposite of what is said, it is not for Judges to invent something which they do not meet with in the words of the text (aiding their construction of the text always, of course, by the context); it is not for them so to supply a meaning, for, in reality, it would be supplying it: the true way in these cases is to take the words as the Legislature have given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble, or by the context of the words in question, controlled or altered; and therefore if any other meaning was **[805]** intended than that which the words purport plainly to import, then let another Act supply that meaning, and supply the defect in the previous Act."

It seems to me that the context of section 201 clearly shows that it was the intention of the Legislature that the Revenue Court in the case of a recorded co-sharer in the class of suits specified in the section should dispose of the suit in the case of a recorded co-sharer upon the assumption

(1) (1908) I. L. R. 30 All. 447.
(2) (1910) I. L. R. 32 All. 427.
(3) (1846) 4 Moo. I. A. 179.

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that the plaintiff has the proprietary title in respect of which he is recorded. The proviso to the section itself shows the limitation of the presumption. It is to be rebutted in a separate suit in the Civil Court—the court most fitted to try complicated questions of title. If it was intended that the Revenue Court in such cases was to go into evidence to rebut the presumption, I cannot see why the section provided for the case of a plaintiff who is not recorded and the case of a plaintiff who is recorded. Surely if it was intended that the Revenue Court was to try the question of proprietary title in the case of a recorded plaintiff there was no reason why the Revenue Court should not constitute itself for the purposes of the case of a Civil Court, and that the appeal should not lie to the District Judge just as in the case of a plaintiff who is not recorded.

The reason suggested by STANLEY, C. J., does not commend itself to me. As I pointed out in my judgment in *Bechan Singh* v. *Karan Singh*, if the true construction of the section be according to the view of the majority of the Bench in *Waris Ali Khan* v. *Parsotam Narain*, if the Revenue Court decided in favour of a recorded plaintiff and tried a complicated question of title, the defendant would be entitled under the proviso of the section to re-open the entire case, not by way of appeal but by a separate suit. Indeed, if the view of STANLEY, C. J., be correct, the Revenue Court is the *only* court which can try the question of proprietary title between a recorded plaintiff and a defendant who pleads that the plaintiff had not proprietary title. The court has no option, as it has in the case of a plaintiff who is not recorded, of sending the parties to the Civil Court: it is bound to hear the entire evidence, perhaps for several days, and at the end its labours may be completely futile [806] because the unsuccessful defendant can re-open the entire matter in an independent suit in the Civil Court. Nay, further, it seems to me that if the unsuccessful defendant in the Revenue Court were even to appeal under the provisions of section 177, he would still have the right to re-open the question in a subsequent suit instituted in the Civil Court.

It seems to me that if the respondent's contention be correct, clause (3) is quite superfluous. STANLEY, C. J., says:—"This argument seems to me to have no force. The one Act deals with the law relating to land revenue, the other deals with the law relating to agricultural tenancies and other matters. It was obviously desirable to provide for the presumption in question in section 201 so that the Act should be self-contained." Surely if a non-recorded plaintiff sued a defendant who was recorded, there would be a presumption in favour of the recorded defendant, and yet it is said that clause (3) was enacted solely for the purpose of stating a presumption which would arise in favour of the entry as an entry in a public record quite irrespective of sections 44 and 57 of the Land Revenue Act and sub-section 3 of section 201 of the Tenancy Act. Why was there more necessity for stating the presumption in the case of a recorded plaintiff than in the case of a recorded defendant? One argument put forward against the view which I take is the hardship that might arise in cases in which the record is obviously wrong, or in cases in which the plaintiff may have fraudulently managed to get his name entered. It seems to me that the policy of this Act and the sister Act No. III of 1901 (Land Revenue) was to make the revenue records as valuable as possible and to put a premium upon persons who were entitled to have their names recorded, taking the necessary steps to have the record of their title made. I think that if a person entitled to be recorded as proprietor,

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permits a person who is not entitled to be recorded, he has only himself to blame if a decree is given against him in the Revenue Court.

Furthermore, it must be remembered that a person who has proprietary title and yet is not recorded is in by no means a disadvantageous position. He is entitled, not only to sue in the Civil Court for a declaration of his title, but he can also sue in [807] the Revenue Court notwithstanding that he is not recorded. Having instituted his suit in the Revenue Court, that court may either try the question of title itself or refer the plaintiff to the Civil Court. In one case he has the question disposed of by the Revenue Court with an appeal to the District Judge, in the other case he goes to the Civil Court to try the question, but limitation is stayed meantime in respect of his claim for profits by reason of the fact that he has instituted a suit in the Revenue Court. Is there any just reason why a person who is recorded should be placed in a more disadvantageous position than a person who is not recorded?

In very extreme cases where it is clear that there has been some mistake in the record, it would, I think, be open to the Revenue Court to postpone the decision of the case to give the defendant an opportunity of making an application in the Revenue Court to have the entry corrected. It is said that in certain cases the Revenue authorities may refuse to amend the record even after the Civil Court has settled the question of proprietary title. I do not think that we ought to assume that the Revenue Court would do anything so improper. It is clear from the provisions of the Land Revenue Act and the Agra Tenancy Act that, as a general rule, the Civil Court is the court to decide questions of proprietary title. I do not believe that after the question of proprietary title had been established by the Civil Court, the Revenue authorities would, on a proper application being made to them, refuse to amend their records. I have no hesitation in saying that in my opinion the Revenue Court in the present suit was not competent to go behind the record, receive evidence and try the question of proprietary title, and I think that this should be our answer to the reference.

KNOX, J.—The question referred to us for decision is thus stated:—"Whether in a suit instituted under the provisions of Chapter XI of the Agra Tenancy Act and where the plaintiff is recorded as having proprietary title entitling him to institute the suit, the Revenue Court is competent to go behind the record, receive evidence and itself try the question of proprietary title."

[808] As the referring order points out, there is a conflict of authority in the decisions of this court. In *Bechan Singh* v. *Karan Singh* (1) the interpretation put upon clause (3) of section 201 of the Agra Tenancy Act is that, so far as the Revenue Court is concerned, such court is bound to presume in favour of the plaintiff that he has the right to sue, and the entry of his name shall be regarded as sufficient proof and the court shall not go behind it in order to determine the question of the plaintiff's proprietary title, the remedy of the defendant being a civil suit. On the other hand, in *Gobindi* v. *Saheb Ram* (2), in which I was one of the three Judges who decided the case, it was virtually held that the Revenue Court could go behind the entry and determine the question of the extent at any rate of the plaintiff's proprietary right. In that case the extent of the plaintiff's proprietary right was alone in

(1) (1908) I. L. R. 30 All. 447.

(2) (1909) I. L. R. 31 All. 257.

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question. Again, in *Waris Ali Khan* v. *Parsotam Narain* (1) it was held by two out of the three learned Judges who tried that case that the presumption enjoined by clause 3 of section 201 of the Agra Tenancy Act was not a conclusive but merely a rebuttable presumption. There can be little doubt, it seems to me, as to what is the ordinary and natural meaning of the words which are to be found in section 201 (3) of the Agra Tenancy Act. The words "shall presume" are known and well known both to English and Indian Law(*).

Quite apart from the definition given of them in the Indian Evidence Act of 1872 which cannot be extended to other statutes except by express legislation to that effect, they have acquired a technical meaning of their own, and unless adequate grounds exist, it must be assumed that they are used in this technical meaning (†).

So far as I have been able to gather, both English and Indian Law have agreed in dividing presumptions into three classes :—

(1) conclusive or absolute presumptions of law ;
(2) rebuttable or *prima facie* presumptions of law ;
(3) presumptions of fact.

[809] The first class are inferences which the law will not allow to be contradicted by evidence, the second class are inferences which a Judge of fact is bound to draw from any particular evidence unless and until they are rebutted by evidence or by some other presumptions. With the third class we are not concerned in the present case.

Where the Legislature, both English and Indian, intend to lay down a conclusive presumption of law, the expressions used are "conclusively presume," "conclusive evidence" or some similar expression. Where, on the other hand, they intend to lay down a rebuttable presumption, the phrase used is as here "shall presume" (‡).

There seems to me no reason why, if the Legislature had intended that the Revenue Courts should be barred from taking evidence as to proprietary title in suits under chapter XI, they should not, as they have done in section 9, have made clause (3) run in this wise :—"If the plaintiff is recorded as having such proprietary right, the entry shall, so far as the Revenue Court is concerned, be conclusive proof that the plaintiff has such right."

It is however contended that there are adequate grounds in the present case for concluding that the ordinary interpretation which attaches to the phrase "shall presume" does not give the real intention of the Legislature.

In *Bechan Singh* v. *Karan Singh* (2), my brother BANERJI says that the whole context of the section and the policy of the Act lead in his opinion to only one conclusion, namely, that the Revenue Court should not go behind the entry. In the case of a person whose name is not recorded the Act provides that the question of his title shall be tried by only one court, namely, either by the Civil or the Revenue Court which may constitute itself a Civil Court. In the case of a plaintiff who has been recorded, why should two remedies have been given to his opponent,

(*) Wharton. [1902]. p. 607. Encycl. Vol. 10, p. 327.

(†) Maxwell on Statutes, [1905] Section II, and cases there quoted.

(‡) Act VI of 1882, section 77; XXVII of 1871, section 6; I of 1894, section 6; V of 1898, section 87; 45 and 46, Vic., Ch. LXI, section 21 ; 25 and 26 Vic., Ch. LXXXIX, sections 18, 192; 7 and 8, Vic., Ch. XLV, section 2.

(1) (1910) I. L. R. 32 All. 427.

(2) (1908) I. L. R. 30 All. 447 (448).

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namely, a remedy of trial by the Revenue Court and a suit in the Civil Court?

[810] If we were considering the language of a carefully considered and skilfully drafted Act, this argument would have much weight with me. We know, however, by experience that, as my brother BANERJI points out in *Bechan Singh* v. *Karan Singh* that this Act was "not drawn up with as much care and precision as" it should have been. Where more than one *incuria* has crept in, it may well be that the case before us is another instance of the full significance of the words used not having been fully thought out.

Practically the same difficulty which faces us now arose in the days when Act No. XLII of 1860 was still on the Statute Book. Act No. XLII of 1860, section 1, and after it Act No. XI of 1865, section 13, expressly enacted that the Judge of the Small Cause Court shall not exercise any civil jurisdiction except under the provisions of the Act. We have no such words of express prohibition in Local Act No. II of 1901; all that we have is at the outside a clear intimation that it was the policy of the Legislature that questions affecting proprietary title should be tried by the Civil Courts only. At the same time the difficulty and hardship to the ordinary villager of being sent to the Civil Court whenever a question of title was involved was felt and the legal fiction invented that a Revenue Court before which such a question was raised could, for the time being, constitute itself as a Civil Court. In Act No. XI of 1865, the words of express prohibition do occur and the Calcutta High Court had at a very early date to decide whether Small Cause Courts could in the face of the express provision try questions of title. A Full Bench of that court in *Raghooram Biswas* v. *Ramchunder Dooby* (1), held that Small Cause Courts have jurisdiction to try questions of title which incidentally arise in suits cognizable by them.

Small Cause Courts in these provinces on the strength of this ruling continued, so long as Act No. XI of 1865 was on the Statute Book, to try questions of title which arose before them in suits for damages, rent and the like. Conflicting decisions were, from time to time, passed. The judgment of Civil Courts was the conclusive judgment as to title. I never heard that the procedure caused any serious inconvenience.

[811] But apart from this, and with great respect to the opinion of my learned brother, I am not at all sure that the framers of the Act had not in their minds procedure akin to that with which we are familiar in the case where a person dispossessed of property disputes the right of the decree-holder to be put into possession. The execution court investigates summarily the matter in dispute, and the party against whom the order is passed has a right to institute a suit to establish his right over the property, but, subject to the result of such suit, if any, the order of the execution court shall be conclusive. So here the Revenue Court may have been intended to decide summarily the issue of proprietary right. But the door was left open to any person, the defendant or a third party, to establish by suit in the Civil Court that the plaintiff has not such proprietary right.

The question why two remedies were given to the defendant in one case and not in the other is not so easy to answer. It may have been that, with all due respect to them, the minds of the framers of the Act

(1) (1868) W. R. Sp., No. 127.

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soared above such details. In any case, they would appear to have forgotten when they came to enact section 201 of Act No. II of 1901, what they had enacted in section 34, clause 5 of the Land Revenue Act, 1901. There they had laid down that no Revenue Court shall entertain a suit or application by the person so succeeding or otherwise obtaining possession until such person has made the report required by this section, and yet in section 201 of Act No. II they apparently authorize Revenue Courts to try the suits of plaintiffs who have never made such reports.

It must not be forgotten that the Revenue Courts are supposed to, and as a rule do, deal more swiftly with cases than the Civil Courts do or can. Their procedure is summary and intended to be summary.

I think too much may be made of another argument which has been put forward and which found favour in *Bechan Singh* v. *Karan Singh*, that the object of the Legislature was to bring pressure to bear on persons entitled to proprietary rights to have such rights recorded. It is quite true that elaborate provisions are made for the correction and preparation of these records but the distance at which they are from accuracy may be judged **[812]** from an observation which I find in the report of 1911 on the administration of the land records in the United Provinces. At page 4 may be read : —" In Basti, mutation work continues very heavy, but is kept up to date. The Registrar Kanungo's check disclosed 11,000 errors which were rectified." To hold that the accuracy of a khewat entry in Basti was entitled to the position of an absolute presumption of law seems to me to be a step which could hardly have been contemplated by the framers of the Act in 1901 at a time, when such records were still further removed from accuracy.

I doubt whether the difficulties of effecting mutation are fully realized. I listened to arguments which seemed to imply that a proprietor armed with a Civil Court decree in his favour had merely to go to the Collector and get mutation in his favour effected as easily and swiftly as he can, say, in a registration office.

In this connection the dates contained in *Gobindi* v. *Saheb Ram* (1) are not without interest.

Gobindi got a decree in her favour from the Civil Court on the 8th of October, 1901. She lost no time in applying to the Revenue Court, for she put in her application for mutation in pursuance of the decree by the 19th of October, 1901. It was not till the 18th of November, 1902, that the mutation order was passed, and even then the Revenue Court by some error not explained entered her name as proprietor over a far larger amount than that which the Civil Court had given her. Apparently no one (Registrar Kanungo or other person) in spite of the elaborate precautions for correction and accuracy, observed the error until Gobindi took advantage of it in 1906 to try and get profits for this excess. Saheb Ram was innocent of any fraud or laches, and yet he was on the absolute presumption view remanded to the Civil Court to bring a suit and fight out again the battle that he had fought out in 1901. This, which all but took place in *Gobindi* v. *Saheb Ram*, will again take place if we hold that the Legislature intended section 201 (clause 3) to be an absolute presumption so far as the Revenue Courts are concerned.

[813] Fictions of law (and presumptions are such fictions) are not for the destruction of but for the supporting of rights. As Lord MANSFIELD

(1) (1909) I. L R. 31 All. 257.

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pointed out in *Morris* v. *Peigh* (1), they hold only in respect of the ends and purpose for which they were invented; when they are urged to an intent and purpose not within the reason and policy of the fiction the other party may show the truth. It is because I fear that this fiction may (*abit omen*) work strongly to the detriment of innocent villagers that I am not prepared to hold it if I can find any way of escape.

This being so, I am not prepared to recede from the view I held in *Gobindi* v. *Saheb Ram*, in which view I had the support of two learned Judges whose experience in revenue law and custom was of no mean order.

It is with the utmost regret and only after long and careful thought that I find myself compelled to differ from my learned colleagues and to hold that the words "shall presume" in section 201, clause 3, connote a rebuttable presumption.

BANERJI, J.—I expressed my views on the question referred to us in this case in my judgment in *Bechan Singh* v. *Karan Singh* (2), and I have heard nothing to induce me to alter these views. I have shown in that judgment that the provisions of section 201 of the Agra Tenancy Act and the language used in it leave no room for doubt that it was the intention of the Legislature that where the plaintiff in a suit under chapter XI is recorded as having the proprietary right, entitling him to institute the suit, the Revenue Court should not go behind the record. It is true that in the section the words "shall presume" are used and that those words ordinarily mean that the presumption is a rebuttable one. It cannot be said that the presumption arising from the record of the plaintiff's name, referred to in the section, is one which can in one case be rebutted, as in the suit which the section authorizes the defendant to bring in the Civil Court, he can rebut the presumption and prove that the record is erroneous. In order to give effect to its intention it was not possible for the Legislature to use any other expression. It could not have said that the entry of the plaintiff's name would be "conclusive proof" of his title, because, as I have pointed out above, the [814] entry could be proved in the Civil Court to be erroneous. The intention of the Legislature is, in my opinion, unmistakable. I do not think it is correct to say that the language of section 201 is practically the same as that of section 44 or 57 of the Land Revenue Act. Whereas under those sections "any person" may sue in the Civil Court to establish his title, section 201 of the Tenancy Act empowers the "defendant" alone to do so. It is a fundamental principle of interpretation that the intention of the Legislature should be carried into effect unless the language used is such as clearly indicates a different intention. The utmost that can be said of the provisions of section 201 is that the language is not explicit and unmistakable. If that is so it is our duty to construe the section in such a manner as to make it harmonize with what appears to be the manifest intention of the Legislature.

I would answer the question referred to us in the negative.

KARAMAT HUSAIN, J.—I agree.

TUDBALL, J.—I concur with the learned Chief Justice. I have given my opinion on the point at length in my judgment in the case of *Waris Ali Khan* v. *Parsotam Narain* (1), and I see no good reason to alter the opinion that I then formed after hearing full arguments on both sides. No fresh argument of any weight has been advanced. It is

(1) 3 Burr., 1243.
(2) (1908) I. L. R. 30 All. 447.

(1) (1910) I. L. R. 32 All. 427.

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not a question of the interpretation of the two words "shall presume," but of the interpretation of the whole of clause (3) of section 202. I would therefore answer the question in the negative.

CHAMIER, J.—I also am of opinion that the question referred to us should be answered in the negative. I do not feel that I can usefully add anything to what has been said by the learned Chief Justice in the present case and by TUDBALL, J., in the case of *Waris Ali Khan* v. *Parsotam Narain* (1). I agree with the reasons given by them for answering the present question in the negative.

PIGGOTT, J.—The question for determination is whether the presumption laid down by clause (3) of section 201 of the Agra Tenancy Act is conclusive or rebuttable. The argument based on the language of the section itself taken as a whole, seems to [815] me irresistible. The very limited scope of the section shows that the Legislature conceived itself to be making special provision for a certain class of cases, and intended the provisions of the section to cover all cases of that particular class, that is to say, suits instituted under the provisions of chapter XI of the Act. A plaintiff instituting a suit under the said chapter must come under one of two descriptions: either he is recorded as possessing the proprietary right entitling him to maintain the suit as brought, or he is not. The first two clauses of section 201 lay down precisely and completely what the court is to do in the latter alternative; one would naturally expect to find in clause (1) equally precise and complete directions to meet the former alternative. If that clause be read as meaning that, if the plaintiff is recorded as having such proprietary right, the court shall proceed to dispose of the suit before it on the presumption that he has it, then the alternative is completely and precisely met. There is no need to say anything about the defendant's pleading that the plaintiff has not such right, because the fact that the plaintiff is recorded is conclusive on the point. There is no need to provide for the trying of an issue on the point, much less for a decision of such issue in a sense adverse to the plaintiff. Accordingly we find that the proviso reserves to any person interested in the matter the right to establish by suit in the Civil Court that the plaintiff has not such proprietary right. This proviso pre-supposes a decision in the suit itself in favour of the plaintiff; it is in harmony with the interpretation I have put on the words of the clause, and is not fairly to be reconciled with any theory of a rebuttable presumption, which might after all result in a decision against the plaintiff on the merits.

The question then remains whether the meaning I have put on the words "shall presume that he has it," as used in this particular context, is one which they will reasonably bear. A negative opinion on this point has been arrived at by those learned Judges of this Court who hold that the implication of a rebuttable presumption is inextricably bound up in the expression "shall presume" either by reason of the definition contained in the Indian Evidence Act, or by reason of their having acquired a certain technical significance when used in a legal [816] enactment. The definition in the Indian Evidence Act seems to me irrelevant, the two Acts being by different Legislatures, and not *in pari materia*. The argument from the alleged technical meaning of the words "shall presume" cannot be pressed too far. I venture to say that the words as they stand, in their ordinary English signification, no more imply a rebuttable presumption than they do an absolute one; their meaning as used in any

(1) (1910) I. L. R. 32 All. 427.

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particular enactment must be controlled either by definition or by context. If it be admitted that they have most frequently been employed in cases where it was clear, from the context or otherwise, that a rebuttable presumption was intended, this would be no sufficient reason for approaching the consideration of the context in the particular section now before us with any bias of mind against inferences in favour of an opposite interpretation fairly arising from the wording of the section as a whole. The entire controversy seems to me to turn on the question whether we are prepared to say that the words "shall presume," in their ordinary legal signification, clearly and necessarily imply, "shall presume until the contrary is proved," so that they cannot with propriety be used in any context whatsoever, unless with the addition of some such adverb as "conclusively", in order to lay down an irrebuttable presumption. I do not think this is a correct view; and in the particular case before us the plain meaning of the words to my mind is—"shall proceed to dispose of the suit on the presumption." It is not true that the court, when so proceeding will have nothing left to try; it will have to go into the whole question of accounts between the parties, and may have to determine a number of issues relating thereto, but it will do so "on the presumption that the plaintiff has the proprietary right entitling him to sue which stands recorded in his favour in the Revenue Court records." This being my view as to the meaning of the statute we are called on to interpret, I am but little concerned to discuss the question as to the intention of the Legislature in so framing the law, or possible hard cases which may arise thereunder. I may point out that the real difficulty which faced this court in the case of *Bhawani Singh* v. *Dilawar Khan* (1), arose from the fact that [817] courts concerned had failed consistently to interpret section 201 of the Tenancy Act as I hold that it ought to be interpeted. If that suit had been decided once and for all "on the presumption" that the plaintiff had the right which stood recorded in his name, there would have been no time for a successful suit by the defendant, while the suit under the Tenancy Act remained pending. There will be no hard cases, of this particular kind at any rate, if persons who have successfully asserted their title in the Civil Court will take prompt steps to have the ervenue records corrected accordingly. Cases of fraud and mistake the Revenue Courts may be trusted to deal with themselves: nor would the possibility of individual cases of hardship be any good reason for refusing to enforce the statute law in accordance with what appears to be its true meaning.

I would therefore hold in reply to this reference that the presumption in question is conclusive so far as Revenue Courts trying suits under chapter XI of the North Western Provinces Tenancy Act are concerned.

The case was then laid before the Bench which referred it to Full Bench.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit for profits brought by the plaintiffs who are recorded co-sharers. The Court of first instance granted them a decree. The lower appellate Court reversed the decree on two grounds; first, that the Court was not bound to presume under s. 201 of the Agra Tenancy Act, that the plaintiffs, whose names were recorded as co-sharers, had the proprietary right entitling them to institute the suit, and secondly, that the matter was *res judicata* in consequence of a decision of the Revenue Court in a previous suit for profits.

(1) (1909) I. L. R. 31 All. p. 253.

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The first point is concluded by the decision of the Full Bench to which it was referred in this case. According to that ruling the plaintiffs being recorded co-sharers, the Revenue Court was bound to presume that they had the right which entitled them to bring the suit.

As to the question of *res judicata* the decision on which the Court below relies was passed before s. 201 of the Agra Tenancy Act was enacted. In view of the provisions of that [818] section, as construed, by the Full Bench, the plaintiff is entitled to maintain the suit and no question of *res judicata* can arise. As the court below decided the case on those preliminary grounds and did not determine the appeal on the merits, we allow the appeal, and setting aside the decree of that court, remand the case to it under order XLI, rule 23 of the Code of Civil Procedure, with directions to re-admit it under its original number in the register and dispose of it on the merits according to law. Costs here and hitherto will follow the event.

Appeal allowed.

Title _____

Accession No. _____

Call No. _____

Borrower's No.	Issue Date	Borrower's No.	Issue Date

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APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Tudball.

MUHAMMAD USMAN (*Plaintiff*) v. MUHAMMAD ABDUL GHAFUR AND ANOTHER (*Defendants*).*

[3rd July, 1911].

Pre-emption—Muhammadan law—Demand made "on the premises"—Demand made in the abadi which was part of the premises sold.

Where a person claiming pre-emption in respect of a certain zamindari share proved that he had made the demand with witnesses while sitting on his *chabutra* in the *abadi*, which formed part of the premises sold, it was *held* that the demand of pre-emption was a good demand made "on the premises" within the meaning of the Muhammadan law. *Kulsum Bibi* v. *Faqir Muhammad Khan* (1) followed.

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THIS was a suit for pre-emption of a zamindari share, the claim being based on the Muhammadan law. The Court of first instance (Munsif of Muhammadabad Gohna) dismissed the suit holding that the requirements of the Muhammadan law as to the preliminary demands had not been complied with. The claimant had in fact made the demand in the presence of witnesses as soon as he heard of the sale, while sitting on his *chabutra* in the *abadi* of the village of which the property sold formed part. The plaintiff appealed, but his appeal was dismissed by the District Judge on grounds which are stated in the judgment of the High Court. The plaintiff thereupon appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Abdul Raoof*, for the respondents.

RICHARDS, C. J. and TUDBALL, J.—This appeal arises out of a suit for pre-emption based on Muhammadan law. The [2] property consisted of a zamindari share. It is suggested, and it appears to be the case, that there has been an imperfect partition under which the vendor holds exclusive possession of a certain part of the zamindari. The *abadi*, however, remains common property of the proprietors of the mahal, and there can be no doubt that the vendor and the plaintiff are each owners of fractional shares in the mahal. The plaintiff alone produced evidence on the question of compliance with the Muhammadan law of demand. The moment that the news of a sale was received the plaintiff demanded his *shufa* and invoked witnesses. He alleged in the plaint that after this notice was given to the vendee. The Court of first instance decided

* Second Appeal No. 1328 of 1910 from a decree of Ram Autar Pande, District Judge of Azamgarh, dated the 26th of September, 1910, confirming a decree of Iftikhar Husain, Munsif of Muhammadabad Gohna, dated the 12th of February, 1910.

(1) (1896) I. L. R. 18 All. 298.

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against the plaintiff on the ground that two separate demands were necessary and that the two demands could not be combined. The lower appellate Court confirmed the decree of the court of first instance, holding, first that the demand with witnesses being made by the plaintiff while sitting on his *chabutra* in the *abadi*, could not be deemed a good demand under the Muhammadan law; and, secondly, that there had been at one time a contract of pre-emption entered into between the co-sharers, and that this contract must be held once and for all to have abrogated all right of pre-emption based on Muhammadan law, and this, notwithstanding that the period covered by the contract had determined on the expiry of the settlement. It has not been argued before us that the two demands could not be combined, and the respondent, as we think rightly, has not relied on the decision of the lower appellate court that the contract abrogated the plaintiff's right under the Muhammadan law. The question before us has been confined to whether or not the demand with witnesses made on the plaintiff's own *chabutra*, can be deemed a good second demand according to Muhammadan law. Muhammadan law requires that the second demand shall be in the presence of the vendor or on the premises. It is quite clear that the demand was not made in the presence either of the vendor or of the vendee. It was however made in the *abadi*, which undoubtedly was part of the premises sold. It is quite true that it was the plaintiff's own *chabutra* in the sense that it was the *chabutra* belonging to his residence in the village. **[3]** In the case of *Kulsum Bibi* v. *Faqir Muhammad Khan* (1) it was held that the demand made in the village, a fractional share of which had been sold, was a good demand on the premises according to Muhammadan Law. We find it impossible to distinguish the present case from the case cited. The plaintiff when making the demand was actually standing on joint property. It is contended that the domand was not *bona fide* and the court below had found, as a matter of fact, that the demand was not *bona fide*. We do not think that the court arrived at any such finding. The Court was merely quoting passage from the judgment of the Bench which decided the case of *Kulsum Bibi* v. *Faqir Mahammad Khan* The demand was a perfectly *bona fide* demand if it was openly made with the intention of asserting the right to pre-emption. We have already stated that in the plaint the plaintiff alleged that after the demand had been made, actual notice was given to the defendant vendee, and this allegation was admitted in the written statement. Under the circumstances it is quite impossible to hold that there was any *mala fides* about the demand. We think that it must be held that the demand was a sufficient compliance with the Muhammadan law. The case however, was decided upon a preliminay point and must be remanded. We accordingly allow the appeal, set aside the decrees of both the courts below, and remand the case to the court of first instance, through the lower appellate court, with directions to re-admit it under its original number and determine the same according to law. Costs here and heretofore will abide the result.

Appeal allowed.

(1) (1896) I. L. R. 18. All. 298.

34 A. 4 (=8 A. L. J. 1015=11 I. C. 663).

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[4] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

BENI RAM AND OTHERS (*Defendants*), *v.* MAN SINGH (*Plaintiff*).*

[10th July, 1911.]

Hindu law—Mitakshara—Joint Hindu family—Father committed to the Court of Session—Loan taken for his defence—Legal necessity.

Held that the necessity of raising money to pay for the defence of the head of a joint Hindu family committed to the Court of Session on a serious criminal charge was a valid legal necessity such as would support a mortgage of the family property executed by the father and one of his sons for such purpose. *Chandradeo* v. *Mata Prasad* (1), *Luchmun Koour* v. *Mudaree Lall* (2) and *Dulcep Singh* v. *Sree Kishoon Panday* (3) referred to.

[Fol. 26 M. L. J. 528=16 M L. T. 76=24 I. C. 356; Ref. 52 I. C. 734=4 Pat. L. J. 653; Rel. 65 I. C. 668; 70 I. C. 391=1 Pat. 171; Fol. 71 I. C. 749=21 A. L. J. 168 =45 All. 311; 83 I. C 413=5 Pat. L. T. 135=3 Pat. 250.]

The facts of this case were as follows :—

One Mathura Prasad, the head of a joint Hindu family, was committed to the Court of Session on charges under sections 467 and 471 of the Indian Penal Code. In order to raise funds for his defence, Mathura Prasad, with one of his sons, Janki Prasad, mortgaged some of the family property for the sum of Rs. 2,000. The present suit was to bring the mortgaged property to sale for realization of the mortgage debt, at the date of suit amounting to Rs. 10,094-14-3. The defendants were Janki Prasad and Beni Ram, sons of Mathura Prasad, and Gajadhar and Raj Bahadur, sons of Janki Prasad. The court of first instance (Subordinate Judge of Agra) decreed the claim. The defendants appealed to the High Court, where the principal questions raised were whether the deed of mortgage was duly executed and registered and whether it could be enforced against Beni Ram, Gajadhar and Raj Bahadur.

Mr. *Nihal Chand* (with him Babu *Jagindro Nath Chaudri*) for the appellants.

The Hon'ble *Nawab Muhammad Abdul Majid* (with him Maulvi *Ghulam Mujtaba*), for the respondent.

CHAMIER, J.—This was a suit by the respondent to enforce a mortgage deed executed in his favour by Mathura Prasad, and his son Janki Prasad. The defendants to the suit were Janki Prasad, Beni Ram another son of Mathura Prasad, and Gajadhar and Raj Bahadur, sons by Janki Prasad. The principal sum secured by the deed was Rs. 2,000 The claim was for [5] Rs. 10,094-14-3 and that amount has been decreed. In the court below it was contended by the defendants that the provisions of the deed relating to interest were unconscionable and should not be enforced. The contention was overruled and has not been repeated here. The only questions for decision are whether the deed in suit was duly executed and registered, and whether it can be enforced against the appellants, Beni Ram, Gajadhar and Raj Bahadur.

Of the marginal witnesses to the deed, Bhola Nath is dead and Piari Lal has disappeared. The two remaining witnesses, Chiddo and Chiranji Lal, a brother of Mathura Prasad, did their best to minimize the effect of their testimony, but both had to admit that the deed was signed by

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* First Appeal No. 15 of 1910 from a decree of Sheo Prasad, Subordinate Judge of Agra, dated the 6th of October, 1909.

(1) (1909) I. L. R. 31 All. 176.
(2) (1850) 5 S. D. A. N. W P. 327.
(3) (1872) 4 N. W. P. H. C. Rep. 83.

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=11 I. C. 663.

Mathura Prasad and Janki Prasad. Another witness, Jai Ram, whom the court below has believed, said that Mathura Prasad and Janki Prasad signed the mortgage deed in his presence in the Muttra jail. Chiranji Lal, Brahman, proves the due execution by Mathura Prasad, of a power of attorney, authorizing Janki Prasad to procure the registration of the mortgage deed. There can, I think, be no doubt that the mortgage was duly executed and registered.

Mathura Prasad had been committed to the Court of Session on charges under sections 467 and 471 of the Indian Penal Code, and the money was borrowed for the purpose of engaging counsel to defend him at the trial. The mortgagee was aware of the purpose for which the money was being borrowed. Mathura Prasad was ultimately convicted and sentenced to several years' rigorous imprisonment. The question is, whether the mortgage made in these circumstances is binding upon the other members of the family. According to the *Mitakshara* one member of a joint family may 'effect a gift, mortgage or sale of family property in time of distress for family purposes and especially for religious purposes.' Mathura Prasad was the manager of the family property and the mortgage must be held to be binding upon the family if it comes within the rule just stated.

According to the decision of the majority of the Full Bench in *Chandradeo* v. *Mata Prasad* (1), the mortgagee must make out a [6] case of necessity although the persons against whom he is seeking to enforce his mortgage are the sons and grandsons of the mortgagor. If we were at liberty to adopt the view taken by the minority in that case, the present case would be clear enough. As we are bound by the opinions of the majority, we have to inquire whether there was legal necessity for the loan. Legal necessity is of various kinds and when one gets outside religious and other well recognized classes of necessity, there seems to be room for considerable difference of opinion as to whether a given expenditure is a legal necessity or not, although a learned writer on the Hindu law has said that to any one acquainted with the inner life of Hindu families, it will be at once clear whether any particular instance of family expenditure is proper or not (Bhattacharyya on the Hindu Joint Family, Tagore Law Lectures, 1884-5, p. 488).

The cases of *Mahabir Prasad* v. *Basdeo Singh* (2), *Khalil-ul-Rahman* v. *Gobind Pershad* (3), *Parman Dass* v. *Bhattu Mahton* (4), *Durbar Khachar* v. *Khachar Harsur* (5), *Sumer Singh* v. *Liladhar* (6), *Natesayyan* v. *Ponnusami* (7), *McDowell* v. *Rajava Chetty* (8), *Erasala Gurunatham Chetty* v. *Adepally Raghavalu Chetty*(9) and *Prayag Sahu* v. *Kasi Sahu* (10), which were cited in the arguments, afford little, if any, assistance, for in all of them the question was whether a father's liability originating either in the commission of a crime or the breach of a civil duty could be enforced against the family property in the hands of his sons or grandsons. In all of them the question discussed was whether the debt incurred was illegal or immoral. The question of legal necessity was not discussed in any of those cases. On the question of necessity the respondent has relied upon the cases of *Luchmun Koour* v. *Mudaree Lall* (11) and *Dulcep Singh* v. *Sree Kishoon Panday* (12). In the former the Court Pandit

(1) (1909) I. L. R. 31 All. 176.
(2) (1884) I. L. R. 6 All. 234.
(3) (1892) I. L. R. 20 Cal. 928.
(4) (1897) I. L. R. 24 Cal. 672.
(5) (1908) I. L. R. 32 Bom. 348.
(6) (1911) I. L. R. 33 All. 472.
(7) (1892) I. L. R. 16 Mad. 99.
(8) (1908) I. L. R. 27 Mad. 71.
(9) (1908) I. L. R. 31 Mad. 472.
(10) (1911) 11 C. L. J. 599.
(11) (1850) 5 S. D. A. N. W. P. 327.
(12) (1872) 4 N. W. P. H. C. Rep. 83.

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was of opinion that a case of *musibat* or family necessity had been established. The facts were that the head of a Hindu joint family [7] had been sent to prison on account of non-payment of a fine, and several decrees were being executed against him and the property was sold in order to pay off the decrees and obtain his release from prison. In the latter case a member of a joint family had been committed to a special commissioner on a charge of dacoity. While awaiting trial in order to effect his release, he raised money by selling family property and purchased his discharge from prison, it being the policy of Government at the time to discontinue criminal proceedings against persons who made restitution to the parties whom they had injured. The Court, while not expressing any opinion as to the soundness of the decision in the case of *Luchmun Koour* v. *Mudaree Lall*, held that sufficient necessity had been established to warrant the inference of assent to the sale by the minor members of the family. If these cases were rightly decided, there can be no doubt that there was legal necessity for the mortgage in the present case. I think it is doubtful whether either of these cases would now be followed. In one of them the father had been convicted of a criminal offence and sentenced to pay a fine, and in the other the vendor of the property expressly admitted responsibility for a dacoity. There is, however, a clear distinction between selling or mortgaging property in order to obtain the release from jail of a member of the family who has been shown to be guilty of a criminal offence and selling or mortgaging property in order to raise funds for the defence of a member who has been accused in a criminal Court. In the one case the family has been disgraced and the release of the offender will not remove that disgrace. It is also desirable that an offender should suffer for his misdeeds. In the other the family is threatened with disgrace, and the intention is to ward it off. According to our system of jurisprudence and practice a man is presumed to be innocent until his guilt is established. The question, whether in such a case as this legal necessity exists for raising money cannot depend upon the result of the trial. It must be remembered that the deed in suit is signed not only by Mathura Prasad, who presumably knew that he was guilty, but also by his son Janki Prasad, who is not shown to have had anything to do with the offence, and who was *de facto* manager of the family affairs, while his father was in the lock-up. I doubt whether [8] any more pressing necessity could exist from the point of view of members of a Hindu family than the necessity for raising money to defend the head of the family against a serious criminal charge. In determining whether or not a case of *Musibat* has been made out, one must have regard to the probable intention of the author of the rule and to the class for whom the rule was intended. It is not suggested that an excessive amount of money was raised, and the plea that the terms of the mortgage are unconscionable has been abandoned. I am of opinion that the Court below was right in holding that a case of necessity has been made out. I would dismiss the appeal with costs.

KARAMAT HUSAIN, J.—I agree.

BY THE COURT.—The order of the Court is that appeal be dismissed with costs.

Appeal dismissed.

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34 A. 8 (= 11 I. C. 476=8 A. L. J. 1101).

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Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

CHUNNI LAL AND ANOTHER (*Defendants*) v. SITA RAM (*Plaintiff*).*

[10th July, 1911.]

Suit for declaration for invalidity of an adoption—Suit dismissed as time barred—Plaintiff debarred from obtaining a decree for possession on title.

When the setting aside of an adoption is essential to the granting of a decree for possession of immovable property, the fact that a suit to set aside the adoption has become time-barred is a bar to the granting of a decree for possession on title. *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar* (1) referred to. *Nathu Singh* v. *Gulab Singh* (2), and *Chandania* v. *Salig Ram* (3) distinguished.

[Ref. 75 I. C. 14=20 A. L. J. 814=45 All. 1.]

THE facts of this case were as follows :—

On the death of one Musammat Maghi Bai, widow of one Banke Das, the defendant, Chunni Lal, claiming to be the adopted son of Banke Das, obtained entry of his name in place of that of Maghi Bai. He thereafter sold a portion of the property. Thereupon the plaintiff, Sita Ram, brought a suit for a declaration that Chunni Lal was not an adopted son; that the sale-deed executed by him was null and void, and for possession of the property on the ground of the plaintiff being the next reversioner. He also prayed for an alternative relief that in the event of its [9] being found that Chunni Lal was the adopted son and the sale-deed was valid, the plaintiff might be given a decree for pre-emption. The Subordinate Judge held that the claim for a declaration was time-barred and that, therefore, the adoption could not be questioned, and gave a decree for pre-emption. The plaintiff appealed. The defendant Chunni Lal and his vendee filed cross-objections against the decree for pre-emption. The District Judge held that the alleged adoption, being that of a sister's son, was invalid; that the claim for a declaration was time-barred; that the declaration was not essential to the granting of a decree for possession, and that the claim for possession was within time. He dismissed the claim for a declaration; decreed the claim for possession, and dismissed the cross-objections. The defendants appealed to the High Court against the decree for possession. The appeal was heard by KARAMAT HUSAIN J., who subsequently referred it to a Bench of two Judges.

Munshi *Jang Bahadur Lal*, for the appellants :—

The court having distinctly dismissed the prayer for a declaration could not at the same time give a decree for possession. The dismissal of the prayer for a declaration amounted to this, that as between the parties the adoption was valid and could not be questioned. As a consequence of this, no decree for possession could have been given. The plaintiff did not appeal from that part of the decree which disallowed the declaration, and it has become final. The claim for possession must, therefore, necessarily fail.

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*Second appeal No. 326 of 1909, from a decree of F. S. Tabor, District Judge of Banda, dated the 18th of January, 1909, modifying a decree of Achal Bihari, Subordinate Judge of Banda, dated the 12th of November, 1908.

(1) (1894) I. L. R. 22 Cal. 609.
(2) (1895) I. L. R. 17 All. 167.
(3) (1903) I. L. R. 26 All. 40.

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Babu *Piari Lal Banerji* (for Mr. *A. H. C. Hamilton*; Babu *Durga Charan Banerji*, with him), for the respondent:—

Although the prayer for a declaration is time barred, yet as the suit is for possession as well the period is 12 years: article 141, and not article 118, governs the case; *Natthu Singh* v. *Gulab Singh* (1). The effect of dismissal of the prayer for declaration is not to make the adoption valid. The only result is that I cannot get that relief. The smaller relief of declaration which was open to me is now time-barred, and I cannot get it. But I am entitled to a larger relief, namely, possession. It was not on the merits that the suit for declaration was dismissed. On the contrary, the finding of the lower appellate court is that the [10] adoption, if it took place, was invalid. The claim was dismissed on a point of limitation. If a widow makes an adoption, but retains possession herself, and the reversioner brings a suit, after six years have expired, for a declaration of the invalidity of the adoption, he being not then entitled to sue for possession as well, and the court holds that the adoption is invalid, but dismisses the suit on the ground of limitation, can he not, afterwards, sue for and obtain possession? The dismissal of a suit on the ground limitation does not mean that all the issues in the case are found and decided against the plaintiff. A declaration is not a condition precedent for a decree for possession. This is laid down in I. L. R. 17 All. cited above, and in *Ram Chandra Mukerjee* v. *Kanjit Singh* (2), *Chandania* v. *Salig Ram* (3), *Basdeo* v. *Gopal* (4), *Ghandharap Singh* v. *Lachman Singh* (5) and *Jagannath Prasad Gupta* v. *Runjit Singh* (6).

Munshi *Jang Bahadur Lal*, in reply:—

Although it might have been unnecessary for the plaintiff to sue for a declaration, still in this case he chose to ask distinctly and separately for that relief. That was dismissed, and that part of the decree was allowed to become final. The plaintiff must take the consequences. In none of the cases cited on the other side was there a decree disallowing a declaration. The case of *Malkarjun* v. *Narhari* (7) supports me.

KNOX and KARAMAT HUSAIN, JJ.:—KARAMAT HUSAIN, J., by his order, dated the 8th of March, 1911, referred this appeal to a Bench of two Judges. The facts are these:—The owner of the property in dispute died about 1893. His widow, Maghi, took possession of the property, and adopted Chunni Lal to her husband in 1900. After her death in that year, Chunni Lal on the 10th of December, 1900, applied for mutation of names in his favour, and Narain, father of the plaintiff, objected. His objection was disallowed and the name of Chunni Lal was entered in April, 1901.

Chunni Lal, on the 25 of June, 1907, sold a portion of the property to Mata Din. The plaintiff, on the 25th of June, [11] 1908, brought an action against Mata Din and Chunni Lal. He sought three reliefs (1) a declaration that the adoption of Chunni Lal was invalid (2) recovery of possession of the property, and (3) in the alternative possession by right of pre-emption. The court of first instance dismissed the suit for declaration and possession and decreed that for pre-emption.

The plaintiff, appealed and the defendants filed objections under order XLI, rule 22. The lower appellate court came to the conclusion that the adoption was invalid, but that the suit being one for possession

(1) (1895) I. L. R. 17 All. 167.
(2) (1899) I. L. R. 27 Cal. 242 (254).
(3) (1903) I. L. R. 26 All. 40.
(4) (1886) I. L. R. 8 All. 644.
(5) (1888) I. L. R. 10 All. 485.
(6) (1897) I. L. R. 25 Cal. 354.
(7) (1900) I. L. R. 25. Bom. 337 (350)

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was not barred by time. It gave the plaintiff a decree in the following terms.—" The decree of the lower court, dated the 12th November, 1908, be modified and the claim be decreed in part with proportionate costs, the claim for declaration be dismissed and the claim for possession of the property be decreed with proportionate costs. The respondent's objection be dismissed with costs." The defendants come to this Court in second appeal, and it is urged by their learned vakil that the result of the dismissal of the plaintiff's claim for a declaration that the adoption of Chunni Lal is invalid is that, so far as the plaintiff is concerned, Chunni Lal's adoption cannot be questioned, and that his suit, therefore, for possession must fail. The learned vakil for the respondent argues that the lower appellate court in its judgment has found the adoption to be invalid; that the dismissal of the plaintiff's suit for a declaration of the invalidity of the adoption on the ground of limitation does not make the adoption valid, and that in a suit for possession on title a court may find an adoption to be invalid, although a suit for the invalidity of the adoption may be barred by time. In support of his contention he refers to *Nathu Singh* v. *Gulab Singh* (1) and *Chandania* v. *Sulig Ram* (2) and says that notwithstanding the dismissal of the claim for a declaration that the adoption was invalid, a decree for possession on title could be given. In none of the rulings referred to by the learned vakil for the respondent had the suit for a declaration of the invalidity of the adoption been dismissed, and those rulings are, therefore, distinguishable from the case before us. The dismissal of the plaintiff's suit for the declaration that the adoption was invalid precludes him [12] from questioning the validity of the adoption, and without establishing that the adoption is invalid, he cannot establish his title to possession. His suit for possession must therefore fail. If the avoidance of a juristic act is essential for the completion of a plaintiff's title for possession and the suit for such avoidance is time-barred, it is difficult to see how a suit for possession on title can succeed, and the remarks of their Lordships of the Privy Council in *Luchman Lal Chowdhri* v. *Kunhaya Lal Mowar* (3) favour that view; but as the trend of authority in this Court is the other way and as it is unnecessary to discuss that point in the present appeal, we refrain from entering into that question.

For the above reasons we allow the appeal, dismiss the plaintiff's claim for possession, and direct the lower appellate court to try the following issues with reference to the suit of the plaintiff for pre-emption.

(1) Is the plaintiff entitled to pre-emption on the basis of the *wajib-ul arz*?

(2) If he is, what is the price paid by Mata Din for the property claimed?

Additional evidence may be received. Ten days will be allowed for objections.

Mr. *Banerji*, for the respondent, admits that findings have been returned to both the above points by the lower appellate court and that he accepts those findings.

Upon those findings we decree the plaintiff's claim for pre-emption and direct that if he pay Rs. 150 on or before the 10th day of October, 1911, a decree be issued in his favour. If the amount be not so paid, the suit will stand dismissed with costs in all courts. The appellants will get the costs of this appeal.

Appeal decreed.

(1) (1895) I. L. R. 17 All. 167.
(2) (1908) I. L. R. 26 All. 40.
(3) (1894) I. L. R. 22 Cal. 609, at 611.

34 A. 13 (=8 A. L. J. 1072=11 I. C. 305.)

[13] APPELLATE CIVIL.

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34 A. 13=8 A. L. J. 1072 =11 I. C. 305.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

JIWAN RAM (*Defendant*) *v.* TONDI SINGH (*Plaintiff*).*

[10th July, 1911.]

Letters Patent, section 10—Appeal—Appeal from a dissentient judgment in an appeal under section 10—Pre-emption—Wajib-ul-arz—Custom or contract—Partition of village—No new wajib-ul-arz framed—"Hissadar deh"—Construction of document.

Held that an appeal will lie under section 10 of the Letters Patent from the judgment of a Judge who has differed from his colleague in an appeal under the same section.

The wajib-ul-arz of an undivided village gave a right of pre-emption first, to a near co-sharer (*hissadar karib*) and then to a co-sharer in the village (*hissadar deh*). Subsequently the village was divided by perfect partition into two mahals. No new wajib-ul arz was prepared. In a suit for pre-emption by the co-sharers in one of the mahals consequent upon a sale of property situated in another mahal to a stranger :—

Held, that the right might be enforced notwithstanding the partition. The meaning of the words *deh* and *mahal* discussed by KARAMAT HUSAIN, J.

Dalganjan Singh v. *Kalka Singh* (1) and *Dori* v. *Jiwan Ram* (2) referred to.

[Ref 17 C. W. N. 308=17 C. L. J. 206=18 I. C. 253—Appeal under Letters Patent.]

THE facts of this case were as follows :—

The respondent brought a suit for pre-emption in respect of the sale of a certain property in a village, basing his claim on the custom prevailing in the village. At the time when the wajib-ul-arz was prepared, there was only one mahal in the village. This wajib-ul-arz bore the date of 1272 Fasli. Subsequently the village was divided into two mahals, but no fresh wajib-ul-arz was prepared. The pre-emptor in the present case was a sharer in one mahal and the property sought to be pre-empted was situated in the other.

The defence to the suit was that no custom of pre-emption existed, and that further by reason of the partition the pre-emptor had lost all right to pre-empt.

The first two courts held that the wajib-ul-arz recorded a custom and that the plaintiff could pre-empt, inasmuch as the subsequent partition did not affect his pre-emptive rights,

A second appeal was preferred to the High Court and was heard by a Judge sitting singly. He held that the plaintiff had lost his right by reason of the partition and dismissed the suit. From this decision an appeal was preferred under section 10 of [14] the Letters Patent and was heard by a bench of two Judges, consisting of STANLEY, C. J. and BANERJI J. The two Judges differed in opinion the Chief Justice holding that the partition did not affect the right of the plaintiff, while BANERJI, J., was of opinion that the pre-emptor had lost his right by reason of the partition. The judgments are reported in I. L. R. 32 All 265 (s. v. *Dori* v *Jiwan Ram*). The decision of the Chief Justice prevailed, and an appeal was again preferred under section 10 of the Letters Patent.

Babu *Durga Charan Banerji* (with him Babu *Girdhari Lal Agarwala*) :

No appeal lay. Under the Civil Procedure Code the opinion of the Judge agreeing with the lower court prevailed, and by section 27 of the

* Appeal No. 16 of 1910 under section, 10 of the Letters Patent.

(1) (1899) I. L. R. 22 All. 1.

(2) (1910) I. L. R. 32 All. 265.

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Letters Patent the opinion of the senior Judge was given preference. From such a decision passed in an appeal under the Letters Patent, the Letters Patent gave no further right of appeal. That right was confined to appeals from a decision of a single Judge or from the decision of a bench when the Judges constituting it differ. A right to appeal under the circumstances was not given and a right to appeal must be given by statute. The Judges trying the case in appeal might again differ, then a third appeal under the Letters Patent would have to be brought. The law could not have contemplated that. So far as this country was concerned, a decision of the senior Judge of a bench hearing an appeal under the Letters Patent was to be final.

Babu *Sital Prasad Ghosh* (with him Babu *Jogindra Nath Mukerji*), for the appellant:—

The section only said that the decision of the senior Judge would prevail for the purposes of that appeal, not that it would be final. But a decision of Judges in an appeal under the Letters Patent was the decision of a Division Bench. It came under the second class contemplated by section 10 of the Letters Patent. The Chief Justice constituted the Division Benches under section 13 of the Charter Act. If there is a difference between the Judges, an appeal lies under the Letters Patent. If it were otherwise, the result might be that a single Judge of the High Court could overrule two or more Judges.

[15] KNOX and KARAMAT HUSAIN, JJ.:—A preliminary objection has been raised to the hearing of this appeal to the effect that no appeal lies. The case before us came originally in second appeal before a Judge of this Court sitting alone. From his judgment an appeal was filed under section 10 of the Letters Patent and was heard by two Judges of this Court. The two Judges were equally divided in opinion, and, as provided in the Letters Patent, the opinion of the senior Judge prevailed. From this opinion of the senior Judge, an appeal has again been filed. Section 10 of the Letters Patent is cited as authority for filing this appeal. We are told that no precedent could be found which exactly covers the case before us, and no such case appears to have arisen before any of the High Courts in India. We have not been able to find any case exactly in point. We are, therefore, thrown back upon the words as contained in section 10. Omitting for the time being such words of the section as have no bearing upon the case before us, that section will run as follows:—"And we do further ordain that an appeal shall lie to the said High Court from the judgment of one Judge of the said High Court, and that an appeal shall also lie to the said High Court from the judgment of one Judge of any Division Court wherever such Judges are equally divided in opinion." The words stand unlimited and give an unlimited right of appeal wherever there may occur a judgment of two Judges of this Court, when these Judges are equally divided in opinion.

It was contended that the appeal should lie to the High Court as a whole. We have considered that point also. Section 13 of the High Court Act, 1861, provides for the exercise of the appellate jurisdiction vested in this Court in such manner as may appear to this Court to be convenient for the due administration of justice and provided for by the rules of this Court. The only rule that bears upon the present case is rule 4, read with rule 1, and that provides that every case other than a case contained in rule 1, and rule 1 does not provide for such a case as the one before us, shall be heard and disposed of by a Bench of two Judges. The preliminary objection therefore fails.

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The case was thereupon argued on merits and judgment reserved.

[16] The following judgments were delivered :—

KNOX, J.—I would dismiss this appeal. It arises out of a suit for pre-emption based upon custom as contained in the wajib-ul-arz. The wajib-ul-arz under which the right is claimed is a wajib-ul-arz prepared under and in accordance with the provisions of Regulation VII of 1822. According to the Regulation that wajib-ul-arz is *prima facie* evidence of the custom recorded in it unless and until it has been formally altered.* It shall be shown by the result of a full investigation in a regular suit that the proceeding or record of the Collector was erroneous or incomplete. No evidence has been given by the defendant. I have therefore, to see what is the true construction to be placed upon its language. The terms of it will be found fully set out at page 282, I. L. R., volume 32. As I read them they record a custom whereby a person holding a share in the *deh* of Dharera has a right of pre-emption over and above a stranger. This is what I understand the villagers of Dharera intended and what they understood and what the Settement Officer found to be the custom. The stranger was to be kept out so long as any one who held any part or lot in the *deh* was prepared to pre-empt.

I would therefore dismiss the appeal with costs.

KARAMAT HUSAIN, J.—Certain property in the village Dharera was sold and a suit for pre-emption on the basis of the wajib-ul-arz of 1272 Fasli brought. The terms of the wajib-ul-arz are :—

"Agar kisi hissadar ko haqiyat apni bai wa rehan aur murtahin ko rehan dar rehan karna ho to bawaqt intiqal ke lazim hoga ki pahle apna hissadar karib ko aur dursurat inkar uske dusre hissadar deh ko khabar dekar baqimat wajib bai wa rehan kare."

[If any *hissadar* (sharer) has to sell or mortgage his *haqiyat* (interest) and if any mortgagee has to sub-mortgage it, he at the time of the transfer must give information first to his near *hissadar* and in case of his refusal (to buy) to other *hissadar deh* (sharer in the village) and then sell or mortgage it (to others) for a proper price.]

The village afterwards was divided into several mahals for which no new wajib-ul-arz was framed. The property sold was [17] situate in one mahal and the pre-emptor had a share in another mahal. A single Judge of this Court held that a perfect partition put an end to the right of pre-emption in respect of the property situate in a different mahal and the Full Bench case of *Dalganjan Singh* v. *Kalka Singh* (1) applied. He therefore dismissed the pre-emptor's claim. On appeal, the learned Judges who heard the appeal took different views. STANLEY, C. J., held that the plaintiff was entitled to pre-empt notwithstanding the partition, and that the words *hissadar deh*, as used in this wajib-ul-arz, meant a sharer in the village. BANERJI, J., came to the conclusion that the plaintiff could not pre-empt after the partition of the village, as although he was a sharer in the village, he was not a co-sharer of the vendor, and that the words *hissadar deh*, as used in the wajib-ul-arz meant a co-sharer of the undivided village for which the wajib-ul-arz had been prepared. See *Dori* v. *Jiwan Ram* (2). Hence this appeal. It has been expressly laid down in the Full Bench case of Dalganjan Singh that, where on the perfect partition of a mahal under the North-Western Provinces

* See Regulation VII, 1822, and *Heturaji Dubain* v. *Pahalwan Bhagat*, I. L. R. 33 All. 196.

(1) (1899) I. L. R. 22 All. 1.

(2) (1910) I. L. R. 32 All. 265.

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Land Revenue Act, 1873, no new wajib-ul-arz has been framed for any of the new mahals, the question whether or how far a contract or a custom of pre-emption recorded in the wajib-ul-arz of the undivided mahal is still in force, or who is entitled to claim the benefit of it, is not capable of any absolute or invariable answer." This shows that the mere fact that the words *hissadaran deh* have been construed to mean "co-sharers in the undivided village," is no reason for holding that the words "*hissa lar deh*" in the present case also mean a co-sharer in the undivided mahal and not a sharer in the *deh*, i.e., village.

Again, in interpreting a wajib-ul-arz according to the ruling in the case of *Dalganjan Singh* "no general considerations are of any value. In every case we must place ourselves as nearly as possible in the position of the parties and have regard to surrounding circumstances." These remarks imply that the learned Judges who decided *Dalganjan Singh* v. *Kalka Singh* (1) on placing themselves as nearly as possible in the position of the parties to the wajib-ul-arz and considering the surrounding [18] circumstances came to the conclusion that by using the words "*hassadaran deh*" the framer of the wajib-ul arz intended to confer the right of pre-emption on the co-sharers of the undivided *deh* meaning thereby the undivided mahal. It must be taken for granted that in the case such surrounding circumstances did exist as forced the learned Judges to come to that conclusion. It remains to be seen if in the case before us the circumstances are such as to make us conclude that the right of pre-emption is intended for the co-sharers of the undivided *deh* as one mahal. *Deh* is a Hindi word and means a definite area of agricultural holdings with houses upon, and is thus a physical unit. *Mahal* is a corruption of an Arabic word and is a legal term meaning "any local area held under separate engagement for the payment of the land revenue." *Deh* and *mahal* are two distinct conceptions. In one *deh* there may be several *mahals* and in one *mahal* there may be several *dehs* or portions of them. It, however, sometimes happens that a definite area of land is one *deh* and also one *mahal*. This is a pure accident and must not lead to the erroneous notion that when the terms "*deh*" and "*mahal*" may be predicated of one and the same area of land they became synonymous. When the wajib-ul-arz of the village Dharera was framed in 1272 Fasli, it was one *deh* and also one *mahal*. It was called a *deh* from the physical point of view and a *mahal* from the fiscal stand-point. The meaning of a "*hissadar* in the *deh* of Dharera" is quite distinct from the meaning of "a *hissadar* in the *mahal* of Dharera." The plain and natural meaning conveyed by the former is "a sharer in the physical entity called Dharera" without any notion of his liability to the payment of revenue; while the natural and ordinary meaning of the latter is "a co-sharer in the mahal of Dharera who is a member of the co-parcenary body jointly and severally responsible for the revenue of the mahal".

There being a vast distinction between the word "*deh*" and the word "*mahal*," the plain meaning of a "*hissadar deh*" in the wajib-ul-arz we have to construe is "a sharer in the village Dharera," and there are no surrounding circumstances to lead me to infer that the intention of the framers of the wajib-ul-arz in question was to mean by those words "a co sharer in the undivided [19] mahal of Dharera." Had they any such intention, they would have used the expression "*hissadar mahal*" instead of "*hissadar deh*." Moreover, the distinction sought to be drawn between a "*hissadar deh*" and a "*hissadar*

(1) (1899) I. L. R. 22 All. 1.

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mahal " is too fine for the mental calibre of the class of people to which the ordinary framers of wajb-ul-arzes belong. Again, in the wajib-ul-arz before us there are indications which go to show that a "*hissadar deh* " means " a sharer in the village " and not " a co-sharer in the undivided mahal." One is that the framers are stating a custom which exists in the " village " and not in the " mahal." Another is that they use the word " *hissadar*" in the singular number, showing thereby a complete absence of the idea of the co-parcenary body from their minds. The existence of the expression, " As to the rights of co-sharers among themselves based on custom or agreement," in the wajib-ul-arz in *Dalganjan Singh's* case might have been one of the surrounding circumstances which led the Chief Justice to hold that " *deh* " in that wajib-ul-arz meant "*mahal.*" There is nothing in the case before us to show that the word "*hissadar*" in the beginning of the pre-emption clause means "a co-sharer in the undivided mahal of Dharera " to make me infer that that word in the expression " *hissadar deh* " also means " a co sharer in the undivided mahal of Dharera." The natural meaning of the pre-emption clause in the case before us to my mind is that at the time framing the wajib-ul-arz there existed a custom whereby *a sharer in the village* was entitled to pre-empt. The fact that he at that time was also a *co-sharer in the undivided mahal* of Dharera was a mere accident and not the *differentia* on which the existence of the right of pre-emption depends. It is admitted in *Dalganjan Singh's* case that persons other than co-sharers in an undivided mahal can have the right of pre-emption after a perfect partition, and that being the case to be a co-sharer in an undivided mahal, cannot be an essential of the right of pre-emption. For the above reasons I hold that the plaintiffs, on the right interpretation of the wajib-ul-arz of 1272 Fasli, notwithstanding a perfect partition, are, as sharers in the village, entitled to pre-empt. The result is that I would dismiss the appeal with costs.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

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34 A. 20 (=8 A. L. J. 1020=11 I. C. 672.)

[20] APPELLATE CIVIL.

Before Mr. Justice Sir George Knox, and Mr. Justice Piggott.

MOHSIN ALI (*Decree-holder*) *v.* MASUM ALI (*Judgment-debtor*).*

[13th July, 1911.]

Civil Procedure Code (1908), *section* 48—*Execution of decree—Limitation—Execution prevented by fraud of judgment-debtor.*

Upon a correct interpretation of clause 2 of section 48 of the Code of Civil Procedure (1908) the effect of the proviso embodied in that clause is that the bar to execution created by the first clause of the same section is removed for a period of twelve years from any date on which the judgment-debtor has by fraud prevented the execution of the decree. *Sreenath Gooho* v. *Yusoof Khan* (1) dissented from.

[Ref : 58 I. C. 862=10 L. W. 566; 60 I. C. 630=1920 M W N. 788; 80 I. C. 905.]

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* Second Appeal No. 413 of 1911 from a decree of H W. Lyle, District Judge of Agra, dated the 16th of January, 1911, confirming a decree of Raja Ram, Munsif of Agra, dated the 29th of July, 1912.

(1) (1881) I. L. R. 7 Cal. 556.

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APPELLATE CIVIL.

34 A. 20=8 A. L. J. 1020=11 I. C. 672.

THIS was an appeal arising out of an application for execution of a decree passed on the 8th of June, 1891. In the year 1906 there was an application for execution by arrest of the judgment-debtor, and in the course of these proceedings it was found that the judgment-debtor had by fraud prevented the execution of the decree at various times within twelve years immediately before the date of the application then in question. In the present case also the question raised was whether execution of the decree was barred under section 48 of the Code of Civil Procedure, 1908. It was held by both the courts below that section 48 applied and the application was accordingly dismissed. The decree-holder appealed to the High Court.

Pandit *Sham Kishan Dar*, for the appellant.

Babu *Satya Chandra Mukerji*. for the respondent.

KNOX and PIGGOTT, JJ.—This is a second appeal in an execution case arising out of a decree passed on the 8th of June, 1891. The question to be decided is whether the application for execution out of which this appeal arises is or is not barred by the provisions of section 48 of the Code of Civil Procedure. We find that in the year 1906 there was an application for execution by arrest of the judgment-debtor, in connection with which the dispute between the parties was carried up to this Court in second appeal. The finding of the Additional Subordinate Judge in his judgment, dated the 6th June, 1907, which was affirmed by this Court on appeal, was to the effect that that [21] application was not barred by the provisions of section 48 aforesaid, because the judgment-debtor had by fraud prevented execution of the decree at various times within twelve years immediately before the date of the application then in question. Those dates are set forth in the judgment itself, and the last date there given is the 10th of June, 1904, when a warrant for arrest of this judgment-debtor was applied for, and the finding is that the judgment-debtor was guilty of fraud in that he successfully evaded arrest. We are of opinion that upon a correct interpretation of clause 2 of section 48 of the Code of Civil Procedure, the effect of the proviso embodied in that clause is that the bar to execution created by the first clause of the same section is removed for a period of twelve years from any date on which it is held that the judgment-debtor has by fraud prevented the execution of the decree. We have been referred to a ruling to the contrary in the case of *Sreenath Gooho* v. *Yusoof Khan* (1). But it seems to us that the learned Judge who decided that case has not given due effect to the words "Nothing in this section shall be deemed" at the beginning of clause 2, section 48 of the Code of Civil Procedure. We are, accordingly of opinion that this appeal must prevail and that the orders of both the courts below must be set aside and the learned Munsif directed to restore the application for execution to his file and endeavour to execute the warrant of arrest applied for by the decree-holder. If, as the learned Judge seems to think, there is reason to suspect that the decree-holder has applied for this warrant of arrest without serious intent of getting it executed, it should be easy enough for the court to deal with such tactics on his part. The application has been dismissed merely on the ground that it is barred under the provisions of section 48 of the Code of Civil Procedure and in that opinion we are unable to concur. The appellant will get his costs of these proceedings.

Appeal allowed.

(1) (1881) I. L. R. 7 Cal. 556.

34 A. 22 (=11 I. C. 710=8 A. L J. 1084).

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JULY 14.

APPELLATE CIVIL.

34 A. 22=11 I. C 710=8 A. L. J. 1084.

[22] APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Piggott.

ABDULLAH KHAN AND ANOTHER (*Plaintiff*) *v.* MUSAMMAT BUNDI AND OTHERS (*Defendants*).*

[14th July, 1911.]

Act No. IV of 1882 (*Transfer of Property Act*), *section* 41—*Ostensible owner—Owners of the property minors at the date of transfer—Act* (*Local*) *No. II of* 1901 (*Agra Tenancy Act*), *section* 201.

The owner of certain zamindari property died leaving him surviving a widow and two minor sons. During the minority of the sons their mother not only got herself recorded in respect of one-third of the property left by the husband (her proper share being one-eighth and the balance being her sons'), but she mortgaged it to one *N*. *N* sold his rights to *K*, who brought a suit for sale on his mortgage and having brought the property to sale purchased it himself He subsequently transferred it to *M* *M* brought a suit for profits against the sons and got an *ex parte* decree. *Held* on suit by the sons for declaration of title to their share in the property, excluding the one eighth belonging to their mother, or in the alternative for possession, (1) that the suit was not barred by the provisions of section 41 of the Transfer of Property Act, 1882, and (2) that the proviso to section 201 of the Agra Tenancy Act, 1901, protected the present suit. *Dalibai* v. *Gopibai* (1) and *Dambar Singh* v. *Jawitri Kunwar* (2) referred to.

THE facts of this case were as follows :—

One Nasib Khan died about the year 1890, possessed of a share in mauza Taprana. He left surviving him a widow Musammat Bundi, and two sons, who are the plaintiffs appellants now before us. Accordingly to the Muhammadan law, Musammat Bundi would inherit a one-eighth share in the landed property left by Nasib Khan, and the sons would take the remainder in equal shares. The appellants were minors at the time of their father's death, and during their minority Musammat Bundi not only got herself recorded as proprietor of a one-third share, but proceeded in 1892 to mortgage the same to one Nihal. The latter sold his rights to one Rura Mal, who is a respondent in this case. He brought a suit on the mortgage and, having obtained a decree, brought this one-third share to sale and purchased it himself. He subsequently sold to Mohib-ullah Khan, who is the second respondent. Mohib-ullah Khan, on the 1st of September, 1903, brought a suit for profits on account of this one-third share. This suit was not resisted by the present appellants and resulted in [23] an *ex parte* decree in favour of Mohib-ullah Khan. The plaintiffs then sued to establish their right in respect of five twenty-fourths share of the property left by Nasib Khan, being the difference between the one-eighth share which passed to Musammat Bundi by right of inheritance and the one-third share, which she mortgaged in 1892.

The Court of first instance (Munsif of Kairana) dismissed the suit, and this decree was affirmed in appeal by the Additional District Judge of Meerut. The plaintiffs appealed to the High Court.

Maulvi *Muhammad Ishaq*, for the appellants.

Mr. *C. Ross Alston*, for the respondents.

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* Second Appeal No. 1365 of 1910 from a decree of C. E. Guiterman, Additional Judge of Meerut, dated the 14th of September, 1910, confirming a decree of Kameshwar Nath, Munsif of Kairana, dated the 16th of June, 1910.

(1) (1902) I. L. R. 26 Bom. 433. (2) (1907) I. L. R. 29 All. 292.

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APPELLATE CIVIL.

34 A. 22=11 I. C. 710=8 A. L. J. 1084.

KNOX and PIGGOTT JJ.:—This was a suit for a declaration that the plaintiffs appellants be declared proprietors of a certain share in mauza Taprana or in the alternative be awarded possession of the same. It appears that one Nasib Khan died somewhere about the year, 1890, possessed of a share in the village in question. He left surviving a widow, Musammat Bundi, and two sons, who are the plaintiffs appellants now before us. According to the Muhammadan law, Musammat Bundi would inherit a one-eighth share in the landed property left by Nasib Khan, and the sons would take the remainder in equal shares. The appellants were minors at the time of their father's death, and during their minority Musammat Bundi not only got herself recorded as proprietor of a one-third share but proceeded in 1892 to mortgage the same to one Nihal. The latter sold his rights to one Rura Mal, who is a respondent in this case. He brought a suit on the mortgage and having obtained a decree, brought this one-third share to sale and purchased it himself. He subsequently sold to Mohib-ullah Khan, who is the second respondent now before us. Mohib-ullah Khan, on the 1st of September, 1908, brought a suit for profits on account of this one-third share. This suit was not resisted by the present appellants and resulted in an *ex parte* decree in favour of Mohib-ullah Khan. By the present suit the plaintiffs seek to establish their right in respect of a five twenty-fourths share of the property left by Nasib Khan, being the difference between the one-eighth share which passed to Musammat Bundi by right of inheritance and the [24] one-third share, which she mortgaged in 1892. The Courts below have dismissed the suit on two grounds only. First, they have held that the decision in the suit for profits operates as *res judicata* so as to bar this suit under the provisions of section 11 of the Code of Civil Procedure; secondly, they have held that the respondent, Mohib-ullah Khan, is protected by the provisions of section 41 of the Transfer of Property Act. In our opinion the suit ought not to have been dismissed on either of these grounds. The plaintiffs were minors at the time of their father's death, and at the time of the mortgage in favour of Nihal which constitutes the original transfer lying at the root of the respondent's title. Under these circumstances it cannot be said that Musammat Bundi was the ostensible owner of this one-third share with the consent, express or implied, of the present plaintiffs. Authority for this proposition may be found in *Dalibai* v. *Gopi Bai* (1) and in *Dambar Singh* v. *Jawitri Kunwar* (2). With regard to the question of *res judicata* we do not find it necessary to determine the question of the effect of the Revenue Court's decree on the ground of the same having been passed *ex parte*. It is sufficient for us to say that the plaintiffs in our opinion are clearly protected by the proviso to clause (3) of section 201 of the Agra Tenancy Act, II of 1901. At the time when he filed his suit for profits, Mohib-ullah Khan was not a recorded co-sharer, but he had applied for mutation some months before and mutation of names was effected in his favour while the suit for profits was pending and before it had been decided. On the principle laid down by the Full Bench of this Court which recently considered this question, it is clear that, even if that suit for profits had been defended by the present appellants, Mohib-ullah could have obtained a decree in that Court on the basis of the record in his name in the revenue papers on his proving that his name had been so recorded at any time before the decision of the suit. The *ex parte* decree

(1) (1902) I. L. R. 26 Bom. 433 (436). (2) (1907) I. L. R. 29 All. 292 (294.)

passed against the present plaintiffs cannot put them in a worse position than they would have occupied if they had resisted the suit and the suit had been determined against them on proof that Mohib-ullah Khan, during the pendency of the suit, became a recorded co-sharer. It follows [26] that the present suit is protected by the proviso at the end of clause (3) of section 201 of the Tenancy Act. We, therefore, accept this appeal, and setting aside the decrees of both the courts below, decree the plaintiff's claim for a declaration to the extent already stated, with costs throughout.

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34 A. 22=11 I. C. 710=8 A. L. J. 1084.

Appeal allowed.

34 A. 25 (=8 A. L. J. 1045=11 I. C. 636).

FULL BENCH.

Before The Hon'ble Mr. H. G. Richards, Chief Justice, Mr. Justice Banerji and Mr. Justice Tudball.

BHOLA NATH (*Plaintiff*) *v.* MUSAMMAT KISHORI AND ANOTHER (*Defendants*).*

[20th July, 1911.]

Civil Procedure Code (1908), *section* 60 (1) *(c)—Execution of decree—Mortgage—Agriculturist's house not appurtenant to his holding.*

Held by RICHARDS, C. J. and TUDBALL, J., (BANERJI, J., *dissentiente*) that section 60 of the Code of Civil Procedure will not operate to bar the sale of a house belonging to an agriculturist in execution of a decree on a mortgage of the same if such house is not an appurtenance of the mortgagor's holding which he is prohibited by law from mortgaging or transferring.

Per BANERJI, J.—The Legislature clearly intended that no court should sell a house belonging to and occupied by an agriculturist, provided that the house is of the description mentioned in clause (*c*) of the proviso to section 60, Code of Civil Procedure, and it makes no difference in the powers of the court, whether that house was mortgaged by the agriculturist for his debt or was not so mortgaged. The proviso forbids both attachment and sale, that is, where an attachment must precede a sale it forbids attachment, as well as sale, and where attachment is not a preliminary step, it forbids sale. *Ram Dial* v. *Narpat Singh* (1) referred to

[Ref : 63 I. C. 264=2 Pat. L. T. 622; 84 I. C. 749=22 A. L. J. 321=46 All. 489.]

THE facts of this case were as follows :—

One Gaya, the deceased husband of Musammat Kishori, and another person, Jaisukh, mortgaged to the plaintiff a portion of a dwelling house for Rs. 99. The mortgage was dated the 8th July, 1909. Gaya died childless. The plaintiff brought this suit against Kishori and Jaisukh for payment of mortgage money with interest and in default for the sale of the house. The defendant took up the plea that the house being an agriculturist's house could not be brought to sale. The Munsif dismissed the suit holding the mortgage to be invalid, but he found that it had been genuinely entered into. The Subordinate Judge affirmed [26] the decision, on the ground that an agriculturist's house could not be sold, and as six years had expired since date of mortgage, he dismissed the suit altogether. The plaintiff appealed to the High Court.

* Second Appeal No. 1194 of 1910 from a decree of Srish Chandra Basu, Subordinate Judge of Bareilly, dated the 14th July, 1910, confirming a decree of Baijnath Das, Munsif of Hevali, dated the 4th of April, 1910.

(1) (1909) I. L. R. 33 All. 136.

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JULY 20.

FULL BENCH.

34 A. 25 =8 A. L. J. 1045 =11 I. C. 646.

Munshi *Iswar Saran*, for the appellant, referred to order XXXIV, rules 4 and 5, as governing mortgage suits. Section 60 of the new Code did not apply to decrees obtained on a mortgage. Properties exempted therein were only saved from sale when attachment was necessary. That group of sections was headed 'attachment' and only related to sales in execution of money decrees. Besides, there was nothing to prevent a tenant selling or mortgaging his house of his own accord. Where a heading was given to a group of sections, it controlled their interpretation; Wilberforce on Interpretation, page 294. If a tenant could sell the materials of his house he could mortgage them; *Bhagwandas* v. *Hathibhai* (1).

Babu *Balram Chandra Mukerji* [for Maulvi *Ghulum Mujtaba*], for the respondents :—

The court should not help the plaintiff to bring the house to sale. It would be necessary to hold that section 60 had nothing to do with mortgage decrees. The words in the proviso were 'attachment *or* sale,' '*sale*' there included sales after attachment or otherwise ; *Tika Ram* v. *Bachailal* (2), *Ram Dial* v. *Narpat Singh* (3).

Munshi *Iswar Saran*, in reply :—

In the proviso the expression 'attachment *or* sale' was governed by the use of the word '*such*' preceding it. If the mortgage itself were invalid, the mortgagor would not incur any personal liability either. Act V of 1908 mainly dealt with procedure, and such an Act could not override a substantive right and that by implication only.

RICHARDS, C. J.—This appeal arises out of a suit for sale on a mortgage. The property consisted of a house, and it has been found that the mortgagors to whom the house belonged were agriculturists. Both the courts below have dismissed [27] the suit on the strength of section 60 of the Code of Civil Procedure.

It is to be borne in mind that it is not found that the house in question was an appurtenance of a tenancy which the tenant was incapable of mortgaging or transferring. This is a very important matter, because the question might be very different if the mortgage had been a mortgage of the house of an occupancy tenant which was found to be appurtenant to the holding. The sole question for us to decide is whether or not having regard to the provisions of section 60 of the Code of Civil Procedure the courts below were correct in dismissing the plaintiff's suit.

Section 60 (1) is as follows :—" The following property is liable to attachment and sale in execution of a decree, namely, lands, houses * * * Provided that the following particulars shall not be liable to such attachment or sale, namely :—

" (*a*) The necessary wearing apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments, as in accordance with religious usage, cannot be parted with by any woman :

" (*b*) tools of artizans, and where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed grain as may, in the opinion of the court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section ;

(1) (1879) I. L. R. 4 Bom. 25.
(2) (1909) 6 A. L. J. R. (Notes of cases) 107.
(3) (1909) I. L. R. 33 All. 136.

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"(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant there to and n cessary for their enjoyment) belonging to an agriculturist and occupied by him."

The argument on behalf of the respondents is that by virtue of the proviso the house of the defendants cannot be sold, and that inasmuch as the house cannot be sold in exacution of the decree, no mortgage decree ought to be made.

On the other hand, the appellant argues that section 60 does not apply to mortgage decrees at all, that it deals entirely with attachment and sale in respect of simple money decrees.

[28] In my judgment the decision of the courts below were incorrect. *Prima facie* a man is entitled to mortgage his property if he pleases; and if he can make a valid mortgage, the mortgagee is entitled to a mortgage decree entitling him to sell the property. The only aspect in which the decree of the court below can be supported is on the ground that the proviso to section 60 by implication enacts that the mortgage of a house of an agriculturist is illegal. Such a contention in my opinion cannot be sustained. The Code of Civil Procedure is an act which deals entirely with matters of procedure; and *prima facie* it is very improbable that the Legislature intended to deal with matters of substantive law. Where it was considered necessary for the protection of certain classes of tenants that their powers of transfer should be restricted, the Legislature by express provisions in the Tenancy Act has so enacted. It seems to me also that it would be a very strained construction to give to section 60 to hold that it applied to the execution of mortgage decrees. The section itself is headed "attachment." In the case of mortgage decrees no attachment is necessary and in practice no attachment is ever made. The section begins: — "The following property is liable to attachment and sale in execution of a decree." It seems quite clear that these words only apply to simple money decrees. Then follows the proviso, where it is true that the words are not "attachment *and* sale," but "attachment *or* sale." It must, however, be remembered that the proviso is a proviso to section 60, clause 1, which deals with simple money decrees. The words "such attachment or sale" also appear in the proviso, clearly showing that the proviso relates to what immediately preceeds. It is argued that the word "or" appearing in the proviso, instead of the word "and" necessarily shows that the section relates to mortgage decrees. I do not agree with this argument. There are cases of simple money decrees in which it is not necessary that there should be an attachment, namely, when there has been already an attachment prior to judgment or on foot of another decree. Furthermore, in the explanation the very same words "attachment or sale" appear, where it is quite clear that reference is being made to the execution of a simple money decree of a particular nature, namely, a simple money decree for rent. [29] In my opinion we would not be justified in holding that it was intended by the proviso to section 60 to render the sale or mortgage of the house of an agriculturist illegal. If it was not so intended, the mortgagor was entitled to mortgage his house, and the mortgagee, under the provisions of order XXXIV, rules 4 and 5, was entitled to a decree for sale, and I think that he would be entitled to execute this decree for sale notwithstanding the provisions of section 60 (1) (c) of the Code of Civil Procedure. I would allow the appeal.

BANERJI, J.—I regret I cannot agree with the learned Chief Justice. I see no reason to alter the opinion I expressed in my judgment in the

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34 A. 25=9 A. L. J. 1045 =11 I. C. 646.

case of *Ram Dial* v. *Narpat Singh* (1), decided by the late Chief Justice and myself, and subsequently followed by me in *Gulzari Lal* v. *Bhikari* (2). The court below must be taken to have found that the house which the plaintiff seeks to bring to sale is a house belonging to an agriculturist and occupied by him within the meaning of clause (c) of the proviso to section 60 (1) of the Code of Civil Procedure. If the Legislature forbids the sale of such a house, a court cannot by its decree order that a house of that description should be sold. In my opinion the law forbids the sale of such a house. Section 51 (*b*) provides that a court may order execution of a decree by attachment and sale, or by sale without attachment of any property. Section 60 of the Code specifies the different classes of property which are liable to attachment where attachment is necessary, and to sale. The proviso to the section is to the effect that certain particulars, among which are houses and other buildings belonging to and occupied by an agriculturist, shall not be liable to attachment *or* sale. At the commencement of the section the word "and" is used and in the proviso we find the word "or". The proviso, as I understand it, forbids both attachment and sale, that is to say, where an attachment must precede a sale, it forbids attachment as well as sale, and where it is not necessary that an attachment should be a preliminary step to a sale, it forbids sale. Therefore, in my opinion, section 60 and the proviso to it take away from the court the power to order a sale of property of the description mentioned in the proviso.

[30] The object of the Legislature is manifest. That object is that certain classes of debtors should be protected against their own improvidence. There can be no doubt that in the case of a simple decree for money the dwelling house occupied by an agriculturist cannot be sold. The policy of the law is that he should not be deprived of his place of residence by a process of court. I fail to see why, if an unsecured creditor of the agriculturist cannot proceed against the debtor's dwelling house, a secured creditor should be allowed to do so. The policy of the law equally applies to both the cases. In my opinion the Legislature clearly intended that no court should sell a house belonging to and occupied by an agriculturist provided that the house is of the description mentioned in clause (c) of the proviso to section 60, and it makes no difference in the powers of the court whether that house was mortgaged by the agriculturist for his debt or was not so mortgaged. I think that the use of the disjunctive "or" in the proviso is very significant, and that it leaves no room for doubt as to the intention of the Legislature. The Code of Civil Procedure no doubt lays down the procedure to be followed in the case of attachments or sales. One of the rules on the subject is that the dwelling-house of an agriculturist should not be sold, and that rule a court is bound to follow. To hold that such a house can in some cases be sold will be departing from the prescribed procedure and defeating the policy of the law. For these reasons I am of opinion that, as the court cannot order a sale of property of the description in question, it cannot make a decree directing such sale and the decision of the courts below is right. I would dismiss the appeal.

TUDBALL, J.—I am in full agreement with the learned Chief Justice and have practically nothing to add to what he has said. Presuming that the agriculturist in the circumstances of the present case has a legal right to sell or mortgage his house, it not being appurtenant to a class of holding which is non-transferable according to law, I fail to see how in

(1) (1909) I. L. R. 33 All. 136.

(2) (1911) 8 A. L. J. Notes of cases, 38.

justice, equity, or good conscience, a court can refuse to grant to the mortgagee a decree for sale. It seems to me as clear as possible that section 60 of the Code of Civil Procedure does not, and was never intended to apply to the case of a mortgage decree, for the execution of which [31] provision is made elsewhere than in that section. It seems to me to be going much too far to hold that section 60 of the Civil Procedure Code destroys the right of a man to make a mortgage of his property; for it practically amounts to that to say that his mortgagee is not entitled to a decree for sale on the basis of a mortgage which would otherwise be perfectly legal and valid. I think stress must be placed upon the fact that in the present case there is nothing to show that the house in question is appurtenant to the mortgagor's holding, or to show what the nature of that holding is. I say this by reason of the decision in *Ram Dial* v. *Narpat Singh* (1). That case was decided upon two grounds. With one I fully agree; but the other is the subject of discussion in this present case and I cannot accept it. For these reasons I would admit the appeal.

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34 A. 25=8 A. L. J. 1045 =11 I. C. 646.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decrees of both the courts below be set aside and the case remanded to the court of first instance, through the lower appellate court, with directions to readmit it in its original number in the register and determine it according to law. The parties will abide their own costs in this court. Otner costs will follow the event.

Appeal allowed.

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34 A. 32 (=8 A. L. J. 1111=11 I. C. 640).

APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, Mr. Justice Banerji and Mr. Justice Tudball.

RANGAM LAL AND ANOTHER (*Plaintiffs*) v. JHANDU (*Defendant*).*

[21st July 1911.]

Civil Procedure Code (1908), *order XLI, rule* 33—*Appeal—Procedure—Power of appellate court to interfere with portion of decree not challenged by either party.*

Plaintiff sued defendant for rent and obtained a decree for a portion of his claim. Plaintiff then appealed against the disallowance of the balance of the amount claimed, but defendant submitted to the decree and neither filed a cross appeal nor took objections under order XLI, rule 22, of the Code of Civil Procedure, 1908.

Held that it was not competent to the appellate court acting under order XLI, rule 33, to interfere with the decree obtained by plaintiff in so far as it had not been challenged by defendant. *Attorney-General* v. *Simpson* (2) referred to.

[**Fol**: 18 I. C. 530; 31 I. C. 986; **Ref**: 23 I. C. 886; 22 C. L. J. 397 =20 C. W. N. 541= 32 I. C 499; 48 I C. 78=28 C. L. J. 123; 60 I. C. 705; 43 All. 330=60 I. C. 817; **Dist**: 18 A. L. J. 925=58 I. C. 114: **Ref**: 82 I. C. 984; 79 I. C. 670; **Dist**: 72 I. C. 96.]

THE facts of this case were as follows:—

The plaintiffs brought a suit against the defendant for rent of a holding and claimed Rs. 294-7-0. The defendant alleged that the claim had been discharged. The Assistant Collector gave the plaintiffs a decree for Rs. 96-11-11 and dismissed the rest of their claim. The plaintiffs appealed

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* Second Appeal No 79 of 1911 from a decree of D. L. Johnston, District Judge of Meerut, dated the 23rd of September, 1910, reversing a decree of Mahesh Prasad, Assistant Collector, first class, of Meerut, dated the 23rd of March, 1910.

(1) (1909) I. L. R. 33 All. 186. (2) [1901] 2 Ch. D. 671.

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with respect to the portion of their claim dismissed by the first court. The defendant submitted to the order in so far as it was against him, nor did he file any objections under Or. XLI, r 22, in the plaintiffs' appeal. The District Judge remitted certain issues to the first court and on return of the findings he dismissed the entire suit of the plaintiffs, holding that he had power to do so under order XLI, rule 33, even though the defendant had not appealed against that part of the decree which was against him. The finding of the first court on remand was that a certain sum had been paid twice over. The plaintiffs appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellants :—

When the Legislature enacted order XLI, rule 33, it was not intended to do away with the provisions of order XLI, rule 22, which required that objections should be filed by the respondent if he meant to challenge any part of the decree within a certain **[33]** time. The interpretation of order XLI, rule 33, accepted by the Judge, would over-ride the necessity of paying court fee in certain cases, and make the provisions of the law of limitation regarding appeals absolutely nugatory. The language of the section showed that it only applied to cases where there were several respondents, against some of whom only a decree was passed. It had to be interpreted consistently with other provisions of Law ; Maxwell on Interpretation of Statutes, 247. In the case of several respondents the question of limitation would not arise, as they would all be on the record. The appeal would be within time and the court fee paid. He referred to order LVIII, rule 4, of the rules of the Supreme Court of Judicature in England and to *Attorney-General* v. *Simpson* (1).

Munshi *Mangal Prasad Bhargava*, for the respondent, relied on *Bikramjit Singh* v. *Husaini Begum* (2).

RICHARDS, C. J., and BANERJI and TUDBALL, JJ. :—This appeal arises out of a suit brought by a zamindar against a tenant for rent. The rent claimed was the sum of Rs. 294 7-0. The defence was that the claim had been discharged. The Assistant Collector, who tried the case in the first instance, found that the defendant was entitled to certain credits, but that there was a balance due of Rs. 96-11-11, for which he gave a decree. The plaintiff appealed against the decree in so far as it dismissed any part of his claim. The defendant submitted to the decree. He neither filed a cross appeal nor objections, as provided by order XLI, rule 22 of the Code of Civil Procedure. On appeal the learned District Judge referred certain issues. It would rather appear that he was influenced by certain matters which either were not before the court of first instance or were not urged in that court. These issues in substance involved a retrial by the court of first instance of the very issues which that court had already decided. The result, however, of the findings was that the learned District Judge considered that the plaintiff's claim had been fully discharged ; and he consequently in exercise of what he considered to be the powers conferred upon him by order XLI, rule 33, dismissed the plaintiff's suit *in toto*.

[34] The plaintiff comes here in second appeal and contends that the learned District Judge was not justified under the circumstances in making such a decree.

The question is one of considerable importance, because rule 33 of

(1) [1901] 2 Ch. D. 671.

(2) (1881) I. L. R. 3 All. 648.

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34 A. 32= 8 A. L. J. 1111 =11 I. C. 640.

order XLI is a new rule introduced into the Code of Civil Procedure for the first time in 1908. The rule is as follows :—

"The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order that case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection.

Illustration.

A claims a sum of money as due from him by *X* or *Y*, and in a suit against both obtains a decree against *X*. *X* appeals and *A* and *Y* are respondents. The appellate courts decides in favour of *X*. It has power to pass a decree against *Y*."

The words are no doubt very wide, but we think that care and judicial discretion must be used by appellate courts in the exercise of the powers conferred by the rule. In a proper case the court, of course, is quite entitled and should not hesitate to exercise them. It is not easy, nor perhaps expedient, to lay down any hard and fast rule. We think, however, that one principle may be safely stated. The courts in the exercise of the powers conferred by order XLI, rule 33, should not lose sight of the other provisions of the Code of Civil Procedure itself, nor of the Court Fees Act nor of the Law of Limitation. In particular it should bear in mind the case stated by way of illustration at the foot of the rule. Rule 22 of the same order provides :—"Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him before the court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the [35] appeal or within such further time as the appellate court may see fit to allow."

This rule clearly shows that it was intended that, *prima facie* at least, a respondent should not be allowed to take exception to so much of a decree as was against him without complying with the provisions of the rule.

In a case in which there is no sufficient reason for a respondent neglecting either to appeal or to file objections, we think the court should hesitate before allowing him to object at the hearing of the appeal filed by the appellant. The object of rule 33 is manifestly to enable the court to do complete justice between the parties to the appeal. Where, for example, it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the court may grant relief to the respondent, although he has not filed an appeal or preferred an objection. Of such cases the illustration to the rule is a type. In the supposed case the appellate court could not do justice to the appellant without doing injustice to the respondent unless it was enabled to make a decree against "Y".

The rule itself is for the most part taken from order LVIII, rule 4, of the rules of the Supreme Court of Judicature in England. The case of the *Attorney General* v. *Simpson* (1) is another illustration of the class of cases which calls for the exercise of the powers conferred by rule 33. That was a case in which an action was brought on behalf of the public for a

(1) (1901) L. R. 2 Ch. D. 671.

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declaration that the public were entitled to use certain locks on the river Ouse without payment of tolls. A further declaration was claimed that the defendant was under an obligation to repair, and keep in repair the locks. The court of first instance made a decree declaring that the public were entitled to use the locks without payment of tolls; but it, at the same time, contrary to the plaintiff's claim, declared that the defendant was under no obligation to repair the locks. The Court of Appeal found that the public were not entitled to use the locks without payment of tolls to the defendant. At the same time they were of opinion that the defendant was under an obligation to repair the locks. [36] The plaintiff, however, not unnaturally, had taken no exception to that part of the declaration of the court of first instance which absolved the defendant from the obligation to keep the locks in repair. The Court of Appeal felt that they were justified, while declaring that the public were liable to pay tolls, to declare that the defendant was liable to keep the locks in repair, notwithstanding that no appeal or objection had been taken to that part of the decree by the plaintiff.

In our opinion the di-missal by the learned District Judge of the plaintiff's suit in its entirety was not a proper exercise by him of the powers conferred by order XLI, rule 33. If the defendant was aggrieved by the decree against him for Rs. 96, there was no reason why he should not have appealed or filed objections.

We accordingly allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance. We decree that the parties shall pay their own costs in this Court. The defendant respondent will have his costs in the lower appellate court.

Appeal allowed.

34 A. 36 (=11 I. C. 474=8 A. L. J. 1052).

APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, Mr. Justice Banerji and Mr. Justice Tudball.

MUHAMMAD SHARIF AND ANOTHER (*Plaintiffs*) *v.* BANDE ALI AND OTHERS (*Defendants*).*

[21st July, 1911.]

Act No. 1 of 1872 (Indian Evidence Act), section 108—Evidence—Presumption of death—Burden of proof.

Held that the presumption which it is permissible to make under section 108 of the Indian Evidence Act, 1872, does not go further than the mere fact of death. If the period which has elapsed since the time that the person whose death is in question was last heard of is more than seven years, there is no presumption that such person died during the first period of seven years and not at any subsequent period.

Dharup Nath v. *Gobind Saran* (1) discussed. *In re Phene's Trusts* (2), *Narayan Bhagwant* v. *Shrinivas Trimbak* (3), *Fani Bhushan Banerji* v *Surjya Kanta Roy Chowdhry* (4) and *Srinath Das* v. *Probodh Chunder Das* (5) referred to.

[Fol: 81 I. C. 449=25 Bom. L. R. 134=47 Bom. 451; 37 Mad. 440; Ref: 42 I. C. 241=1917 M. W. N. 722=33 M. L. J. 295; 1921 M. W. N. 610=41 M. L. J. 295=14 L. W. 315; 71 I. C. 305=43 M. L. J. 725=16 L. W. 976=1923 M. W. N. 49; 74 I. C. 656=45 All 466.]

* Second Appeal No. 67 of 1911 from a decree of C. Rustomji, District Judge of Allahabad, dated the 14th of September, 1910, confirming a decree of Pirthwi Nath, Subordinate Judge of Allahabad, dated the 2nd of March, 1910.

(1) (1886) I. L. R. 8 All. 614.
(2) (1869) L. R. 5 Ch. A. 139.
(3) (1905) 8 Bom. L. R. 226.
(4) (1907) I. L. R. 35 Cal. 25.
(5) (1910) 11 C. L. J. 580.

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34 A. 36=11 I. C. 474=8 A. L. J. 1052.

[37] THE facts of this case were as follows :—

One Madad Ali mortgaged certain property to the father of the defendants respondents, on two occasions, first on 18th January, 1887, and again on 27th May, 1890 Madad Ali disappeared sometime after and nothing was heard of him again. His brother, Dildar Ali, died five to seven years ago. On his death the plaintiffs appellants, who were heirs of Dildar, sought to redeem the mortgages made by Madad Ali. They alleged that as Madad Ali disappeared some 18 years ago, he must be presumed to have been dead for the last eleven years, and Dildar, who was alive till a later date, must be deemed to have succeeded him as heir. The defendants took the plea that Dildar died first, and so did not come in at all. The first court and the lower appellate court found that Dildar died 7 years ago, but that there was no evidence as to when Madad Ali died.

Babu *Piari Lal Banerji* (for Munshi *Haribans Sahai*), for the appellants :—

A presumption arose on the expiry of seven years that Madad was dead, and it was for the other side to prove that he was alive after that date. There was no presumption as to when he died during those seven years. If the suit had been brought immediately after the seven years had expired, the other side would have had to prove his existence—why should the burden be shifted now that a longer time had elapsed ; *Dharup Nath* v. *Gobind Saran* (1). He referred to *In re Phene's Trusts* (2). He also relied on a decision of KARAMAT HUSAIN, J., in S. A. 486 of 1909. He discussed *Fani Bhushan Banerji*, v. *Surjya Kanta Roy Chowdhry* (3) and *Narayan Bhagwant* v. *Shreniwas Trimbak* (4).

Babu *Balram Chandra Mukerji*, for Dr. *Satis Chandra Banerji* (Mr. *Zafar Medhi* with him), for the respondents, referred to *Srinath Das* v. *Probodh Chunder Das*, (5).

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs sought to redeem two mortgages. It was necessary in order that they should succeed in their suit that they should [38] establish that they were the heirs of one Madad Ali. They proved that they were the heirs of Dildar Ali, and Dildar Ali would have been one of the heirs of Madad Ali provided that he had survived him. The defence was that Dildar Ali predeceased Madad Ali. The court below finds that Dildar Ali died seven or eight years ago The plaintiffs gave evidence which went to show that Madad Ali had not been heard of for some seventeen or eighteen years by persons who would naturally have heard of him if he had been alive. Beyond this they were able to give no affirmative evidence that Madad Ali was dead. Upon these facts the plaintiffs claim that they are entitled to succeed. They rely upon the provisions of section 108 of the Evidence Act, which is as follows :—

"Provided that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

They contend that it must be presumed that Madad Ali died some time during the first seven years during which, according to the evidence he was not heard of, and that upon the expiry of the first seven years it must be presumed that he was dead.

(1) (1886) I. L. R. 8 All. 614.
(2) (1869) L. R. 5 Ch. A. 139.
(3) (1908) I. L. R. 35 Cal. 25.
(4) (1906) 8 Bom. L. R. 226.
(5) (1910) 11 C. L. J. 580.

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34 A. 36=11 I. C. 474=8 A. L. J. 1082.

In my opinion this contention is not correct. The mere fact that the evidence adduced by the plaintiffs went to show that Madad Ali had not been heard of for more than seven years raises no greater presumption of his death than if the evidence had been confined to the exact period of seven years. In other words the only presumption is that Madad Ali is dead There is no presumption that he died in the first seven years or in the last seven years. The presumption merely is that he was dead at the time the question whether he was alive or dead arose, the burden of showing that he was alive being thrown upon the defendants if it was necessary for them to do so.

The plaintiffs rely on the case of *Dharup Nath* v. *Gobind Saran* (1). It was decided in that case that the presumption which the plaintiffs contend for did arise. With all respect to the learned Judge who delivered the judgment in the case, I think that he misinterpreted and misunderstood the passage from Taylor on Evidence which he quotes. The period of seven years which the learned author there speaks of, is in my opinion, [39] the minimum period during which it is necessary for the plaintiff to show that the person whose life or death is in question has not been heard of, and that if the evidence shows the person had not been heard of for 14 or 15 years instead of seven, the presumption would not be carried one bit further. There would be merely the presumption that the man was dead ; but there would be no presumption that he died at any particular moment of the period during which he has not been heard of. In the last edition of Taylor on Evidence the passage is as follows :— "although, however, a person who has not been heard of for 7 years is presumed *to be dead*, the law raises no presumption as to the time of his death, and if any one seeks to establish the precise period during those seven years at which some person died, he must do so by actual evidence." It is said that the anomalous position is created that if Dildar had sued during his lifetime, he would have succeeded, and that now his heir is not entitled to succeed. It seems to me that this argument proceeds upon the assumption that if Dildar had sued during his lifetime, the evidence as to the disappearance of Madad Ali would have been exactly the same. This would be a very rash assumption. Seven or eight years ago there must have been many persons who might have heard of the existence of Madad Ali who are now dead and gone.

Reliance was also placed upon the case *In re Phene's Trusts* (2). In that case the question was whether or not Nicholas Phene Mill had survived his uncle who died on the 5th of January, 1861, leaving certain property by will to his nephews in equal shares. Nicholas Phene Mill was one of his nephews. Sir G M. GIFFARD, L J., examined the authorities upon the question of presumption and finally decided that it lay upon the administrator of Nicholas Phene Mill to show by affirmative evidence that the latter had survived his uncle. At page 151 the Lord Justice says :—

"It is a general well-founded rule that a person seeking to recover property must establish his title by affirmative proof. This was one of the grounds of decision in *Doe* v *Nepean*, and to assert as an exception to the rule that the *onus* of proving death at any particular period, either within the seven years or otherwise should be with the party alleging death at such particular period, and [40] not with the person to whose title that fact is essential, is not consistent with the judgment of the present Lord Chancellor, when Vice Chancellor, in *In re Green's Settlement*, or with the *dictum* of Lord Justice BOLT when he said in *In re Benham's Trusts*, that the question was one, not of presumption but of proof; or with the real substance of the

(1) (1886) I. L. R. 8 All. 614.

(2) (1869) L. R. 5 Ch. A. 139.

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actual decisions, or the sound parts of the reasoning, in *Doe* v. *Napean*, or with the judgments in *Rex* v. *Inhabitants of Harborne* and *Reg* v. *Lumley*, or with the principles to be deduced from the judgment in *Underwood* v. *Wing*. The true proposition is, that those who found a right upon a person having survived a particular period must establish the fact affirmatively by evidence; the evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail.

In my opinion these remarks apply with equal force to the case where it is essential for the plaintiff's claim that he should establish the death of an individual at a particular period.

Lastly, the appellants relied upon the judgment of KARAMAT HUSAIN J., in the case of *Musammat Akbari-un-nissa* v. *Syed Bashir Ali* (1). With great respect I think the learned Judge fell into the same error as the Judges who decided the case of *Dharup Nath* v. *Gobind Saran*, and that he also misunderstood the judgment in Phene's Trusts case.

The view I take was taken in the case of *Narayan Bhagwant* v. *Shriniwas Trimbak* (2) and in the case of *Fani Bhushan Banerji* v. *Surjya Kanta Roy Chowdhry* (3). This last ruling was cited with approval in the case of *Srinath Das* v. *Probodh Chunder Das* (4). MOOKERJEE J., says at page 585 :—

"The only presumption which is enacted by section 107 of the Indian Evidence Act is, that the party is dead at the time of the suit, but there is no presumption as to the precise time of his death."

In my opinion there can be no doubt whatever that on the true construction of section 108 of the Evidence Act it lay upon the plaintiffs to show by affirmative evidence that Dildar Ali survived Madad Ali. Having failed to do so, the suit could not succeed. I would dismiss the appeal.

BANERJI, J.—I am of the same opinion. The case turns upon the construction of section 108 of the Indian Evidence Act. Under that section there is no doubt a presumption that a person who has not been heard of for seven years should be deemed to be dead, but there is no presumption as to the time of [41] his death. The true construction of the section has, in my opinion, been correctly laid down in the note to section 108 in Ameer Ali and Woodroffe's edition of the Evidence Act. The learned authors say:—

"The rule is the same whether only seven years or more than seven years have elapsed. There is no presumption either as to the time of death within the period of seven years, or that the person died at conclusion of the period * * * The only presumption enacted by the section is that the party is dead at the time of suit, but there is no presumption in any case as to the time of his death."

The weight of authority to which reference has been made by the learned Chief Justice is in support of this view, and I do not think that I can profitably add anything to what he has said. I agree in the order proposed.

TUDBALL, J.— I concur.

BY THE COURT.—The order of the Court will be that the appeal is dismissed with costs.

Appeal dismissed.

(1) S. A. No. 486 of 1909.
(2) (1905) L. R. 8 Bom. 226.
(3) (1907) I. L. R. 35 Cal. 25.
(4) (1910) 11 C. L. J. 580.

1911
JULY 27.

APPELLATE CIVIL.

34 A. 41 (=8 A. L. J. 1095 =12 I. C. 183.)

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Piggott.

KHUB CHAND (*Defendant*) *v.* HARMUKH RAI AND ANOTHER (*Plaintiff*).*

[27th July, 1911.]

Act No IX of 1908 (*Indian Limitation Act*) *section* 12—*Limitation—Time requisite for obtaining copy—Application for copy made on date the Court closed for annual vacation—Notice posted during vacation—Copy received after vacation.*

Where an application for copies of a judgment and decree was made on the day when the Court rose for its annual vacation, it was *held* that the applicant was entitled to the benefit of the whole period of the vacation, notwithstanding that the copying department was kept open for some days and a notice posted during the vacation that the applicant's copies were ready.

[Ref : 1 Pat. L. J. 485 ; 35 I. C. 888=20 C. W. N. 1303 : Cf : 36 M. L. J. 122=1918 M W. N. 886=9 L. W. 8 : 36 M. L. J. 62.]

THE facts of this case were as follows :—

The decision of the first Court in a certain case was dated the 30th of September 1909. The appellant applied for a copy of the judgment and decree on the 13th of October, 1909. On the latter date the subordinate courts closed for the annual vacation [42] and did not re-open till the 17th of November, 1909. Under the special orders of the District Judge the copying department continued working during the earlier days of the vacation, and accordingly a notice to the effect that the copy required by the appellant was ready, was posted on the notice-board of the court on the 18th of October, 1909. The copy was actually received by the appellant on the 29th of November, 1909, and his petition of appeal was presented to the lower appellate court on the 1st of December, 1909. The District Judge dismissed the appeal as time-barred. The appellant appealed to the High Court urging that he was entitled to the benefit of the whole period of the vacation, notwithstanding the notice above referred to.

Munshi *Gulzari Lal*, for the appellant.

Mr. *Abdul Raoof* and Dr. *Tej Bahadur Sapru*, for the respondents.

BANERJI and PIGGOTT, JJ.—This is a defendant's appeal, and the only point for determination is whether the lower appellate court was justified in dismissing the appeal presented before it by the same defendant, on the ground that it was barred by limitation. The decision of the first court in the case was dated the 30th of September, 1909. This defendant applied for a copy of the judgment and decree on the 13th of October, 1909. On that same date the courts below closed for the annual vacation, and did not re-open until the 17th of November, 1909. It appears that under the special orders of the District Judge the copying department continued working during the earlier days of the vacation, presumably in order to make up arrears. Under these circumstances a notice to the effect that the copy required by the defendant, Khub Chand, was ready, was posted on the notice-board of the court on the 18th of October, 1909. The copy was actually received by Khub Chand on the 29th of November, 1909, and his petition of appeal was presented to the lower appellate court on the 1st of December,

* Second Appeal No. 406 of 1910 from a decree of H. M Smith, Additional Judge of Aligarh, dated the 4th of March, 1910, confirming a decree of Banke Behari Lal, Additional Subordinate Judge of Aligarh, dated the 30th of September, 1909.

1909. The question we have to determine is what is to be considered the period requisite for obtaining necessary copies in this case. We have it on the affidavit of the appellant, which was not controverted, that he did not actually receive notice that his copy was ready before the date on which the copy was made over to him, namely, the [43] 29th of November, 1909. We have only to consider, therefore, whether he was bound to have taken cognizance of the notice posted on the notice-board of the Court on the 18th of October, 1909, at a time when the Court was closed on account of the annual vacation. We are of opinion that the appellant should not be considered bound to have taken cognizance of that notice until the date the Court re-opened after the vacation, that is, until the 17th of November, 1909. We hold, therefore, that the period requisite for obtaining the copy in this case extended from the 13th of October to the 17th of November, 1909, and if this period be excluded under the provisions of section 12 of the Limitation Act, the appeal was within time when presented to the lower Appellate Court on the 1st of December, 1909. We, accordingly, allow this appeal, set aside the order and decree of the lower Appellate Court and remand the case to that Court with directions to re-admit the appeal under its original number in the register and to dispose of it according to law. Costs here and hitherto will abide the event.

Appeal allowed—Cause remanded.

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JULY 27.

APPELLATE CIVIL.

34 A. 43 =8 A. L. J. 1095 =12 I. C. 183.

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34 A. 43 (=11 I. C. 706=8 A. L. J. 1138.)

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Piggott.

KULDIP DUBE (*Plaintiff*) *v.* MAHAUL DUBE AND OTHERS (*Defendants*).*

[29th July, 1911.]

Award—Act No. 1 of 1877 (*Specific Relief Act,*) *section* 30—*Specific performance—Suit to recover money payable under an award—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule* 1, *articles* 113, 116, 120—*Limitation.*

By the terms of an award it was provided, *inter alia*, that the defendants should pay to the plaintiff the sum of Rs. 350 on or before the 27th of June, 1904, and in default of such payment the plaintiff could recover from the defendants Rs. 350 with interest at 12 per cent. per annum.

Held that a suit to recover on default of payment by the stipulated date, the sum abovenamed with interest was not a suit for specific performance of a contract, and as such governed, by article 113 of the first schedule to the Indian Limitation Act, 1908, but was governed by either article 116 or article 120.

Sukho Bibi v. *Ram Sukh Das* (1), *Raghubar Dial* v. *Madan Mohan Lal* (2), *Sheo Narain* v. *Beni Madho* (3), *Sornavalli Ammal* v. *Muthayya Sastrigal* (4), [44] *Taleswar Singh* v. *Bahori Singh* (5) and *Bhajhari Saha Banikya* v. *Behary Lal Bhasak* (6) referred to.

[Fol.: 31 I. C. 816; Ref: 64 I. C. 431=2 Lah. 316.]

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* Second Appeal No. 146 of 1911 from a decree of Guru Prasad Dube, Second Additional Judge of Gorakhpur, dated the 21st of November, 1910, confirming a decree of Lal Gopal Mukerji, city Munsif of Gorakhpur, dated the 20th of March, 1909.

(1) (1883) I. L. R. 5 All. 263.
(2) (1893) I. L. R. 16 All. 8.
(3) (1901) I. L. R. 23 All. 285.
(4) (1900) I. L. R. 23 Mad. 593.
(5) (1904) I. L. R. 26 All. 497.
(6) (1906) I. L. R. 33 Cal. 881.

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APPELLATE CIVIL.

34 A. 43=11
I. C. 705=8
A. L. J. 1138.

BY an award dated the 12th of January, 1904, it was provided, amongst other things, that one party should pay to the other the sum of Rs. 350 on or before the 27th of June, 1904, and in default of such payment being made the party to whom it was due was entitled to recover the same with interest at the rate of 12 per cent. per annum. The present suit was to recover this sum of Rs. 350 with interest, as well as other moneys alleged to be due under the terms of the award. As regards the sum of Rs. 350 the Court of first instance (city Munsif of Gorakhpur) held that its recovery was barred by article 113 of the first schedule to the Indian Limitation Act, 1908, and on appeal this finding was upheld by the additional District Judge. The plaintiff thereupon appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

TUDBALL and PIGGOTT, JJ.—The parties to this suit are members of one and the same family. On the 9th of January, 1904, they executed an agreement by which they submitted various differences which had arisen between them to the arbitration of one Phullu Dube and on the 12th of January, 1904, the arbitrator delivered an award which was signed by the parties in token of their acceptance. This award contained a number of provisions regarding the family property and the debts due on the same; but we are now concerned only with one provision, according to which the defendants (strictly speaking Dudhnath, father of the first three defendants and grand-father of the fourth) was bound to pay Rs. 350 to the plaintiffs by the 27th of June, 1904. In default of such payment it was provided by the award that the plaintiffs should be entitled to recover this amount with interest at 12 per cent. per annum. The suit is one for recovery of this amount with interest, as well as for other moneys alleged to be due to the plaintiffs in consequence of the provisions of the award. The Court of first instance went into the whole question of accounts between the parties and finally decreed the plaintiff Kuldip Dube a sum [45] of Rs. 125-8-0 with proportionate costs and future interest at 6 per cent. per annum on account of certain payments made in accordance with provisions contained in the award in satisfaction of certain family debts, but dismissed the claim for Rs. 350 and interest as barred by limitation. The plaintiff appealed, and there was a cross objection by the defendants regarding another item in the account. The court of first appeal, the learned Additional Judge of Gorakhpur, affirmed the decision of the first court, and the plaintiff, Kuldip Dube, comes to this court in second appeal. His memorandum raises a small question as to costs, which was not pressed in argument and which will practically be disposed of by the order we propose to pass as to the costs of the suit as a whole. The one question for determination before us is whether the claim for Rs. 350 and interest in accordance with the provisions of the award of the 12th of January, 1904, is or is not barred by limitation. This money was payable on or before the 27th of June, 1904, and this suit was instituted in the court of first instance on the 8th of February 1909. The contention on behalf of the defendants, which has found favour in both the courts below, is that the period of limitation applicable is three years, in accordance with article 113 of the second schedule to the Indian Limitation Act. If the suit can in fact be regarded as one "for specific performance of a contract" within the meaning of the said article, it should presumably have been brought within three years of the date fixed for the payment of the money,

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namely, the 27th of June, 1904. On the other hand, the plaintiff appellant contends before us that the suit is either governed by article 116 (for compensation for the breach of a contract in writing registered), or is one falling under article 120 of the same schedule, as being a "suit for which no period of limitation is provided elsewhere." In either case the suit would fall within a six years' period of limitation and would be well within time.

We have been referred to a number of cases on the subject.

In *Sukho Bibi* v. *Ram Sukh Das* (1) and again in *Raghubar Dial* v. *Madan Mohan Lal* (2) it was held, in each case by two Judges of this court, that a suit for the recovery of a balance of [46] money due under the terms of an award is virtually a suit for the specific enforcement of the award, and is therefore subject to the limitation prescribed by article 113 of the second schedule to the Indian Limitation Act of 1877. The point was discussed at some length in the latter of these two judgments, and the decision turns upon an express finding that the suit then before the court was not one for compensation for the breach of a contract. These cases were considered by a bench of this court in *Sheo Narain* v. *Beni Madho* (3). That was a suit for recovery of possession over immovable property; the learned Judges held that the mere fact that such a suit was brought upon a title established by a certain award would not make it a suit for specific performance. They did not find it necessary to dissent from the two older rulings of this court already referred to; but it is clear that they doubted them, for they relied upon a Madras case—*Sornavalli Ammal* v. *Muthayya Sastrigal* (4)—in which these rulings are distinctly dissented from. A later case of our own court is that of *Tale-war Singh* v. *Bahori Singh* (5). The facts of this case are worth noting because the *ratio decidendi* is significant. It appears that certain matters in dispute between the parties had been referred to arbitration, and that the arbitrator delivered an award in accordance with a compromise entered into by the parties themselves. This award directed, amongst other things, that each party should transfer certain immoveable property to the other, and the suit was by one of the parties concerned for recovery of the property agreed to be conveyed. It was held that this was a suit for specific performance of a contract within the meaning of article 113 of the second schedule of the Indian Limitation Act. The plaintiff had at the time of his suit no valid title to the property which he claimed; what he possessed under the terms of the award was a right to compel the opposite party to give him a valid title deed by executing a conveyance in his favour. Such a suit may perhaps be a suit "for specific performance" in the strictest sense of the words. It does not seem quite clear how far the learned Judges who decided that case relied on the fact that the award before them was based upon a compromise entered into [47] by the parties and might therefore be held to partake in a special sense of the nature of a contract. It would seem, however, that they accepted the position taken up in the older rulings of this court that, by reason of the operation of section 30 of the Specific Relief Act (Act I of 1877), a suit for the specific performance of the terms of an award should be regarded as a suit for the specific performance of a contract within the meaning of article 113 of the schedule to the Limitation Act. In any case the

(1) (1883) I. L. R. 5 All. 263.
(2) (1893) I. L. R. 16 All. 3.
(3) (1901) I. L. R. 23 All. 285.
(4) (1900) I. L. R. 23 Mad. 593.
(5) (1904) I. L. R. 26 All. 497.

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34 A. 43=11 I. C. 705=8 A. L. J. 1138.

principle underlying the decision is that an award is the outcome of a contract to refer to arbitration and that the Legislature has seen fit to limit suits for the specific performance of a contract to a period of three years, even though such contract be in writing registered, and though a longer period would have been allowed for a suit in which the plaintiff confined himself to seeking damages for breach of the terms of the registered contract. The Calcutta High Court had occasion to consider the older rulings of this court in the case of *Bhajahari Saha Banikya* v. *Behary Lal Basak* (1). The remarks of MOOKERJEE, J., at pages 885 and 886 of the report are of great interest. He doubted the correctness of the Allahabad decisions on the ground that there was nothing in section 30 of the Specific Relief Act, which necessarily placed awards on the same footing as contracts for purposes of limitation; but he admitted the general principle that ".the jurisdiction of the court in enforcing the specific performance of the provisions of an award is founded on the principle that the award is the outcome of a contract to refer to arbitration," and he did not base his dissent from the broad proposition laid down in *Sukho Bibi* v. *Ram Sukh Das* entirely on that ground. He pointed out that, when a court orders the defendant to pay money to the plaintiff which the former ought to have paid under the terms of an award but had not paid, the court is not really enforcing specific performance at all, but is directing payment of compensation for non-compliance with the terms of the award.

It seems to us that this remark is peculiarly apposite to the facts of the case now before us and furnishes the true basis for the decision of the same. All that section 30 of the Specific Relief Act lays down is that when the question is one of specific [48] performance, the court has the same powers, and should proceed upon the same principles, in the case of an award as in the case of a contract. The way to consider the question then is to take the terms of the award before the court and to see whether, if these same terms had been embodied in a contract between the parties, the suit before the court is or is not one in which specific performance of those terms is claimed and ought to be decreed. In the present case the terms were that the defendant should pay the plaintiff Rs. 350 on or before the 27th of June 1904. The defendants failed to do so, and the plaintiff claims that, under a further provision contained in the document itself, he is entitled to recover Rs. 350 with interest at 12 per cent. per annum. Had the same suit been brought with reference to a contract in writing registered which embodied the same terms, no one would have dreamt of describing the suit as one for specific performance of the contract. It would clearly be a suit for compensation for breach of contract in a case in which the penalty for such breach was prescribed by the contract itself (*vide* sections 73 and 74 of the Indian Contract Act), and it would be subject to a limitation period of six years under article 116 of the schedule to the Indian Limitation Act. We are, therefore, clearly of opinion that the suit before us is not one for specific performance at all, and that article 113 of the schedule to the Indian Limitation Act does not apply. We do not think that we are precluded from arriving at this decision by the older rulings of this court to which reference has been made. In the first place, those rulings have been distinguished, and their authority shaken, by the later rulings of this court which we have also considered. In the second place, it is not necessary for us to determine the broad question whether or not a suit to enforce the specific performance of the

(1) (1906) I. L. R. 33 Cal. 881.

provisions of an award is a "suit for the specific performance of a contract" within the meaning of article 113 aforesaid. In so far as this proposition appears to be laid down by rulings of this court, we leave it undisturbed. We say the suit before us is not a suit for specific performance at all; and this must be a question to be determined in each case upon the pleading set forth in the plaint taken in connection with the terms of the award or other document upon which the plaintiff's suit is based.

[49] Nor is it necessary for us to determine whether article 116 or article 120 of the schedule to the Indian Limitation Act governs this case. If the correct view be that an agreement to refer a matter to arbitration is in effect a contract to do whatever the arbitrator shall direct, it may be that the suit before us is a suit for compensation for breach of contract, and is governed by article 116 because based upon a registered instrument. Otherwise, it is a suit of a nature for which provision is not elsewhere made and must be referred to the provisions of article 120. In either case the period of limitation is the same, and the suit is within time.

We accordingly set aside the decrees of both the courts below, and give the plaintiff a decree for a further sum of Rs. 543-10-0 in addition to the sum of Rs. 125-8-0 awarded by the first court. The plaintiff will get his costs in this court. In the lower appellate court the defendants respondents should bear the costs of their cross-objections which were dismissed; otherwise the parties will pay and receive costs in both the courts below in proportion to failure and success. The decree will carry interest at 4 per cent. per annum from the date of the first court's decision as directed in the decree of the said court.

Appeal allowed.

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JULY 29.

APPELLATE CIVIL.

34 A. 48=11 I. C. 705=8 A. L. J. 1138.

34 A. 49 (=8 A. L. J. 1160=11 I. C. 712.)

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Piggott.

SALIG RAM AND ANOTHER (*Plaintiffs*) *v.* CHAHA MAL (*Defendant*).*

[29th July, 1911.]

Act No. IX of 1872 (*Indian Contract Act*), *section* 212—*Principal and agent—Suit for compensation for loss caused by negligence of agent—Jurisdiction—Civil Procedure Code* (1908), *section* 20 (*c*).

The plaintiffs who were grain-dealers, ordered the defendant, who was a commission agent at Karachi, to purchase some grain for them. The latter did so, and the plaintiffs sent him some money on account. In accordance with the direction of the plaintiffs the railway receipt for the goods purchased was sent by value payable post. By some mischance it did not arrive. The defendant instructed the railway authorities not to deliver the goods till the balance due to him was paid. The balance was paid by the plaintiffs to the defendant's agent at Dehli. The Railway officials at Hathras refused to deliver the goods without the defendant's consent and delay occurred. In the meantime the price of the particular kind of grain fell and the speculation resulted in a loss to the [50] plaintiffs. *Held*, on suit by the plaintiffs for compensation instituted at Hathras, that the case was for compensation under section 212 of the Contract Act in respect of the direct consequences of the defendant's neglect and misconduct, and that the cause of action arose at Karachi and the suit therefore did not lie in the court at Hathras.

[Ref: 42 All. 619=18 A. L. J. 749=59 I.C. 359; 60 I. C. 481; 64 I. C. 387 2 Lah. L. J. 555; 80 I. C 661=22 A. L. J. 591=46 All. 465; 78 I. C. 991; 79 I. C. 30; Dist: 88 I. C. 309.]

* First Appeal No. 7 of 1911 from an order of H. M. Smith, Additional Judge of Aligarh, dated the 23rd of September, 1910.

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APPELLATE CIVIL.

34 A. 49=8 A. L. J. 1160 =11 I. C. 712.

THE facts of this case were as follows :—

The plaintiffs, who were grain dealers at Hathras, on the 30th December, 1910, telegraphed to the defendant, who was a commission agent at Karachi, ordering two wagon loads of *juar* to be sent at once to Hathras. They sent 600 rupees by telegram and another 600 rupees by means of a hundi. The *juar* was despatched on the 2nd of January, 1911, and reached Hathras on the 12th of January. The railway receipt was, on the plaintiff's instructions, sent value payable for the balance due to the defendant, but for some reason it was not delivered to the plaintiff's and, owing to instructions given by the defendant to the railway authorities, the grain was not delivered to the plaintiffs until the 8th of February, 1911. Meanwhile the price of juar had fallen and the speculation resulted in a loss. The plaintiffs sued for compensation due on account of the alleged negligence of the defendant, and instituted the suit at Hathras. The court of first instance (additional Munsif of Hathras) decreed the claim in part. On appeal by the defendant the additional Judge of Aligarh held that the court at Hathras had no jurisdiction and ordered the plaint to be returned for presentation to the proper court. Against this order the plaintiffs appealed to the High Court.

Mr. *A. H. C. Hamilton*, for the appellants.

Munshi *Girdhari Lal Agarwala*, for the respondent.

TUDBALL and PIGGOTT, JJ.—The plaintiffs appellants are residents of Hathras in the Aligarh district where they deal in grain. The defendant is a commission agent doing business at Karachi. The former brought the present suit in the court of the Munsif at Hathras (it was subsequently transferred to the court of the Additional Munsif of Aligarh) on the following allegation of fact :—In the end of December, 1910, grain being very dear at Hathras, they inquired by telegram from the defendant the price at which *juar* was selling at Karachi. The defendant wired the rate on the 27th [51] of December, 1910. On the 30th December, 1910, they wired to him an order to purchase two waggon loads of *juar* at once and to despatch the same by rail to Hathras. They wired to him on the same day Rs. 600, and also sent him a *hundi* for Rs. 600. On the same date the defendant wired to say that he had purchased 500 maunds of *juar*. On the 2nd of January, 1911, the defendant wired to say that the goods had been despatched. They actually arrived at Hathras on the 12th of January. After receipt of the telegram of the 2nd of January the plaintiffs wrote to the defendant telling him to send the railway receipt and invoice to them by value payable post for the amount which might still be due to him. He, however, failed to send the railway receipt, but on the 16th of January he sent a post-card stating that he had sent it V. P. P. for Rs. 310-7-0, and that they should pay this amount and take the receipt. No receipt arrived. (Here we may note that it had been duly sent V. P. P., but owing to some error either in the address or on the part of the post office had not been delivered.) Correspondence followed. The defendant ordered the railway authorities not to deliver the goods. (He had not then received payment of the balance due.) On the 25th of January the plaintiffs paid the amount to the defendant by handing it over to an agent of his at Delhi. The Railway officials at Hathras refused to deliver without the defendant's consent and further delay occurred and the goods were not delivered until February 8th. In the meantime the price of the grain at Hathras fell and the speculation resulted in a loss to

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34 A. 49=8 A. L. J. 1160 =11 I. C. 712.

the plaintiffs. This loss they ascribe to defendant's negligence and misconduct in (1) not sending the railway receipt as ordered, (2) in ordering the railway authorities at Karachi not to deliver the goods, (3) in still delaying to order the delivery after the payment made on the 25th of January to his agent at Delhi.

Among other defences with which we have no concern, the defendant pleaded that the court at Aligarh had no jurisdiction to try the suit. The first court held that it had and partly decreed the claim. The lower appellate court held that the courts in Hathras had no jurisdiction and ordered the plaint to be [52] returned for presentation in the proper court. Hence the present appeal.

The sole question for decision is, whether the cause of action in whole or in part arose at Hathras, *vide* section 22 (c) of the Code of Civil Procedure, which applies to the facts of the present case. The case is clearly one for compensation under section 212 of the Contract Act in respect of the direct consequence of the defendants' neglect and misconduct as alleged. The latter was the appellants' agent, and it was his duty to purchase the grain at Karachi, to place it on the railway at Karachi, and despatch it to the plaintiff's address, and he was then directed to post the railway receipt and send it V. P. P. to the plaintiffs. When the trouble arose it will be seen from the correspondence detailed in the first court's judgment that he ordered the railway authorities at Karachi not to deliver the goods as he had not received payment. Finally, after the money had been paid on the 25th of January, he was asked by letter to order the said railway authority at Karachi to wire instructions to Hathras to make delivery. In this also he is said to have made delay.

It is thus quite clear that the defendant's neglect or misconduct or both, took place, if at all, at Karachi. In the course of the transaction he had nothing to do outside Karachi. He had not contracted to deliver at Hathras, but merely to place the goods on the rails at Karachi and to post the railway receipt there also. We fail to see that the cause of action, i.e. the defendant's alleged neglect or misconduct which resulted in loss, occurred anywhere else but at Karachi. It is urged that the resultant loss or damage occurred at Hathras, and that the negligence and misconduct plus the resultant loss constitute the whole cause of action, and that, therefore, the cause of action partly arose in Hathras.

It is quite clear that under section 17 (*a*), read with explanation III, of Act XIV of 1882, the present suit would not have been within the jurisdiction of the Hathras Court. The contract was made at Karachi, where the plaintiff's offer was accepted. The performance of the contract had to be completed at Karachi and the money due was payable at Karachi. The defendant contracted to act as the plaintiff's agent at Karachi for the purpose [53] of purchasing and despatching the goods and to do certain acts there also. His negligence or misconduct, if any, occurred there.

The language of the section has been altered in the present Act in that in place of the words "The cause of action arises" and Explanation III of section 17 the words "The cause of action in whole or in part arises" have been substituted. This has not in our opinion altered the law as to what is the cause of action in suits arising out of contract Explanation III of section 17, Act XIV of 1882, though it does not appear in the present Act, is a correct statement of what the law still is and shows clearly the true meaning of the words "cause of action" in the case of suits arising out of contracts.

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34 A. 49=8 A. L. J. 1160 =11 I.C. 712.

In our opinion, therefore, the cause of action in the present suit arose wholly at Karachi and the lower appellate court's order was sound. We therefore dismiss the appeal with costs.

Appeal dismissed.

34 A. 53 (=8 A. L. J. 1148=11 I. C. 737.)

APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

MUHAMMAD NAZIR KHAN (*Plaintiff*) *v.* MAKHDUM BAKHSH AND ANOTHER (*Defendants*).*

[31st July, 1911.]

Pre-emption—Muhammadan law—Talab-i-mawasibat.

Where a person immediately on hearing of the sale of a house exclaimed "*mera hak shafa hai*" and without any delay took the price and brought it to the vendee and claimed the house, *held* that the expressions used by him coupled with the circumstances contituted a sufficient first demand. *Muhammad Abdul Rahman Khan* v. *Muhammad Khan* (1) distinguished.

THIS was an appeal under section 10 of the Letters Patent from a judgment of KARAMAT HUSAIN, J. The facts of the case are fully stated in the judgment under appeal, which was as follows :—

"This was a suit for pre-emption on the basis of the Hanafi Law and the question to be decided is whether the expressions used by the pre-emptor in making the *talab-i-mawasibat* do or do not amount to a claim for pre-emption. The first court came to the conclusion that they did not. The lower appellate court came to the conclusion that they did and decreed the suit. The defendant comes here in second appeal and his learned counsel contends that the expressions used by the pre-emptor are not sufficient to constitute the first demand. The lower appellate court in its judgment remarks as follows : 'In the present case the words used were *mera shafa* repeated twice. The plaintiff [54] also asked those present to bear witness to it. He then immediately went inside the house, brought the money and being accompanied by witnesses went to the vendee, offered him the money and made the second demand. The words uttered at the first demand amply and clearly show that the plaintiff had a clear intention of demanding his right, *vide* Weekly Notes, 1897, pp. 23 and 93 ; 6 A. L. J. R . 15.'

" The Hanafi Law on the question of first demand is very clear. Some expression showing that the pre-emptor claims pre-emption must be used. The expression used in the present case, as found by the lower court is *mera shafa*, which only gives an information that the pre-emptor has the right to pre-empt. There is nothing in the expression to show that, in addition to the information given by him, he claims to pre-empt. A pre-emptor may say ' I am a pre-emptor, but I do not claim to pre-empt,' or he may say 'I am a pre-emptor and I claim to pre-empt.' The fact that the expression I am a pre-emptor ' may be used together with a claim to pre-empt as well as with a waiver of that claim conclusively shows that the expression 'I am a pre-emptor,' does not in any way convey the idea that the pre-emptor does claim to pre-empt. The point is covered by an unreported decision of this Court in S. A. 1059 of 1901, decided on the 1st of December, 1903, and I quote the following extract from the judgment :—'As to the decision of the case upon the principles of Muhammadan Law, we find ourselves driven to the conclusion that no right has been acquired by the plaintiff under that law. We cannot find that merely for the plaintiff to say " I am a pre-emptor, my right extends to the land " constitutes a *talab-i-mawasibat* either by express terms or by implication. There is abundance of authority upon the subject. It is immaterial, according to the Hedaya, in what words the claim is preferred. It is sufficient that

* Appeal No. 47 of 1911 under section 10 of the Letters Patent.

(1) (1903) 8 A. L. J. 270.

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34 A. 53=8 A. L. J. 1146 =11 I. C. 737.

they indicate a claim. But we have nothing in the expressions used in this case to make it possible to say that such a claim has been made or can be inferred. Mr. Justice AMEER ALI in his work upon Muhammadan Law, Vol. I, p. 597, following the past authorities, says :—"If a pre-emptor were to say to the purchaser, I am thy pre-emptor or *shafee*, it would be void." The result of this is clear that a mere expression or declaration of his right does not itself show that he wishes to enforce that right. We find ourselves constrained to overrule the claim of the pre-emptor appellant and hold that the first demands necessary under the Muhammadan law have not been made.'

"In addition to the authorities cited in the unreported case I cite the following from Baillie's Muhammadan law :—'There is some difference as to the words in which the demand should be expressed. But the better opinion is that it is lawful in any words that intelligibly express the demand. So that if the pre-emptor should say 'I have demanded' or 'I demand pre-emption,' it would be lawful, but if he were to say 'I am thy *shafee* or pre-emptor' or 'I take thy mansion by pre-emption' it would be void. (Book on Pre-emption, Chapter III, p. 487, edition 2).

"There is nothing technical in this rule of Muhammadan law. It is based on the causes of interpretation which determine the intention of a person. The intention is to be gathered from expressions used by that person and not from words which havs not been used by him. The expression 'I am a pre-emptor, [55] only gives information that the speaker is a pre-emptor not of what the pre-emptor is going to do—but the words 'I have demanded' or 'I do demand pre-emption' show an intention to *claim* pre-emption.

"The case *Ihsanul Huq* v. *Kallan* (1) has no application to the facts of the present case, because, according to the remarks made by the learned Judges in that case it appears that a demand was made. The learned Judges say:—'The plaintiff in his evidence states that as soon as he heard of the purchase from a friend he at once said "I am a pre-emptor, I have a claim (*main shafi hun ; mera haq hai*)"...'The words the plaintiff used were probably equivocal, but a witness, named Abdul Ghafur, was called and he says that when the plaintiff was informed that the house was sold, he at once said that he was a pre-emptor and would take the house, and told Nanhe, his brother, to take money and asked us to accompany him.' The rulings in *Ahmad Shah Khan* v. *Abadi Begam* (2) and *Muhammad Yunis Khan* v. *Muhammad Yusuf* (3) do not apply to the facts of these cases.

"The result is that I hold that the expression found by the lower appellate court to have been used by the pre-emptor *mera shafa*, does not constitute a *talab mawasibat* within the meaning of that expression under the Muhammadan law. I therefore allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs."

Mr. *Mahammad Ishaq Khan* (with him Munshi *Gobind Prasad*), for the appellant.

Mr. *Abdul Raoof* (with him Mr. *Ahmad Karim*), for the respondents.

RICHARDS, C. J. and BANERJI, J. :—This appeal arises out of a suit for pre-emption under the Muhammadan law. The court of first instance dismissed the claim. The lower appellate court decreed the claim reversing the court of first instance, and a learned Judge of this Court reversed the lower appellate court and restored the decree of the court of first instance.

The question is whether the preliminaries required by the Muhammadan law have or have not been performed. The evidence is that the plaintiff pre-emptor immediately upon learning that the sale had taken place said "*mera haq shafa hai.*" This he repeated three times calling upon certain persons who were present to bear witness. On the moment without any delay he took the price of the house and brought it to the vendee and claimed the house, informing him of the fact that he had already made his demand. So far as the question is a question of fact it rested with the lower appellate court to decide that question, [56] and

(1) (1909) 6 A. L. J. 15.
(2) Weekly Notes, 1897, p. 23.
(3) Weekly Notes, 1897, p. 93.

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34 A. 53=8 A. L. J. 1148 =11 I. C. 737.

it was not competent for this court in second appeal to set aside the finding of the lower appellate court. It is said, however, that the words which were used could under no possible circumstances constitute a good first demand under the Muhammadan law. There is no doubt that certain expressions appear in the authorities as illustrations of what constitutes a good demand and the expression used in the present case is not amongst them. It is laid down by Mr. Ameer Ali, at page 606 of volume I of the last edition of his work on Muhammadan law that "no particular formula is necessary so long as the claim is unequivocally asserted." He cites abundant authority for this proposition. There cannot be the least doubt that it was the intention of the plaintiff in the present case to assert and demand his right of pre-emption. It is possible if the words he used were the only evidence in the case that it might be said that the words were equivocal, and did not necessarily show that he was making a demand of pre-emption, but the circumstances and what actually took place at the very moment that he used these words, do in our opinion demonstrate that it was his intention to make the demand; not merely to assert that his claim to pre-empt existed, but actually to demand it. He called the attention of witnesses to the fact and he at once went and got the money. All these things happened simultaneously with the uttering of the words, not after the lapse of some time. Our attention has not been called to any authority which lays down that we are not entitled to take into consideration what actually occurred at the moment to enable us to come to a conclusion whether or not the pre-emptor was demanding pre-emption when he used the particular expressions. If the Court is entitled to consider these circumstances, then it was quite open to the lower appellate court to arrive at the conclusion at which it did arrive and the question becomes a question of fact binding in second appeal. We think that it is impossible to lay down any hard and fast rule as to what expressions constitute a good first demand: each case must be considered and decided upon its own peculiar facts and circumstances.

[57] Reliance has been placed on the case of *Muhammad Abdul Rahman Khan* v. *Muhammad Khan* (1). In that case the words used were:—"I am pre-emptor and my right extends to the land." It was held that these words were not sufficient to constitute a *talab-i-mawasibat*. The learned Judges say at page 271, after referring to the Hidaya:—"But we have nothing before us upon which it is possible to say that such a claim has been made or can be inferred." In our opinion this case is clearly distinguishable from the present case. In the present case there are circumstances which occurred at the very moment at which the words were used from which it can reasonably be inferred that the demand was in fact being made. We think that the decision of the lower appellate court ought to be restored.

We accordingly allow the appeal, set aside the decree of this Court and restore the decree of the lower appellate court with costs of the two hearings in this Court.

Appeal allowed.

(1) (1903) 8 A. L. J. 270.

34 A. 57 (=10 M. L. T. 551=16 C. W. N. 122=1912 M. W. N. 29=15 C. L. J. 78=14 Bom. L. R. 30=13 I. C. 257.)

PRIVY COUNCIL.

JIT SINGH AND OTHERS (*Defendants*) *v.* MAHARAJ SINGH (*Plaintiff*).*

[*On appeal from the High Court at Allahabad.*]

[1st November, 1911].

Privy Council, practice of—Point of law as a ground of appeal which had not been dealt with by the courts below—Appeal heard ex parte.

It is contrary to the practice of the Judicial Committee to allow a point to be raised on appeal before them which has not been discussed in the courts below, and on which their Lordships have not got the assistance of those courts.

APPEAL from a judgment and decree (20th February, 1907) of the High Court at Allahabad, which reversed a decree (18th March, 1904) of the court of the Subordinate Judge of Shahjahanpur.

The facts of the case as alleged by Maharaj Singh the plaintiff (respondent) were that the three sons of one Nehchal Singh, namely Harihar Singh, Himmat Singh and Bahadur Singh, separated in the life time of Harihar Singh, after whose death his **[58]** widow Ummed Kunwar obtained possession of his property and died on the 15th of March, 1892, when the two sons of her daughter, named Khangar Singh and Bishan Singh, succeeded to the property of Harihar Singh in equal shares; and that Khangar Singh, the father of the plaintiff, died on the 29th of July, 1892, and his estate devolved on the plaintiff, who demanded possession of it from the defendants, but they refused to give up possession. The plaintiff further alleged that he was entitled to half the entire property left by the husband of Ummed Kunwar, and that for necessary expenses he had transferred half of his half share to one Musammat Bed Kunwar under a deed of sale, dated the 4th of September, 1903; and he therefore in the present suit, brought on the 11th of September, 1903, prayed for possession of the property of Harihar Singh to which he was entitled through Khangar Singh.

Bahadur Singh had died without issue in 1878. Himmat Singh left a son, Nirmal Singh, who was the grandfather of Jit Singh, the first defendant. The other defendants were members of the family, except one, who was a transferee from Jit Singh; and two others, who were mortgages of a portion of the property in suit. The only defence now material was that of Jit Singh, the first defendant, who pleaded (*inter alia*) that Khangar Singh the father of the plaintiff predeceased Ummed Kunwar, and that, therefore, the plaintiff had no right to the property in suit; that Himmat Singh, Bahadur Singh, Harihar Singh and Nirmal Singh were all members of a joint Hindu family and did not separate; and that the name of Ummed Kunwar had been entered in the papers only for her consolation and satisfaction on account of her being a widow; and in the third paragraph of the written statement he asserted that "even if, as stated by the plaintiff, Khangar Singh is the daughter's son of Harihar Singh, the plaintiff has, in the presence of Bishan Singh, no right to sue; because Khangar Singh died during the lifetime of Ummed Kunwar, otherwise the plaintiff would not have been silent for such a long time."

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Present:—Lord MACNAGHTEN, Lord ROBSON, Sir JOHN EDGE and Mr. AMEER ALI.

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The suit of Maharaj Singh was numbered 119 of 1903. Two other suits relating to the property in dispute were brought in 1904 one by Bishan Singh (45 of 1904) on the allegation that on the death of Ummed Kunwar he alone succeeded to the property [59] of Harihar Singh, inasmuch as his brother Khangar Singh had predeceased Ummad Kunwar; and the other (52 of 1904) by Musammat Bed Kunwar, the transferee from Maharaj Singh, in which she claimed a one-fourth of the estate of Harihar Singh. The defendants in these two suits were the other members of the family.

Maharaj Singh's suit (119 of 1903) was decided by the Subordinate Judge on the 18th of March, 1904. He held that the allegation on which the plaintiff's suit was based, namely that his father Khangar Singh survived his maternal grandmother Ummed Kunwar, was not proved either by the oral evidence, which he considered unreliable, or by the documents produced in support of it; and he decided the third issue (when did Khangar Singh die?) against the plaintiff, and holding that in view of that finding it was unnecessary to deal with the remaining issues, he dismissed the suit.

Suits 45 and 52 of 1904 were admittedly tried together by consent, the evidence in one governing the other, and on the 30th of August, 1904, they were decided by the same Subordinate Judge who had decided Maharaj Singh's suit: he, however, found the third issue in the plaintiff's favour in each case, and decreed those suits.

Five appeals were preferred to the High Court in the three suits. Maharaj Singh's appeal was 170 of 1904, the appeals of the defendants in Bishan Singh's suit (45 of 1904) were 264 and 279, and the defendant's appeals in Bed Kunwar's suit (52 of 1904) were 263 and 289. All the appeals were heard together by P. C. BANERJI and R. S. AIKMAN, JJ., who delivered their main judgment in appeal 264, in which, after stating that the five appeals were "connected appeals," and deciding two other issues of fact, namely (1) were Bishan Singh and Khangar Singh the sons of Harihar Singh's daughter? and (2) was Harihar Singh separate from his brothers?, in concurrence with the decision by the Subordinate Judge of those issues in suit 45 of 1904, pointed out that on the issue whether Khangar Singh did or did not predecease Ummed Kunwar the Subordinate Judge "came to the conclusion in the suit of Bed Kunwar (52 of 1904) that Khangar Singh survived his grandmother, a conclusion opposed to his finding in Maharaj Singh's suit," and on that issue remarked as follows:—

"Here too the oral evidence is conflicting, and, as mentioned above, the learned Subordinate Judge has come to two opposite conclusions on this issue. It is admitted that Ummed Kunwar died on the 15th of March, 1892. On behalf of Maharaj Singh and Bed Kunwar reliance is placed on the report of a patwari, dated the 22nd of September, 1892, in which the date of Khangar's death is given as the 29th of July, 1892. In his later judgment the learned Subordinate Judge refers to this as one of the pieces of evidence which had led him to change his mind. But in our opinion this report of the patwari as to the date of Khangar's death is unreliable. There is evidence printed at pages 18 and 19A of First appeal No. 263 which in our opinion shows that Khangar Singh was dead on the 4th of July, 1892. On that date Bishan Singh applied for the entry of the names of himself and Maharaj Singh, the son of Khangar Singh, in the place of Musammat Ummed Kunwar. In this petition Bishan Singh associated with himself Maharaj Singh, the minor son of Khangar Singh, under the guardianship of Fateh Singh, the maternal uncle of Maharaj Singh. This clearly indicates to us that Khangar Singh was dead on that date. Although, however, Khangar Singh may have been dead before the 4th of July, 1892, when the petition was presented, it does not at all follow that he was dead on the 15th of March when Ummed Kunwar died. The very fact that Bishan Singh associated Khangar's son with himself in this application is a strong indication that Khangar Singh did survive Ummed Kunwar. It is quite

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clear from the documentary evidence that there was no love lost between Bishan Singh and Khangar Singh. In the preceding January Bishan Singh had got Khangar Singh ejected from certain land of which he was declared to be Bishan Singh's sub-tenant. If Khangar Singh had predeceased Ummed Kunwar, we think Bishan Singh would never have associated Maharaj Singh with himself in this petition. He would have claimed the whole of the inheritance for himself. There is also filed a copy of a judgment of a Deputy Collector, dated the 31st of March, 1892, passed on an application made by Khangar Singh against Bishan Singh. We think it is probable that, had Khangar Singh been dead on that date, the matter would have been brought to the attention of the Court. Under these circumstances we are unable to say that the later conclusion arrived at by the learned Subordinate Judge as to the time of Khangar's death is wrong.

"Upon the findings at which we have arrived, in concurrence with the court below, that court was justified in decreeing one-half of the claim of Bishan Singh, and the suit of Bed Kunwar and the appeals filed against the decrees in those suits must fail That court should have decreed the claim of Maharaj Singh and his appeal must prevail."

The result of this decision was that the following order was made by the High Court in the appeal (170 of 1904) of the respondent in the present appeal :—

"This is the appeal of Maharaj Singh in the suit brought by him which was dismissed by the court below For the reasons stated by us in our judgment in appeal 264 of 1904, decided to-day, this appeal must prevail. We [61] accordingly decree the appeal, set aside the decree of the court below and make a decree in favour of Maharaj Singh on the same terms as the decree made by the court below in the suit of Bed Kunwar, No. 52 of 1904 "

In the petition by the defendants to the High Court for leave to appeal to His Majesty in Council one of the grounds taken was, that in any event during the lifetime of Bishan Singh the plaintiff Maharaj Singh was not entitled to maintain the suit. This ground had not been dealt with by either of the courts in India.

On this appeal, which was heard *ex parte*—

Ross for the appellants contended that the High Court had erred in holding that the respondent had proved that Khangar Singh survived Ummed Kunwar. In the respondent's suit the Subordinate Judge had held that the evidence was unreliable, and that the respondent had not established his allegation to that effect ; and though in the other suits by Bishan Singh and Bed Kunwar the Subordinate Judge had come to an opposite conclusion, it was admitted that those two suit which had not been brought until 1904, had been tried together by consent of the parties on the same evidence and decided in the first court on the 30th of August, 1904, the respondent's suit had been instituted on the 11th of September, 1903, and decided on the 18th of March, 1904; and was therefore it was submitted, clearly tried quite independently of the two later suits. In the High Court, no doubt, the appeals in the three suits were all heard together and treated as " connected appeals." But it was only by referring to evidence not on the record in the respondent's suit, and which was never made part of the record in that suit on any application of the parties or by any order of the court, that there was any concurrence in the decisions of the courts in India to the effect that Khangar Singh had survived his grandmother. Such evidence, it was contended, had been wrongly referred to by the High Court. The proper course when the High Court reversed the decision of the first court on a preliminary issue, as it did in the respondent's suit, would have been to remand the case to the Subordinate Judge for trial of the remaining issues. Besides, the High Court had held that the fresh evidence in the later suits on which the Subordinate

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Judge professed to have changed his opinion, was [62] not reliable. [Their Lordships thought that there were concurrent decisions on the point as well as on the other matters of fact in the case.] It was then submitted that the respondent was not entitled in law to maintain his suit at all as long as Bishan Singh was alive (1). [MR. AMEER ALI. Can you raise a new point like that now, especially in a case heard *ex parte*?] Notice of appeal has been duly given and the respondent might have appeared ; the point of law suggested was taken in the third paragraph of the appellant Jit Singh's written statement, though it was not dealt with by the courts below [SIR JOHN EDGE. The paragraph of the written statement referred to cannot, I think, be interpreted as raising the point you now suggest.] It appears to raise the same point, which is one that was again raised in the grounds for leave to appeal to His Majesty in Council [Their Lordships, however, were of opinion that the point now raised had not (except as a ground for leave to appeal to England) been taken before the courts in India, and that it could not be taken for the first time before the Judicial Committee.]

The judgment of their Lordships was delivered by LORD MACNAGHTEN :—

It is not usual to allow a point to be raised here on appeal which has not been discussed in the Court below, and upon which their Lordships have not got the assistance of the Court below.

On this ground their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants :—*Barrow, Rogers and Nevill.*

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34 A. 63 [=39 I. A. 7=15 C. L. J. 68=16 C. W. N. 97=9 A. L. J. 37=(1912) M. W. N 32=14 Bom. L. R. 1=21 M. L. J. 1158=13 I. C. 304=11 M. L. T. 6.]

[63] PRIVY COUNCIL.

JAMNA DAS (*Decree-holder*) *v.* RAM AUTAR PANDE AND OTHERS, (*Judgment-debtors*).

[*On appeal from the High Court at Allahabad.*]

[2nd November, 1911.]

Act No. IV of 1882, (Transfer of Property Act) section 90—Mortgage—Sub-mortgage—Purchaser from mortgagor—Mortgage-money, part of consideration for sale—Personal liability of purchaser—Sale of mortgagee rights.

In this case it was held (affirming the decisions of the Courts in India in *Jamna Das v. Ram Autar Pande* (2) that the purchaser of the mortgaged pro-

Present—Lord MACNAGHTEN Lord ROBSON Sir JOHN EDGE and Mr. AMEER ALI.

(1) This contention which Mr. Ross was not allowed to raise was on the lines of Mr. Mayne's argument in *Venkayamma Garu v. Venkata Ramanayyamma Bahadur Garu* (1902) I. L. R. 25 Mad. 678 at page 692, to the effect that " takers of obstructed heritage are joint tenants if in the same generation, then survivorship follows" a contention which was accepted by the Judicial Committee in that case. On that authority, and applying it to the present case if it be assumed in the respondent's favour that Khangar Singh survived Ummed Kunwar he took the estate as a joint tenant with his brother Bishan Singh: and on Khangar Singh's death Bishan Singh by right of survivorship succeeded to the whole estate, and Maharaj Singh not being in the same generation was excluded by law and had no right of suit until Bishan Singh's death. *Reporter's note.*

(2) (1909) I. L. R. 31 All. 352.

perty was not a person from whom the balance of the mortgage debt was "legally recoverable" within the meaning of section 90 of the Transfer of Property Act, IV of 1882.

[Fol : 30 I. C. 785=18 M. L. T. 247 ; Ref : 16 C. L. J. 394=17 I. C. 927 ; 17 C. L. J. 120=17 C. W. N. 457=18 I. C. 747 ; 3 Pat. L. J. 394=46 I. C. 98 ; 41 Mad. 488=43 I. C. 625 ; Fol: 78 I. C. 545 ; Ref : 75 I. C. 940 ; 75 I. C. 1016=18 L. W. 530 =45 M. L. J. 693 ; Fol : 76 I. C. 57 ; Dist : 84 I. C. 26 ; Ref : 84 I. C. 962=47 M. L. J. 517=20 L W. 721=1924 M. W. N. 838.]

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34 A. 63=39 I. A. 7=15 C. L. J. 68=16 C. W. N. 97 =9 A. L. J. 37=1912 M. W. N. 32=14 Bom. L. R. 1 =21 M. L. J. 1158=13 I. C. 304=11 M . L. T. 6.

APPEAL from a decree (20th April 1909) of the High Court at Allahabad, which affirmed a decree (16th April, 1907) of the court of the Subordinate Judge of Mizapur.

The appellant, the holder of a mortgage decree against the respondents under section 88 of the Transfer of Property Act (IV of 1882), applied for a decree under section 90 of that Act, which enacts that "when the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the court may pass a decree for such sum."

The first respondent Ram Autar Pande was the purchaser of the mortgaged property, and the other respondents were the representatives of the mortgagor.

The Subordinate Judge allowed the application against the judgment-debtors other than Ram Autar Pande, but dismissed it as against him.

The main question for decision in this appeal was whether the courts below were wrong in holding that a decree under section 90 could not be passed against the first respondent.

The facts are stated in the report of the case before the High Court (RICHARDS and GRIFFIN, J J.) which will be found in I. L. R. 31 All. 352.

[64] On this appeal—

Sir H. Erle Richards, K. C. and *Ross* for the appellant contended that the first respondent was not merely the purchaser of the equity of redemption, but of the whole mortgage debt, and part of the purchase money had been left in his hands in order to pay off the debt, and that a personal decree could therefore be made against him for payment. The word "defendant" in section 90 of the Transfer of Property Act was not limited to the mortgagor. In making the decree under section 88, which was dated the 29th of November, 1904 (1) the High Court said that if the sale did not satisfy the decree the "mortgagee rights" (which had not been sold) could be proceeded against in execution of the decree. Reference was made to *Matadin Kasodhan* v. *Kazim Husain* (2) and *Ganga Prasad* v. *Chunni Lal* (3) [Lord MACNAGHTEN referred to *Izzatunnissa Begam* v. *Partab Singh* (4)]. The decisions of the courts in India, it was submitted, were therefore wrong and should be set aside.

DeGruyther, *K. C.* and *B. Dube* for the first respondent were not called upon.

The judgment of their Lordships was delivered by LORD MACNAGHTEN :—

This is a perfectly plain case. The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor. The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to

(1) See I. L. R. 27 All. 364.
(2) (1891) I. L. R. 13 All. 432.
(3) (1895) I. L. R. 18 All. 113.
(4) (1909) I. L. R. 31 All. 583.

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pay this mortgage debt. Therefore, he is not a person from whom, in the words of the 90th section of the Transfer of Property Act, "the balance is legally recoverable."

Their Lordships will therefore humbly advise His Majesty that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant :—*Ranken Ford, Ford and Chester.*

[65] Solicitors for the respondent Ram Autar Pande :—*Barrow, Rogers and Nevill.*

(34 A. 65 (=13 I. C. 269=11 M. L. T. 1=1912 M. W. N. 16=9 A. L. J. 40=16 C. W. N. 217=15 C. L. J. 72=14 Bom. L. R. 33=23 M. L. J. 1=39 I. A. 10.)

PRIVY COUNCIL.

LEKHRAJ KUNWAR (*Plaintiff*) *v.* HARPAL SINGH AND OTHERS (*Defendants*).

[3rd and 22nd November, 1911.]

[*On appeal from the High Court at Allahabad.*]

Hindu law—Inheritance—Impartible estate governed by rule of primogeniture—Estate devised to widow of owner—Suit by reversioner—Compromise of suit by widow and reversioner—Descent of estate governed by the compromise and not by will.

The owner of an impartible estate governed by the rule of primogeniture died leaving a will by which he gave an absolute estate to his widow, against whom S., the next reversioner, brought a suit on the ground that the will was invalid and that he was entitled to possession of the estate. In that suit the parties came to a compromise, by the terms of which it was agreed that the widow should hold for her life the position of "gaddi-nashin," paying S a monthly allowance, and that after her death S or "any representative of his who may be living at that time will be the absolute owner of all the movable and immoveable properties and will occupy the gaddi." S predeceased the widow leaving no male issue and without having made any disposition by will or otherwise of his interest in the estate. On the death of the widow in possession, the widow of S sued to recover the estate from members of her husband's family who had possession of it.

Held by the judicial Committee (affirming the decision of the High Court) that the rights of the parties depended not on the will but on the compromise, the terms of which gave S a vested interest in the estate, which retained its character of impartibility, and on the death of S descended not to his widow (the appellant) but to the respondent his heir, according to the rule of primogeniture.

[Ref : 73 I. C. 196=25 Bom. L. R. 293=47 Bom. 597.]

APPEAL from a judgment and decree (29th May 1908) of the High Court at Allahabad, which reversed a judgment and decree (24th February 1906) of the District Judge of Jaunpur and dismissed the appellant's suit.

The main question for determination in this appeal was as to the effect of a document, dated the 25th of April, 1896, called a compromise, as to the interpretation and legal effect of which the courts in India differed, the District Judge construing it in favour of the appellant and the High Court in favour of the respondents.

The facts of the case are fully stated in the judgment of the High Court, and in the judgment of their Lordships of the [66] Judicial Com-

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*Present:—Lord MACNAGHTEN, Lord ROBSON, Sir JOHN EDGE and Mr. AMEER ALI.

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mittee. The report of the case before the High Court (SIR JOHN STANLEY C. J. and BANERJI, J.) will be found in I. L. R. 30 All. 406.

On this appeal—

Sir Erle Richards, K. C. and *B. Dube* for the appellant contended that the will of Randhir Singh in favour of his wife Sonao Kunwar conferred on her an absolute proprietary estate, and that the effect of such transfer was to destroy the original character of impartibility of the estate and the special custom of primogeniture regulating its descent. Reference was made to *Suraj Mani* v. *Rabi Nath Ojha* (1) *Bhoobun Mohini Debi* v. *Hurrish Chander Chowdhry* (2) and *Abdul Wahid Khan* v. *Nuran Bibi* (3). The estate therefore came to Sonao Kunwar as an absolute estate governed by the ordinary rules of Hindu law. Under the compromise, dated the 25th of April, 1896, made between Sheopal Singh and Sonao Kunwar, the former took, subject to the life interest of the latter an absolute vested estate in the property which became self-acquired, and was governed by the Mitakshara law. The High Court had therefore erred in holding that by the terms of the compromise it was the intention of the parties that the estate should on the death of Sonao Kunwar descend by the rule of the primogeniture [*DeGruyther K. C.* referred to *Khunni Lal* v. *Gobind Krishna Narain* (4) as supporting the decision of the High Court in the present case.]

DeGruyther, K. C. and *Ross* for the respondents were not called upon.

The judgment of their Lordships was delivered by Sir JOHN EDGE:—

This is an appeal by Thakurain Lekhraj Kunwar (the plaintiff) from the decree of the High Court of Judicature for the North-Western Provinces of India, dated the 29th of May, 1908, which set aside the decree in the plaintiff's favour of the District Judge of Jaunpur, and dismissed the plaintiff's suit and certain objections which had been filed by her.

[67] In the suit in which the decree now under appeal was made the plaintiff, who was the widow of Sheopal Singh, claimed proprietary possession of the riasat of Singra Mau in the district of Jaunpur, and mesne profits. The defendants to the suit, who are respondents to this appeal, are Thakur Harpal Singh, a distant cousin in the male line of Sheopal Singh, Shamsher Bahadur Singh, a younger brother of the father of Thakur Harpal Singh, Raghuraj Bahadur Singh and Rampal Singh, minors, sons of Shamsher Bahadur Singh, and Thakurain Janki Kunwar, the widow of Rudarpal Singh, who was a brother of Sheopal Singh and had died without male issue. The last common ancestor of Sheopal Singh and Thakur Harpal Singh was Dammar Singh.

The District Judge of Jaunpur gave the plaintiff Thakurain Lekhraj Kunwar a decree for possession as a Hindu widow, and decreed mesne profits. From that decree the defendants, Thakur Harpal Singh and Shamsher Bahadur Singh, on his own behalf and as guardian of his sons Raghuraj Bahadur Singh and Rampal Singh, appealed to the High Court, and in that appeal the plaintiff filed objections to the decree of the District Judge, claiming that she was entitled to a decree for possession of the Singra Mau estate as an absolute owner, and not merely for the estate of a Hindu widow. The defendant, Thakurain Janki Kunwar, did not defend the suit; she claimed no interests.

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(1) (1907) I. L. R. 30 All. 84; L. R. 35 I. A. 17.

(2) (1878) I. L. R. 4 Cal. 23; L. R. 5 I. A. 138.

(3) (1885) I. L. R. 11 Cal. 597: L. R. 12 I. A. 91.

(4) (1911) I. L. R. 33 All. 356.

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The question upon which this appeal depends is a short one. The estate of Singra Mau descended in the male line from Dammar Singh as an impartible estate to one Randhir Singh, who died without male issue in January 1895. In the family to which Randhir Singh, Sheopal Singh and Thakur Harpal Singh belonged the rule of primogeniture applied so far as this estate of Singra Mau was concerned. The pedigree of the family will be found in the judgment of the High Court; it is sufficient now to say that Sheopal Singh, who was the plaintiff's husband, was the son of Jagarnath Singh, a younger brother of Randhir Singh, and that on the death of Sheopal Singh without a son in July, 1899, the defendant Thakur Harpal Singh was, subject to the life interest of Thakurain Sonao Kunwar under a compromise, the next member of the family who was entitled the possession of Singra Mau, if the estate was then impartible. The question as to whether the [68] estate had ceased to be impartible or had continued to be and was impartible on the death of Sheopal Singh depends upon the construction of an agreement of compromise of the 25th of April, 1896, to which Sheopal Singh and Thakurain Sonao Kunwar, who was the junior widow of Randhir Singh, were the parties.

Randhir Singh, who was then 74 years of age, and in possession of the impartible estate of Singra Mau, made a will on the 15th of December 1894, by which he left his entire estate and every kind of movable and immovable property of which he was then in possession to Thakurain Sonao Kunwar, his junior wife. It is admitted that if Randhir Singh was then of testamentary capacity he had power as the owner in possession of the impartible estate of Singra Mau to make that will, and by it to put an end to the impartibility of the estate, and to exclude his nephew Sheopal Singh from the succession, which was the effect of the will as it was executed. After the death of Randhir Singh his widow Thakurain Sonao Kunwar applied for a grant to her of probate of the will. Sheopal Singh and others filed objections to probate being granted; thereupon in March, 1896, Sheopal Singh brought a suit in the Court of the Subordinate Judge of Jaunpur against Thakurain Sonao Kunwar and Thakurain Shankar Kunwar, the senior widow of Randhir Singh, a *pro forma* defendant, and Babu Soridat, also a *pro forma* defendant, in which Sheopal Singh alleged that when Randhir Singh was seriously ill and on the point of death, and quite incapable of entering into any contract or of understanding any transaction, the well-wishers of Sonao Kunwar and Shankar Kunwar, having colluded together, caused the will to be executed. Sheopal Singh further alleged in that suit that according to the old custom and nature of the property, and also on the strength of right of survivorship, the right to occupy the *gaddi* and to enter into possession of the entire estate devolved upon him on the death of Randhir Singh, and he prayed for a declaration that the will of the 15th of December, 1894, was null and void as against him and the estate, and for a decree dispossessing Thakurain Sonao Kunwar and Thakurain Shankar Kunwar and awarding absolute possession to him, Sheopal Singh, over the entire estate of Singra Mau, together with [69] *imlaks*, movable and immoveable property appertaining to the said estate.

On the 25th of April, 1896, Sheopal Singh and Thakurain Sonao Kunwar entered into an agreement of compromise which was executed by them and was in the form of a petition to the court of the Subordinate Judge of Jaunpur in the suit which had been brought by Sheopal Singh against Sonao Kunwar, Shankar Kunwar and Babu Soridat. That petition was

presented to the court of the Subordinate Judge, and on the 27th of April, 1896, the Subordinate Judge made a decree in the suit in accordance with the petition giving possession of the estate to Sonao Kunwar for her life subject to the terms of the compromise.

The petition of compromise was as follows :—

"1. The name of Musammat Thakurain Sonao Kunwar will continue to be recorded in the revenue papers in the same way in which it stands recorded, and she will remain in possession during her life time of all the moveable and immoveable properties of which Rai Randhir Singh was in possession, exercising the powers of *gaddinashin* (occupier of *gaddi*) without the power to transfer or charge the estate in any way.

"2 I, Thakur Sheopal Singh, will take the sum of Rs. 12,000 a year at the rate of Rs. 1,000 per month from Musammat Thakurain Sonao Kunwar for all my expenses, and I, Musammat Thakurain Sonao Kunwar, will pay the same. I, Thakur Sheopal Singh, will not interfere with the estate in any way in the lifetime of Musammat Sonao Kunwar. After the death of Musammat Thakurain Sonao Kunwar, I, Thakur Sheopal Singh, or any representative of mine who may be living at that time, will be the absolute owner of all the moveable and immoveable properties possessed by Rai Bahadur Singh and will occupy the *gaddi*. In case of non-payment of the fixed annual allowance, I, Thakur Sheopal Singh, will have power to recover the same by instituting a suit and attaching the profits and moveable property belonging to Thakurain Sonao Kunwar.

"3. If I, Thakur Sheopal Singh, have to go to any member of the brotherhood, or any *rais* on the occasion of any ceremony or otherwise, I will have authority to take as much equipage belonging to the estate as I require, and when I go out for recreations, &c., I will take any conveyance I like for my use. Thakurain Sonao Kunwar will have no power to forbid me.

"4. If, on any particular occasion, any indispensable necessity arise in the estate, and it be necessary to take a loan, we, Thakur Sheopal Singh and Musammat Thakurain Sonao Kunwar will, in concurrence with each other, borrow five or ten thousand rupees, and repay the same gradually from the profits of the estate.

"5. I, Thakurain Sonao Kunwar, also accept all the aforesaid conditions. It is therefore prayed that the case may be struck off as a contested one on the basis of this compromise, and the costs incurred by the parties be charged against themselves. This compromise may be embodied in the decree. [70] Musammat Thakurain Shankar Kunwar and Soridat, *pro forma* defendants, have been exempted."

Sheopal Singh died on the 27th of July 1899 without issue male, and without having made any disposition by will or otherwise of his interest in the Singra Mau estate. Thakurain Sonao Kunwar, who had been in possession of the estate under the compromise of the 25th of April, 1896, died on the 20th of June, 1904, and thereupon Thakurain Lekhraj Kunwar and Thakur Harpal Singh respectively claimed possession of the estate. On the 6th of July, 1904, the Collector of Jaunpur ordered mutation of names in favour of Thakur Harpal Singh ; from that order Thakurain Lekhraj Kunwar appealed to the Commissioner of Benares, who on the 2nd of September, 1904; dismissed the appeal.

The District Judge of Jaunpur in his judgment in this suit held that the estate had descended to Thakurain Sonao Kunwar under the will of Randhir Singh by an entirely new title, and had thereby lost its character of impartibility, and was no longer subject to the special custom of descent. The District Judge further held that the estate which Sheopal Singh would have taken had he survived Thakurain Sonao Kunwar, would be self-acquired by Sheopal Singh as arising out of the contract of compromise with Thakurain Sonao Kunwar. As the learned Judges in the High Court rightly observed, the District Judge went behind the compromise and held that the will was a valid will binding on Sheopal Singh, and determined what in his opinion were the rights of the parties before the

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compromise, the very thing the avoidance of which led to the compromise. The learned Judges in the appeal in the High Court held that the rights of the parties to this suit depended upon the construction of the compromise, but not upon the will of Randhir Singh. With that conclusion their Lordships in this appeal agree. They also held that—

"upon the language of the compromise it is not possible to hold that the character of the estate, as it had been handed down from father to son for generations was changed. As an impartiable estate Sheopal Singh laid claim to it, and the compromise provided that as an impartiable estate it should devolve upon him."

And they accordingly dismissed the suit.

Their Lordships consider that the High Court put the only possible construction upon the agreement of compromise. Sheo- [71]pal Singh never admitted the validity, of the will as against him, and never admitted that Thakurain Sonao Kunwar had obtained any title under the will. It is obvious from the terms of the compromise that Sheopal Singh consistently maintained that the will was invalid, and consequently that Thakurain Sonao Kunwar had taken no title under it, and that the estate as an impartible estate had vested in him on the death of Randhir Singh. By the compromise Sheopal Singh, reserving to himself an income of Rs. 12,000 a year out of the estate, gave to Thakurain Sonao Kunwar a bare interest for her life in his impartible estate. Sheopal Singh in the agreement of compromise carefully provided that on the death of Thakurain Sonao Kunwar, he or his successor should be the absolute owner of the estate and should occupy the *gaddi*; that on the occasion of any ceremony, or when he should go out for recreation, he should have the right to take as much equipage and any conveyance belonging to the estate for his use as he should require, and that Thakurain Sonao Kunwar should have no power to forbid him; and that should it be indispensably necessary to raise any money on the estate by way of loan, he and Thakurain Sonao Kunwar should in concurrence with each other borrow Rs. 5,000 or Rs. 10,000 and repay the same gradually from the profits of the estate. Under the compromise Thakurain Sonao Kunwar had no power to encumber the estate for any purpose, except in conjunction with Sheopal Singh. The terms to which their Lordships have referred are consistent only with the construction placed upon the compromise by the High Court, and there are no terms in the compromise which suggest any other construction. To these terms Thakurain Sonao Kunwar submitted. It may be mentioned that the Subordinate Judge of Jaunpur before making his decree of the 27th of April, 1896, took the precaution of ascertaining that Thakurain Sonao Kunwar understood the terms of the compromise. The High Court rightly dismissed the suit of Thakurain Lekhraj Kunwar.

The fact that after the compromise the will of Randhir Singh was admitted to probate did not affect the rights of Sheopal Singh.

[72] Their Lordships will humbly advise His Majesty that the judgment and decree appealed against should be affirmed and the appeal dismissed with costs.

Appeal dismissed.

Solicitors for the appellant:—*T. C. Summerhays and Son.*
Solicitors for the respondents:—*Barrow, Rogers and Nevill.*

34 A. 72 (=8 A. L. J. 1229=11 I. C. 700).

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APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Piggott.

GANGA SINGH AND ANOTHER (*Defendants*) *v.* BANWARI LAL AND OTHERS, (*Plaintiffs*).*

[19th July, 1911.]

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 88, 89—*Joint decree for sale—Application for order absolute made by some of the decree-holders after the coming into force of the Civil Procedure Code*, 1908, *Civil Procedure Code* (1908), *order XXXIV—Act No. X of* 1897 (*General Clauses Act*), *section* 6.

A decree for sale under the provisions of section 88 of the Transfer of Property Act, 1882, was passed jointly in favour of *B* and *K*. *B* died before any order absolute for sale was passed. On the 30th of April, 1909, the sons of *B* made an application for an order absolute for sale under section 89 of the Transfer of Property Act. *K* was not made a party to it.

Held, that the application would lie, inasmuch as the sons of *B* being joint decree-holders with *K* were entitled to apply for an order for sale (whether or not such order be in fact a final decree), their right to do so being inherent in the decree under section 88 of the Transfer of Property Act. The subsequent repeal of the section could not affect any right acquired or liability incurred thereunder.

THE facts of this case were briefly as follows:—On the 30th of April, 1906, Bhagwan Das and Musammat Kaunsilla jointly obtained, under section 88 of the Transfer of Property Act, a decree for sale upon a mortgage. After the decree Bhagwan Das died. His heirs applied in the execution department on the 30th of April, 1909, for a decree absolute under section 89 of the Transfer of Property Act. It was stated in the application that as Musammat Kaunsilla did not join in it the decree absolute might be prepared in such manner as to safeguard her interests in accordance with order XXI, rule 15. The judgment-[73] debtors objected, *inter alia*, that the heirs of Bhagwan Das alone could not apply for a decree absolute. Musammat Kaunsilla did not appear to contest the application. Both the lower courts granted the application. The judgment-debtors filed a second appeal.

Babu *Piari Lal Banerji* (for Dr. *Satish Chandra Banerji*), for the appellants:—

The application for a decree absolute was made after the new Civil Procedure Code had come into operation. The question is, whether the application would be governed by the new or by the old law. Under the old law an application for an "order" absolute under section 89 of the Transfer of Property Act, would be an application in execution; and, therefore, it could be made by some only of the decree-holders under the provisions of section 231 of the old Code. But the new Code, order XXXIV, rule 5, speaks of a "decree" absolute and not an "order" absolute. That is the final decree in a mortgage suit now, and the suit terminates not on the passing of a decree *nisi* but of the decree absolute. Therefore, under the new Code an application for a decree absolute is an application in the suit itself and not in execution of a decree; and such an application cannot be made by some of the plaintiffs but must be made by all of them, for order XXI, rule 15, applies only to applications in execution. The right to obtain a decree absolute is not denied; but the question is, in what way

* Second Appeal No. 69 of 1910, from a decree of Austin Kendall, District Judge of Cawnpore, dated the 27th of September, 1909, confirming a decree of Mohan Lal Hakku, Subordinate Judge of Cawnpore, dated the 21st of July, 1910.

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will the plaintiffs proceed to obtain it? The question is one of procedure alone and not of a substantive right. Accordingly, the application will be governed by the law of procedure in force at the time when it is made, namely, the new Code. The ruling in the analogous case of *Kounsilla* v. *Ishri Singh* (1) only decided that where substantive rights had been acquired under the old Code, they could not be taken away by the new Code. In the present case the question is purely one of procedure, in which no one has a vested right; *Fateh Chand* v. *Muhammad Bakhsh*, (2) in which, too, the decree *nisi* was before the new Code, and the application for decree absolute was made after the Code came into operation. The principle of the ruling **[74]** in *Basiruddin Mandal* v. *Sonaulla Mandal* (3) is also in my favour. The case of *Gajraj Lal* v. *Ramdin Lal* (4) is distinguishable.

Munshi *Gulzari Lal*, for the respondents:—

The applicants applied that the order absolute be framed and that the name of the Musammat might also be entered therein. It was not an application for a decree absolute in their own favour alone. It is open to some of the decree-holders to apply for the framing of a decree absolute in the name of all. The judgment-debtors suffer no loss whatever, as the decree absolute has been rightly framed in the usual form. It may be said that the substantive right of some of the decree-holders to obtain an order absolute without joining the others cannot be affected by the change, if any, in the new law. The new law, however, makes no material change.

Babu *Piari Lal Banerji*, replied.

KNOX and PIGGOTT, JJ.—In this case a conditional decree for sale under the provisions of section 88 of the Transfer of Property Act (Act IV of 1882) was passed in favour of one Bhagwan Das and his sister-in-law Musammat Kaunsilla jointly; the time fixed for payment under the said decree expired on the 30th of October, 1906. Bhagwan Das died before any order absolute for sale was passed. On the 30th of April, 1909, Banwari Lal and another, sons of Bhagwan Das, presented the application out of which the present appeal has arisen. They ask for "a decree absolute under section 89 of Act No. IV of 1882," after issue of notice both to the judgment-debtors and to the joint decree-holder, Musammat Kaunsilla. With reference to the latter they state that she had declined to join in the application, and they accordingly pray the Court to pass such orders as it may deem necessary for protecting her interests, in accordance with the provisions of order XXI, rule 15, of the Code of Civil Procedure. Now the said Code (Act V of 1908) had come into force on the first day of January, 1909, and by section 156 of the said Code, sections 85 to 90 inclusive, of the Transfer of Property Act (Act IV of 1882) are repealed. It was therefore impossible for the Court to give Bhagwan Das and his brother **[75]** "a decree absolute under section 89 of the Transfer of Property Act," so that the application of the 30th of April, 1909, was certainly irregular in form. This point, however, was never taken by the judgment-debtors. They put in a petition of objection contesting the application on various grounds; but they never took the point that the matter was not one in respect of which an application in execution could be made, and the case is now before us as an "Execution Second Appeal". The joint decree-holder, Musammat Kaunsilla, has put in no appearance, the

(1) (1910) 7 A. L. J. 420.
(2) (1894) I. L. R. 16 All. 259 (264).
(3) (1910) 15 C. W. N. 102.
(4) (1910) 7 A. L. J. 1070.

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case has been contested by the judgment-debtors only, and it is they who are now appellants before this Court. Of the various points raised by them in their petition of objection most have been concluded against them by the findings of the lower appellate court, and are not now before us. The memorandum of appeal to this Court contains three paragraphs, but the second and third are merely arguments in support of the plea taken in the first. This runs as follows :—

" Because the court below has erred in holding that one out of two plaintiffs in a mortgage suit is entitled to obtain a decree absolute for sale."

As put before us in argument this plea involves three propositions of law : —

(i) That the holder of a decree for sale passed under the provisions of section 88 of the Transfer of Property Act (Act IV of 1882), who had not yet obtained an order absolute for sale under section 89 of the said Act at the time when both sections were repealed by the passing of the new Code of Civil Procedure (Act V of 1908), cannot execute his decree without first obtaining a " final decree " in the suit itself under the provisions of order XXXIV, rule 5, of the said Code.

(ii) That an application for such final decree is not a proceeding in execution, so that the provisions of order XXI, rule 15, of the Civil Procedure Code, have no bearing on such application.

(iii) That by reason of the use of the words " on application made in that behalf by the plaintiff " in order XXXIV, rule 5, aforesaid, the application referred to must necessarily fail unless presented by all the persons who appeared as plaintiffs in the suit.

[76] The first of these propositions is open to argument, but we are not satisfied that it is necessary for us either to affirm or to deny it in order to dispose of the present appeal. The new Code of Civil Procedure simply repeals sections 85 to 90 of the Transfer of Property Act, and does not contain any provision to the effect that any decree passed under section 88 shall have the effect of (or shall be deemed to be) a " preliminary decree " under order XXXIV, rule 4. The opening words of order XXXIV, rule 5, refer to " the amount declared due *as aforesaid*," *i.e.*, in a preliminary decree passed under the preceeding rule. It seems probable that the Legislature did not contemplate the particular case of the holder of a decree under section 88 of the Transfer of Property Act who had not yet obtained an order absolute for sale under section 89 of the same Act when the new Civil Procedure Code came into force. That the decree is not abrogated by the repealing clause in the new Code is obvious enough ; the case is covered by the provisions of section 6 of the General Clauses Act (Act X of 1897). The repeal of section 89 of the Transfer of Property Act does not in itself dispose of the question ; a decree under section 88 of the same Act directs that " in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold," and the question is whether a court has or has not power to pass an order directing sale to take place in execution of the said decree, even though section 89 has disappeared from the Statute book.

An order for sale of some sort or kind there must be. The question whether such an order is nothing more than an order in execution, or whether it must necessarily take the form and have the effect of a " final decree " under order XXXIV, rule 5, of the Code of Civil Procedure,

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does not really arise in the present case. The order for sale actually passed is one in favour of all the decree-holders (including Musammat Kaunsilla) and is in the form prescribed for orders under section 89 of the Transfer of Property Act; it is not open to objection on the ground of any defect or informality even if it be held that a "final decree" under order XXXIV, rule 5, of the present Civil Procedure Code, was what was really required. On the pleaings [77] in this case it is not really open to the judgment-debtors to contend that the order for sale, whatever might be its form or its legal effect when considered from other points of view, could be passed otherwise than in execution of the original decree under section 88 of the Transfer of Property Act, and upon an application to execute that decree. Their own petition of objection presented to the first court on the 22nd of May, 1909, only raises the point with which we are now dealing in the form of a plea that "the sons of Bhagwan Das alone are not competent *to take out execution of the whole of the decree.*"

Moreover, we are of opinion that in any case the sons of Bhagwan Das, as joint decree-holders, were entitled under the circumstances of this case to apply for an order for sale (whether or not such order be in fact a "final decree" under order XXXIV, rule 5, of Act No. V of 1908) in favour of themselves and of Musammat Kaunsilla. Their right to do so was inherent in the decree obtained by them under section 88 of the Transfer of Property Act. The subsequent repeal of that section could not "affect any right acquired or liability incurred" thereunder, vide section 6 of the General Clauses Act (Act X of 1897). Under that decree as passed, any one of the joint decree-holders could apply to the Court for an order absolute for sale subject to such orders as the court might see fit to pass to safeguard the rights of the other decree-holders. We see no reason for holding that this right has been taken away by subsequent legislation. It is not a question of procedure, but of a right inherent in the decree.

For these reasons we hold that this appeal fails, and we dismiss it accordingly with costs.

Appeal dismissed.

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34 A. 78 (=12 I. C. 837=8 A. L. J. 1150=12 Cr. L. J. 573).

[78] REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox and Mr. Justice Piggott.

EMPEROR *v.* MASIT.*

[3rd August, 1911.]

Act No. XLV of 1860 (*Indian Penal Code*), *section* 296—*Disturbing a religious assembly —Religious procession on a high-way—Carrying of flags to a temple.*

Where certain Lodhas, who, with the sanction of the public authorities, had been carrying flags to a temple in procession through a public street were attacked by persons who objected to the procession: *held*, that such attack constituted a disturbance of the performance of a religious ceremony punishable under section 296 of the Indian Penal Code.

CERTAIN Lodhas of Bareilly, who had obtained the permission of the local authorities for that purpose, were carrying flags in a procession to a temple. The procession was attacked on its way to the temple by sundry

* Criminal Revision No. 291 of 1911 from an order of F. E. Taylor, Sessions Judge of Bareilly, dated the 19th of May, 1911.

Muhammadans, and one of them, Masit, was charged for this under section 296 of the Indian Penal Code, convicted, and setenced to six months' rigorous imprisonment. Masit appealed to the Sessions Judge, and, his appeal being dismissed, then came in revision to the High Court.

Mr. *Ahmad Karim* (for Mr. *A. H. C. Hamilton*), for the applicant.

The Government Advocate, (Mr. *A. E. Ryves*), for the Crown.

KNOX and PIGGOTT, JJ.—Masit has been convicted of an offence under section 296 of the Indian Penal Code, and has been sentenced to rigorous imprisonment for six months. He appealed to the Sessions Judge of Bareilly, and his appeal was dismissed. He comes here in revision and raises the point whether the facts found constitute an offence under section 296 of the Indian Penal Code; the question of sentence is also put forward as being excessive.

The facts found are that Masit joined with others in attacking a procession of Lodhas who were carrying flags to a temple with the sanction of the public authorities.

The learned counsel who appeared for him in this Court raised the quetion whether the carrying of flags to a temple before they had been, so to speak, consecrated, could be considered the performance of a religious worship or religious ceremony.

[79] He argued that this section of the Indian Penal Code may fairly be supposed to have been framed upon the kindred English law to be found in 52 Geo. III, Chapter 155, section 12, also 23 and 24 Victoria, Chapter 39. The case of *Vijiaraghava Chariar* v. *Emperor* (1) and the case to be found in 3 Indian Cases, 981, were also cited and have been fully considered by us.

We have no reason to suppose that the English law is any guide. The words of section 296 are quite clear. As regards the Madras case we agree with what was said by Mr. Justice BENSON.

We are satisfied that the carrying of these flags to the temple was considered by the Lodhas as the performance of a religious ceremony. They had applied to the public authorities and had got permission to carry the flags through the public streets. The assembly which was engaged in the carrying of these flags was an assembly lawfully engaged in the performance of a religious ceremony.

This being so, we see no reason for interfering, the sentence does not appear to us on the findings, to be excessive. We dismiss the application.

Application dismissed.

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34 A. 79 (=12 I. C. 915=8 A. L. J. 1251).

APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

INDAR SEN SINGH (*Defendant*) *v.* HARPAL SINGH (*Plaintiff*).*

[7th August, 1911.]

Hindu law—Mitakshara—Impartible property—Succession—Impartible property governed by the rule of primogeniture nevertheless joint property.

*First Appeal No. 406 of 1909 from a decree of Keshab Deo, Subordinate Judge of Jaunpur, dated the 15th of September, 1909.

(1) (1902) I. L. R. 26 Mad. 554.

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8 A. L. J.
1251.

Where ancestral property is impartible and is held by a single member of the family, all the members of the family must be deemed to be joint in estate and the rule of succession to the property is the same as that which governs the case of partible property, so that a junior member of the family, who gets maintenance from the person holding the impartible estate, succeeds upon his death to the estate by right of survivorship.

Whatever may be the powers of alienation of the holder of an impartible estate, the succession to it is governed not by the rule which applies to separate property but by the rule of survivorship. Therefore the person who succeeds to [80] the estate does not do so as the heir or legal representative of his predecessor and the estate cannot be regarded as the assets of the last previous holder.

Harpal Singh v. *Bishan Singh* (1) followed. *Raja of Kalahasti* v. *Achigadu* (2) and *Zamindar of Karvetnagar* v. *Trustee of Tirumalai* (3) dissented from.

[Ref. 2 Pat. L. J. 136=39 I. C. 36.]

THE suit out of which this appeal arose related to fifteen villages appertaining to the Singramau estate situated in the district of Jaunpur, which was admittedly an impartible estate held by a single person who succeeded to it according to the rule of primogeniture. Before the estate came to the plaintiff to this suit it was held by one Rai Randhir Singh, who died in 1895, leaving his widow, Thakurain Sonao Kunwar, in whose favour he had made a will before his death. His nephew, Sheopal Singh, who was his nearest male relative at the time of his death, brought a suit against Sonao Kunwar for possession of the estate. The suit was compromised, and a decree was passed in accordance with the compromise. Sheopal Singh died on the 27th of July, 1899, and Thakurain Sonao Kunwar, who survived him, died on the 20th of June, 1904. Thereupon Thakurain Lekhraj Kunwar, the widow of Sheopal Singh, brought a suit against the present plaintiff, Thakur Harpal Singh and others, for possession of the estate. She obtained a decree from the court of first instance on the 24th of February, 1906, but that decree was set aside by the High Court on the 29th of May, 1908. See I. L. R. 30 All. 207.

One Dilraj Kunwar obtained a money decree against Sheopal Singh on the 6th of January, 1897, and she made infructuous attempts to execute it. After the death of Sheopal Singh her legal representatives (she being dead) made an application for execution of the decree on the 4th September, 1906, against Thakurain Lekhraj Kunwar, his widow, and on the 24th of March, 1907, caused the fifteen villages now in dispute to be attached. As the property was ancestral, the decree was transferred to the Collector for execution. That officer granted a lease of it to the defendant appellant on the 14th of March, 1908, for a term of four years. Meanwhile, Thakur Harpal Singh obtained his decree from this Court on the 29th of May, 1908, as stated above, but in spite of his protests the Collector delivered [81] possession of the fifteen villages to the defendant lessee on the 3rd of September, 1908. Thereupon the suit out of which this appeal has arisen, was instituted by the plaintiff, Thakur Harpal Singh, for a declaration of his right to the fifteen villages and for possession of those villages by avoidance of the lease granted to the defendant. The Court of first instance (Subordinate Judge of Jaunpur) decreed the plaintiff's suit. The defendant thereupon appealed to the High Court.

Mr. *W. K. Porter* (for Mr. *B. E. O'Conor*) and Maulvi *Ghulam Mujtaba*, for the appellant:

The court below has erred in treating the property in dispute as joint family property. To impartible estates the doctrines applicable to a

(1) (1909) 6 A. L. J. 753.
(2) (1905) I. L. R. 30 Mad. 454.
(3) (1909) I. L. R. 32 Mad. 429.

joint Hindu family only apply so far as their use is necessary to ascertain who the heir is. Such property is not really joint property and does not pass to the heir by survivorship, but by succession. The property must be deemed to be assets in the hands of the present holder. The hypothesis of the property being joint was applied simply to ascertain the heir. The idea was to keep women out. If there were a right of survivorship, it would mean that a person would acquire an interest in the property at birth, but this was not the case. Reference was made to *Doorga Persad Singh* v. *Doorga Konwari* (1), *Kamakshi Ammal* v. *Chakrapany Chettiar* (2), *Zamindar of Karvetnagar* v. *Trustee of Tirumalai* (3). A joint property carried with it a right to partition and a disability as to alienation: neither element was present in an impartible estate.

The Hon'ble Pandit *Sundar Lal* (Dr. *Satish Chandra Banerji* with him), for the respondent:—

The estate is a joint estate in which each person as he is born, acquires an interest; only the mode of enjoyment is different. One man keeps the bulk of the estate and the others only get maintenance. The estate is joint under the *Mitakshara* law, only the shares are different. The Privy Council have laid down that such an estate is not the separate estate of the Raja. The ordinary law of partible estate applies with such variations as may [82] have sprung up owing to custom. The incidents of inheritance are the same. The Privy Council have only given the holder the right to alienate. In other respects the incidents are the same as those of joint family property. In *Doorga Persad Singh* v. *Doorga Konwari* (1) all that they held was that an impartible estate was impressed with the character of a joint family property, only it carried a right of alienation with it; *Raja Rup Singh* v. *Rani Baisni* (4). Again no succession certificate was necessary in case of an impartible estate, because it was a case of survivorship. The estate passed to us by survivorship and was not the last holder's assets in our hand.

Mr. *W. K. Porter*, in reply:

RICHARDS, C. J., and BANERJI, J.—The suit out of which this appeal has arisen relates to fifteen villages appertaining to the Singramau estate situated in the district of Jaunpur, which is admittedly an impartible estate held by a single person, who succeeds to it according to the rule of primogeniture. Before the estate came to the plaintiff to this suit it was held by Rai Randhir Singh, who died in 1895, leaving his widow, Thakurain Sonao Kunwar, in whose favour he had made a will before his death. His nephew, Sheopal Singh, who was his nearest male relative at the time of his death, brought a suit against Sonao Kunwar for possession of the estate. The suit was compromised, and a decree was passed in accordance with the compromise. Sheopal Singh died on the 27th of July, 1899, and Thakurain Sonao Kunwar, who survived him, died on the 20th of June, 1904. Thereupon Thakurain Lekhraj Kunwar, the widow of Sheopal Singh, brought a suit against the present plaintiff, Thakur Harpal Singh, and others for possession of the estate. She obtained a decree from the court of first instance on the 24th of February, 1906, but that decree was set aside by this Court on the 29th of May, 1908. The judgment of this Court is reported in I. L. R., 30 All. 407. An appeal from the decree of this Court is, we understand, now pending in the Privy Council.*

* The decision of the High Court was affirmed by the Judicial Committee on the 22nd November, 1911. *Vide Supra*, p. 65.

(1) (1879) I. L. R. 4 Cal. 190.
(2) (1907) I. L. R. 30 Mad. 452.
(3) (1909) I. L. R. 32 Mad. 429.
(4) (1885) I. L. R. 7 All. 10.

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12 I. C. 915
=8 A. L. J.
1251.

One Dilraj Kunwar obtained a money decree against Sheopal Singh on the 6th of January, 1897, and she made infructuous [83] attempts to execute it. After the death of Sheopal Singh her legal representatives (she being dead) made an application for execution of the decree of the 4th of September, 1906, against Thakurani Lekhraj Kunwar, his widow, and on the 24 of March, 1907, caused the fifteen villages now in dispute to be attached. As the property was ancestral, the decree was transferred to the Collector for execution. That officer granted a lease of it to the defendant appellant on the 14th of March, 1908, for a term of four years. Meanwhile, Thakur Harpal Singh obtained his decree from this Court on the 29th of May, 1908, as stated above, but in spite of his protests the Collector delivered possession of the fifteen villages to the defendant lessee on the 3rd of September, 1908. Thereupon the suit out of which this appeal has arisen, was instituted by the plaintiff, Thakur Harpal Singh, for a declaration of his right to the fifteen villages and for possession of those villages by avoidance of the lease granted to the defendant.

The plaintiff asserts that as the estate is impartible, it must be deemed to be joint family property, although it was to be held for the time being by one of the members of the family; that although in the previous litigation it was held that it vested in Sheopal Singh, he had no absolute interest in it; that upon his death it passed to the plaintiff by right of survivorship, and that it is not liable to attachment in execution of a decree obtained against him in his personal capacity. The plaintiff also urges that as he was not made a party to the proceedings relating to the execution of the said decree, the lease granted to defendant is not binding on him.

The defendant appellant, on the other hand, contends that the property in suit must be considered to be the assets of Sheopal Singh; that it was therefore liable to attachment and the lease granted to the defendant is valid, and that as the term of the lease has not yet expired, the plaintiff is not entitled to obtain possession.

The Court below has overruled these contentions and decreed the claim, relying mainly on the decision of this Court in *Harpal Singh* v. *Bishan Singh* (1). In that case another [84] creditor of Sheopal Singh, who held a money decree against him, applied, after his death, for execution of the decree against the present plaintiff Harpal Singh. It was held by us that Harpal Singh succeeded to the estate by right of survivorship and not as heir or legal representative of Sheopal Singh holding his assets and that the estate in the hands of Harpal Singh could not be proceeded against by creditor of Sheopal Singh as his assets.

The learned counsel for the appellant, whilst admitting that this ruling is fatal to his appeal, has asked us to reconsider it in the light of the judgments of the Madras High Court in *Raja of Kalahasti* v. *Achigadu* (2) and *Zamindar of Karvetnagar* v. *The Trustee of Tirumalai* (3), which undoubtedly support his contention. After carefully considering these rulings and the decisions of their Lordships of the Privy Council on the point we see no reason to alter the opinion we expressed in *Harpal Singh* v. *Bishan Singh*, referred to above.

In *Katama Natchiar* v. *Raja of Shivaganga* (4) their Lordships of the Privy Council, referring to an impartible estate capable of enjoyment

(1) (1909) 6 A. L. J. 753.
(2) (1905) I. L. R. 30 Mad. 454.
(3) (1908) I. L. R. 32 Mad. 429.
(4) (1868) 8 Moo. I. A. 539.

by only one member of the family at a time, held that "the rule of succession to it is that of the general Hindu law prevalent in that part of India with such qualifications only as flow from the impartible character of the subject. Hence, if the zamindar, at the time of his death, and his nephews were members of an undivided Hindu family, one of the nephews was entitled to succeed to it. They accordingly applied the rule of survivorship in declaring who was the next heir to the estate. Following this ruling their Lordships held, in *Doorga Persad Singh* v. *Doorga Konwari* (1) that "the imparitibility of the property does not destroy its nature as joint family property, or render it the separate estate of the last holder so as to destory the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate. To the same effect is the ruling of their Lordships in *Raja Rup Singh* v. *Rani Baisni* (2) where they held that " impartible ancestral estate is not, **[85]** merely by reason of its being impartible, the separate estate of the single member of the undivided family on whom it devolves." In the case of *Stree Rajah Yanumula Venkayyamah* v. *Stree Rajah Yanumula Boochia Vankondora* (3) SIR JAMES COLVILE, in delivering the judgment of their Lordships said that " the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate". It is unnecessary to quote other decisions of their Lordships. The result of these decisions is that where ancestral property is impartible and is held by a single member of the family, all the members of the family must be deemed to be joint in estate, and the rule of succession to the property is the same as that which governs the case of partible property, so that a junior member of the family who gets maintenance from the person holding the impartible estate succeeds to the estate by right of survivorship.

It is said that this rule was departed from in the case of *Sartaj Kuari* v. *Deoraj Kuari* (4), in which it was held that the holder of an estate impartible by custom and descending by primogeniture is competent, in the absence of a custom as to inalienability, to make a gift of a part of the estate. This power was extended in the Pittapur case (5) to a will made by the holder of an impartible estate. The contention of the learned counsel for the appellant is, and this seems to be the opinion of the learned Judges of the Madras High Court who decided the later cases referred to in an earlier part of this judgment, that the logical result of the decisions of their Lordships of the Privy Council in the two cases mentioned above is that the estate in the hands of the holder of it is separate estate. Even if it be assumed that this is so, it is manifest from the judgments of their Lordships that they left untouched the question of succession to the estate. In both the cases their Lordships only considered the question of the alienability of the estate. In *Sartaj Kuari* v. *Deoraj Kuari* the suit was brought by the son of the Raja who was in possession of the estate to set aside a gift made by him in favour of his junior wife. It was held that there is not such co-parcenary in an estate impartible by custom as, under **[86]** the law of the Mitakshara governing the descent of ordinary property, attaches to a son on his birth. SIR RICHARD COUCH who delivered the judgment of their Lordships, observed (p. 286) : —" Though an impartible estate may be for some purposes

(1) (1879) I. L. R. 4 Cal. 190.
(2) (1885) I. L. R. 7 All. 1.
(3) (1870) 13 Moo. I. A. 333.
(4) (1888) I. L. R. 10 All. 272.
(5) (1889) I. L. R. 22 Mad. 383.

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spoken of as joint family property, the co-parcenary in it which under the Mitakshara law is created by birth does not exist." Their Lordships were considering the power of a son to question an alienation by his father of part of the impartible estate and they held that he had no such power. "The reason" they say, "for the restraint upon alienation under the law of the Mitakshara, is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons." And they held that the property in the fraternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordships' opinion, so connected with the right to a partition that it does not exist where there is no right to it." Holding this view, they observed that, "as by custom the eldest son succeeds to the whole estate on the death of his father, it is difficult to reconcile this mode of succession with the rights of a joint family, and to hold that there is a joint ownership which is a restraint upon alienation." As we have said above, the sole question which their Lordships considered in that case was the question of the alienability of the estate, and they held that there was no such joint ownership as would be a restraint upon alienation. They did not hold that the property is the separate absolute property of the holder of it and that the succession to it is to be regulated by the rule relating to the descent of separate property. In the case mentioned above, *Sartaj Kuari* v. *Deoraj Kuari*, this Court held that the property must be regarded as joint family property governed by the rules of the law of the Mitakshara save so far as the family custom or usage superseded those rules. It is difficult to see what objection could be taken to this view of the position, having regard to the presumption of Hindu law and the decided cases. This Court considered that the custom prevailing in the family did not authorize an alienation of the kind complained of by the plaintiff in the suit, which was admittedly in contravention of the rules [87] of Hindu law. It was no doubt a necessary incident to the custom proved that the junior members of the family could not claim partition, and their Lordships considered that it followed that they could not challenge an alienation made by the *gaddinashin*, and this seems to have been the ground of their decision. We do not, however, think that they decided or intended to decide that the view taken by this Court, viz., that the property was joint family property subject to the necessary incidents of the prevailing custom, was incorrect.

As held in previous cases, the property would devolve on the person who would have been entitled to succeed, if it were partible property, and this rule was not, as it seems to us, abrogated. In the case of *Jogendro Bhupati* v. *Nityanand Man Singh* (1), which was decided after the decision of *Surtaj Kuari's* case and in which that case was cited in the argument, their Lordships observed :—"The fact of the Raj being impartible does not affect the rule of succession. In considering who is to succeed on the death of the Raja, the rules which govern the succession to a partible estate are to be looked at, and therefore the question in this case is what would be the right of succession supposing instead of being an impartible estate it were a partible one." Holding this view their Lordships applied the rule of survivorship. It is noticeable that the judgment in this case also was delivered by SIR RICHARD COUCH, and he referred to the decision of their Lordships in the Shivagunga case. There can be no doubt, upon the authorities, that whatever may be the

(1) (1890) I. L. R. 18 Cal. 151.

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powers of alienation of the holder of an impartible estate the succession to it is governed, not by the rule which applies to separate property, but by the rule of survivorship. Therefore the person who succeeds to the estate does not do so as the heir or legal representative of his predecessor and cannot be said to hold his assets.

This was the view we held in the case of *Harpal Singh* v. *Bishan Singh* (1), and for the reasons stated above we adhere to that view. It is in consonance with the ruling of the Calcutta High Court in *Kali Krishna Sarkar* v. *Raghunath Deb* (2), **[88]** and with that of the Madras High Court in *Nachiappa Chettiar* v. *Chinnayasami Naicker* (3) decided by MOORE and SANKARAN NAIR, JJ. with which we are in full accord, and we are unable, with great respect, to agree with the later decisions of that court. The property in dispute having passed to the plaintiff, Harpal Singh, by right of survivorship and not as heir or legal representative of Sheopal Singh, cannot be regarded as the assets of the latter and was not liable to attachment in execution of the decree obtained against him by Dilraj Kunwar. The lease held by the defendant appellant is therefore void as against the plaintiff, and the appellant is not entitled to continue in possession by virtue of it.

We are further of opinion, in concurrence with the court below, that the aforesaid lease is not binding on the plaintiff, inasmuch as he was not a party to the execution proceedings, in which it was granted by the Collector. According to the decision of this Court in the suit between Thakurain Lekhraj Kunwar and Harpal Singh to which we have already referred, the latter was entitled to the Singramau estate after the death of Sheopal Singh. Therefore, if the decree-holder wished to proceed against any part of that estate, she ought to have made the plaintiff, Harpal Singh, a party to the execution proceedings. As those proceedings were held against Thakurain Lekhraj Kunwar, the widow of Sheopal Singh, who has been declared to have no interest in the estate, they are not binding on the plaintiff. According to the principle of the ruling of the Privy Council in *Malkarjun* v. *Narhari* (4) the lease granted in those proceedings is voidable as against the plaintiff and he is entitled to avoid it, as he seeks to do, in this suit.

For these reasons we are of opinion that the decree of the court below is right. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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34 A. 89 (=12 I. C. 844=8 A. L. J. 1237=12 Cr. L. J. 580).

[89] REVISIONAL CRIMINAL.

Before Mr. Justice Chamier.

EMPEROR v. NAUSHE ALI KHAN.*

[14th August, 1911.]

Act No. XLV of 1860 (*Indian Penal Code*), *section* 379—*Theft—Removal of goods from a person's custody—Larceny.*

In order to constitute larceny there must be an intention to take entire dominion over the property, *i.e.*, the taker must intend to appropriate the property to his own use, but there may be theft without an intention to deprive the owner of the property permanently.

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* Criminal Revision No. 365 of 1911 from an order of Pitambar Joshi, officiating Additional Sessions Judge of Moradabad, dated the 23rd of June, 1911.

(1) (1909) 6 A. L. J. 753.
(2) (1903) I. L. R. 31 Cal. 224.
(3) (1906) I. L. R. 29 Mad. 453.
(4) (1908) I. L. R. 25 Bom. 337.

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34 A. 89=12 I. C. 844=8 A. L. J. 1237 =12 Cr. L. J. 580.

Hence, where a person snatched away some books from a boy as he came out of school and told him that they would be returned when he came to his house, *held*, that the offence of theft had been committed. *R.* v. *Dickinson* (1), *Prosonno Kumar Patra* v. *Udoy Sant* (2) and *Queen-Empress* v. *Agha Muhammad Yusuf* (3) referred to.

THE applicant in this case met a boy coming out of school, and snatched some books which he was carrying away from him telling him that he would get the books back if he came to the applicant's house for them. The applicant was convicted by a Magistrate of the first class of theft under section 379 of the Indian Penal Code, and sentenced to a fine, and this conviction and sentence were upheld on appeal by the Sessions Judge. Both courts found that the applicant's object was to get the boy to his house in order to commit an unnatural offence upon him. The applicant came in revision to the High Court.

Mr. *R. K. Sorabji*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

CHAMIER, J.—This is an application for revision of an order of the Additional Sessions Judge of Moradabad, confirming an order of a Magistrate of the first class whereby the applicant was convicted of an offence under section 379, Indian Penal Code, and sentenced to pay a fine.

The facts found are that the applicant snatched some books from a boy as he was coming out of school and told the boy that he would return the books if he came to his house. Both the [90] Judge and the Magistrate have found that the object of the applicant was to get the boy into his house and commit an unnatural offence upon him.

The question for decision is whether the applicant committed theft. There seems no doubt that on the facts stated the applicant could not be convicted of larceny under the common law. I mention this because my attention has been called to an old English case, in which, on facts not unlike those of the present case, the accused was acquitted. In that case the prisoner took from a house in the night a young girl's bonnet and some other articles of her dress and carried them to a hay-mow where he had twice had connection with her. The jury thought that he took them in order that the girl might again go to the mow, and he might have another opportunity of soliciting her to repeat the connection. It was held that the prisoner had not committed larceny. *R.* v. *Dickinson* (1). In order to constitute larceny there must be an intention to take entire dominion over the property, *i.e.*, the taker must intend to appropriate the property to his own use.

Under the Indian Penal Code 'whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in or to such taking, is said to commit theft.' The question is whether the applicant took the books 'dishonestly'—all the other ingredients of theft are present. 'Dishonestly' is thus defined in section 24, Indian Penal Code:—'whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another, is said to do that thing dishonestly.' In section 23 wrongful gain and wrongful loss are defined thus:—Wrongful gain is the gain by unlawful means of property to which the person gaining it is not legally entitled; and wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled.' It has been held

(1) (1820) R. and R. 420.
(2) (1895) I. L. R. 22 Cal. 669.
(3) (1896) I. L. R. 18 All. 88.

in several cases that theft may be committed even where there is no intention to deprive the owner of the property permanently. A familiar instance is that of a person who seizes the property of another in order to compel that other to pay a sum of money to which the former has [91] no claim; *Prosonno Kumar Patra* v. *Udoy Sant* (1). There is a difference of opinion as to whether it is theft to take the property of another in order to compel payment of a just debt—*Queen-Empress* v. *Agha Muhammad Yusuf* (2)—but it has never been suggested that there can be no theft unless there is an intention to deprive the owner of the property permanently. In the present case there was 'wrongful gain' to the applicant and 'wrongful loss' to the school-boy within the definition of those terms in the Code. I must, therefore, hold that the applicant took the books dishonestly and that he was rightly convicted of theft under section 379, Indian Penal Code. This application is dismissed.

Application dismissed.

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34 A. 89=12 I. C. 844=8 A. L. J. 1237 =12 Cr. L. J. 580.

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34 A. 91 (= 12 I. C. 990=8 A. L. J. 1249=12 Cr. L. J. 614).

CRIMINAL REFERENCE.

Before Mr. Justice Chamier.

EMPEROR v. GUR PRASAD GIR.*

[18th October, 1911.]

Act No. IX of 1890 (*Indian Railways Act*), *section* 125—*Cattle left in charge of keeper allowed to stray on a railway line—Liability of owner.*

The owner of cattle which have been allowed to stray upon a railway in consequence of the negligence of the person actually in charge of them on the owner's behalf is not liable to punishment under section 125 (1) of the Indian Railways Act, 1890. *Queen-Empress* v. *Andi* (3) followed.

THIS was a case referred by the Sessions Judge of Jaunpur under section 438 of the Code of Criminal Procedure. The facts of the case appear from the following order:—

"In this case the applicant has been fined Rs. 5, under section 125 (1) of the Railways Act, as the owner of certain cattle which strayed on the Railway line at Barasathi in this district. Referring to the case of *Queen-Empress* v. *Andi* (3) which has been cited by the learned pleader for the applicant, the learned Magistrate says that 'it is not proved to his satisfaction that the applicant (who was not present when the trespass took place) had, as a matter of fact, appointed a person in charge of the cattle, and that it was due to the negligence of that person that the cattle did stray.' On the evidence I think that the learned Magistrate had really no alternative but to be satisfied of both those matters. Musai, who was convicted and sentenced along with him, corroborates applicant's assertion that he is his cow-herd, and that he was appointed by him to look after the cattle; and, further, Musai admits negligence in having idly suffered another person to guard the cattle instead of looking after them himself. There is no evidence to rebut these assertions of the two accused, which are clearly true. The case consequently is on all fours with the [92] case of *Queen-Empress* v. *Andi*, and there is no ground for making the owner of the cattle liable.

"I would, therefore, report the case to the Hon'ble High Court with the recommendation that the conviction and sentence be set aside, and the fine, if paid, be refunded. The record will first be laid before the learned Magistrate, for any remarks which he may wish to submit."

The Magistrate's explanation was as below:—

"As I have remarked in my judgment, the Railways Act seems to make the owner of cattle trespassing on the railway responsible for the offence unless he can show that

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* Criminal Reference No. 575 of 1911.

(1) (1896) I. L. R. 22 Cal. 669.
(2) (1896) I. L. R. 18 All. 88.
(3) (1894) I. L. R. 18 Mad. 228.

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34 A. 91=21 I. C. 990=8 A. L. J. 1249 =12 Cr. L. J. 614.

he has taken all reasonable care and precaution to prevent the trespass. The appointment of a person to guard the cattle will not, in my opinion, relieve the owner of the responsibility unless it is proved that it was due to the negligence of that person that the cattle did stray. The absence of the owner from the place where trespass takes place is immaterial.

"In the present case the petitioner, Gur Prasad Gir, states that his cow-herd, Musai, was in charge of the cattle, but no evidence has been produced by him to support this allegation. In fact he refused to summon or examine any witnesses on his behalf. The assertion of Musai, who was convicted and sentenced along with the petitioner, though corroborating that of the applicant, Gur Prasad Gir, cannot be treated as evidence in his favour. The evidence for the prosecution clearly shows that on the day of occurrence there was no person to look after the cattle. I think the burden of proving that the trespass took place owing to the negligence of Musai who is alleged to be the applicant's cow-herd lay on the applicant. The bare assertions of the two accused, uncorroborated as they are by independent evidence, are not, in my opinion, sufficient to exonerate him from the liability."

CHAMIER, J.—Gur Prasad Gir was convicted under section 125 of the Railways Act. On the evidence, there seems no doubt, that he had placed his co-accused Musai in charge of his cattle and that it was due to the negligence of Musai that the cattle strayed on the railway. Following the decision of the Madras Court, reported in *Queen-Empress* v. *Andi* (1), I hold that Gur Prasad Gir should not have been convicted. I set aside his conviction and direct that the fine, if paid by him, be refunded.

Conviction set aside.

34 A. 93 (=8 A. L. J. 1269=12 I. C. 987=12 Cr. L. J. 611).

[93] REVISIONAL CRIMINAL.

Before Mr. Justice Chamier.

EMPEROR *v.* ABDUL WAHID KHAN.*

[25th October, 1911.]

Act No. I of 1872 (*Indian Evidence Act*), *sections* 14, 15—*Evidence—Act No. XLV of* 1860, (*Indian Penal Code*), *section* 415—*Cheating—Evidence to show instances of cheating other than those charged inadmissible.*

A person employed as a clerk in charge of the renewal of licenses for hand-carts received Rs. 2 for each such renewal, whereas he ought to have taken Rs. 1-14. He was charged with cheating, and evidence was produced showing that he had taken 2 annas in excess from persons other than those named in the charge. *Held* that such evidence was inadmissible either under section 14, or under section 15 of the Evidence Act. *Emperor* v. *Debendra Prosad* (2) distinguished. *Empress* v. *M. J. Vyapoory Moodeliar* (3) referred to.

[Ref: 47 Cal. 671=24 C. W. N. 501=31 C. L. J. 402=58 I. C. 929=21 Cr. L. J. 849.]

THE facts of this case were as follows:—

The accused was a clerk in the office of the Municipal Board of Pilibhit, and it was his duty to deal with applications for renewal of licences for hand-carts. He should have taken a licence fee of Rs. 1-8-0 for each hand-cart and 6 annas for the preparation of the *takhti* or board showing the number of the cart. The case for the prosecution was that he had demanded and received Rs. 2 from several applicants, and had thereby cheated each of them out of 2 annas.

As it was not permissible to charge the accused with more than three such acts of cheating, the prosecution selected three complainants and

* Criminal Revision No 533 of 1911, by the Local Government from an order of F. E. Taylor, Sessions Judge of Bareilly, dated the 8th of July, 1911.

(1) (1894) I. L. R. 18 Mad. 228.
(2) (1909) I. L. R. 36 Cal. 678.
(3) (1881) I. L. R. 6 Cal. 655.

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produced evidence that each of them had been induced to pay two annas more than could properly have been demanded. The prosecution produced also evidence that the accused had cheated a number of other applicants for licences. The accused was convicted and appealed to the Sessions Judge on various grounds, one of which was that he had been prejudiced by the admission of evidence that he had taken two annas in excess from several persons other than those named in the charges framed against him. The Sessions Judge held that the evidence complained of ought not to have been admitted and he has ordered a fresh trial.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

[94] Maulvi *Muhammad Rahmat-ullah*, for the applicant (accused).

CHAMIER, J.—The accused was a clerk in the office of the Municipal Board of Pilibhit, and it was his duty to deal with applications for renewal of licences for hand carts. He should have taken a licence fee of Rs. 1-8-0 for each hand-cart and 6 annas for the preparation of the *takhti* or board showing the number of the cart. The case for the prosecution was that he had demanded and received Rs. 2 from several applicants, and had thereby cheated each of them out of 2 annas.

As it was not permissible to charge the accused with more than three such acts of cheating, the prosecution selected three complainants and produced evidence that each of them had been induced to pay two annas more than could properly have been demanded. The prosecution produced also evidence that the accused had cheated a number of other applicants for licences. The accused was convicted and appealed to the Sessions Judge on various grounds, one of which was that he had been prejudiced by the admission of evidence that he had taken two annas in excess from several persons other than those named in the charges framed against him. The Sessions Judge held that the evidence complained of ought not to have been admitted and he has ordered a fresh trial.

This is an application presented under the orders of the Local Government for revision of the orders of the Sessions Judge. On behalf of the Crown it is contended that the evidence which has been ruled out by the Sessions Judge was rightly admitted either under section 14 or under section 15 of the Evidence Act. It appears to me that section 15 cannot possibly apply to the case. There is no question whether the accused's act was accidental or intentional or done with a particular knowledge or intention. He admits and it is obvious that he knew what amount he was entitled to take from applicants for licences. In support of the contention that the evidence is admissible under section 14, Mr. *Malcomson* relied upon the decision of the Calcutta High Court in *Emperor* v. *Debendra Prosad* (1). In that case the accused was charged with having **[95]** cheated one Boodri by falsely representing that he was the *Dewan* of an estate and could obtain an appointment for him and thereby obtaining a sum of money as a pretended security deposit. The cross examination foreshadowed the defence that the accused's intention at the time of the representation was not dishonest. The Court held that evidence was admissible to show that at or about the same time the accused had had similar transactions with other persons which taken together showed that the accused's intention was dishonest and that the transaction with Boodri was only one of a systematic series of frauds. I am unable to see how that case is any authority for the admission of the evidence which

(1) (1909) I. L. R. 35 Cal. 573.

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has been objected to in this case. A ruling which applies closely to the present case in that in *Empress* v. *M. J. Vyapoory Moodeliar* (1), where accused was charged with having received a bribe on three specific occasions and an attempt was made to prove that he had received bribes from the same firm on other occasions. The evidence was ruled out on the ground that section 14 of the Evidence Act applies to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, not to cases where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling.

In the present case the accused knew what amount he was entitled to take, and the only question is whether he represented to the three complainants named in the charge that they were bound to pay two annas more, and on the strength of that representation induced each of them to pay Rs. 2 instead of Rs. 1-14 and put the difference in his pocket. It appears to me that section 14 of the Evidence Act does not justify the admission of the evidence which has been objected to.

But I do not understand why the Sessions Judge ordered a fresh trial. He should have disposed of the case on the evidence which was admissible. I would invite his attention to section 167 of the Evidence Act. I set aside the order of the Sessions Judge and direct that the appeal be disposed of according to law.

Order set aside.

34 A. 96 (=8 A. L. J. 1262=12 Cr. L. J. 612=12 I. C. 988).

[96] REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox and Mr. Justice, Griffin.

EMPEROR *v.* AHMAD KHAN.*

[25th October, 1911.]

Act No. III of 1867 (*Public Gambling Act*) *section* 12—"*Mere game of skill*"—*Game of chance.*

Held, that a game which is in fact only to a very slight extent a game of skill and almost entirely a game of chance is not a game which is excluded by reason of section 12 of the Gambling Act, 1867, from the previous provisions of that Act. *Hari Singh* v. *King Emperor* (2) distinguished.

[Ref. 40 Mad. 556=36 I. C. 839; 61 I. C. 518=22 Cr. L. J. 390.]

THE facts of this case are fully set out in the order of the Sessions Judge, which was as follows:—

"Ahmad Khan has been convicted under section 13 of the Gambling Act and sentenced to pay a fine of Rs. 15. He has filed this application in revision on the ground that the game which he played was a game of skill.

"The accused played what is known as the ring game at Gajner fair. He has a number of papers which prove that he used to apply for permission to the authorities to play this game; he has two such orders from some tahsildar granting permission for the game to be played, and saying that this is a game of skill. He also possesses an order of the Joint Magistrate to the effect that if this is not a gambling game, permission is granted. He urges that he has been allowed to play this game for some years without interference. In the Calcutta Law Journal, 1907, page 708, the Calcutta High Court have delivered a judgment dealing with an exactly similar case. After describing the game at some length they decided that it was a game of skill. This

* Criminal Revision No. 509 of 1911, from an order of Austin Kendall, Sessions Judge of Cawnpore, dated the 25th of July, 1911.

(1) (1881) I. L. R. 6 Cal. 655. (2) (1907) 6 C. L. J. 708.

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Court is not bound to follow that judgment, and it is to be remarked that they have based their decision on a mistaken appreciation of what the game is.

"A table about 11 feet long, 3½ feet broad, and about 3½ feet high is used; on this is attached a red baize cloth. At intervals round the three sides of it there are tall brass pegs and at regular intervals over the whole surface of the table are fixed no fewer than 321 coins, there being five rupees, four eight annas pieces, ten four-anna pieces, 168 two-anna pieces and 134 one anna pieces. Cups, clocks and other such articles are scattered at intervals over the table. Four feet away from this table a barrier, 4 feet 6 inches high, is fixed into the ground. A competitor buys small brass curtain rings at a pice each, and the game is that he may lean over the barrier and throw these rings upon the table, if they go over a brass peg or if they encircle a coin he wins a prize. The rings are very light and are made of round wire about ⅛ inch in thickness. With a great deal of practice it is possible that certain small amount of skill might be attained but practically it is a game of mere chance, and certainly, as presented to a number of holiday-making peasants, a simple game of chance and nothing else. Section 13 does not contemplate relaxation of the law in favour of a game in which a certain amount of skill is attainable; the law is relaxed if the game is one, not of skill, but of mere skill; and I have no hesitation in deciding that this is not a game of mere skill. The application is therefore rejected.

[97] "It must be noted, with reference to the permission which the applicant professes to have obtained from various officials, that the Magistrate's order was not simply a bare permission to him to play but simply ran that if it were not a gambling game it might be played. The tahsildar's permission no doubt, was direct, but I fail to understand under what law the tahsildar was empowered to grant such permission, nor could the fact that such permission had been obtained absolve the accused from the consequences of his act if, as a matter of fact, the game which he played was not a game of mere skill. With reference to the last paragraph, I direct that a copy of this order be sent to the District Magistrate for information."

Ahmad Khan thereupon applied in revision to the High Court.

Mr. *C. Ross Alston*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

CHAMIER, J.—The applicant has been convicted under section 13 of the Public Gambling Act, 1867, of having played a game for money in a public place. He was caught in the act of conducting what is known as the ring game. It is fully described in the judgment of the Sessions Judge and it seems to me the same game as that which is described by MITTRA and FLETCHER, JJ., in the case of *Hari Singh* v. *King Emperor*, decided on August 19th 1907 (1). That case was decided under the Bengal Gambling Act, II of 1877, in section 10 of which as in section 13 of the Public Gambling Act, III of 1867, the expression "game of mere skill" is used. The learned Judges of the Calcutta High Court said:—"It seems to us that, although there is an element of chance in throwing a ring over the pin, the chief element of the game is one of skill." I am somewhat disposed to think that the element of chance in this case is so strong as to make it impossible to hold that the game is a mere game of skill. At the same time there is no doubt that a considerable amount of skill might be attained at the game. Having regard to what seems to have taken place in past with reference to this case, I am inclined to think that there ought not to have been an order for the prosecution of the applicant. In this case, however, the question must be decided whether the game was a mere game of kill or not. In view of [98] the decision of the Calcutta High Court I refer this case to a bench of two Judges.

The case coming on before a Division Bench, the following judgment was delivered:—

KNOX and GRIFFIN, JJ.—We have carefully considered the description given of the game which both the courts below held to be not a game

(1) (1907) 6 C. L. J. 708.

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of mere skill. The learned counsel for the applicant who asks us to interfere with the view taken by these courts, has referred us to a Calcutta ruling in Criminal Revision No. 771 of 1907, *Hari Singh* v. *King Emperor*. There is a material difference between the words used in section 10 of the Bengal Public Gambling Act and section 12 of Act No. III of 1867, which is the Act which governs the case now before us. We are by no means sure that the game which the Calcutta High Court Judges had under consideration was precisely the same as is described by the learned Sessions Judge of Cawnpore. We are, of course, only concerned with the game described by the latter. From the description so given we find ourselves unable to interfere. We hold that the game described by the learned Sessions Judge of Cawnpore is not a game of mere skill. The application is dismissed.

Application dismissed.

34 A. 98 (=8 A. L. J. 1245=12 I. C. 920.)

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

BISHAMBHAR NATH (*Plaintiff*) *v.* BHULLO AND OTHERS (*Defendants*).*

[26th October, 1911.]

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 194—*Lambardar—Suit by lambardar against co-sharers for excess of profits due to other co-sharers and himself—Lambardar not agent of co-sharers.*

Held that a lambardar is not the agent of the co-sharers generally so as to be entitled to sue on their behalf to recover profits due to some of them from other co-sharers holding *sir* and *khudkasht* lands in excess of their proper shares.

[Ref: 11 A. L. J. 742=21 I. C. 38; 36 All. 441; Expl. 38 All. 223; Dist: 75 I. C. 880.]

THE facts of this case were briefly as follows :—

The plaintiff was lambardar and the defendants were co-sharers of a certain village. The defendants held *sir* and *khud-kasht* in [99] excess of their share ; *i. e.*, the income from these lands was greater than their share of profits. The plaintiff, as lambardar, sued for the excess due to himself as a co-sharer as well as for that due to the other co-sharers. The Assistant Collector gave a decree for the whole sum. The District Judge, on appeal, held that the lambardar, as such, was not entitled to recover the excess due to the other co-sharers, and remanded the suit. His judgment was as follows :—

"This is a suit for profits. The lower court decreed the suit for a certain sum. The defendants appeal. In my opinion the learned Assistant Collector's judgment as well as the suit itself is based on misconception and confusion of ideas. I shall, so far as I can, endeavour to make the position clear. The plaintiff respondent is lambardar of the village. The defendants appellants are co-sharers. It is stated that the defendants hold *sir* and *khudkasht* in excess of the share, in other words that the income which they draw from this *sir* and *khudkasht*, is more than the whole of the profits to which they are entitled. Now I do not think there can be any doubt that the plaintiff as a co-sharer can sue for his share for that excess if any.

"But he goes further than this, he sues as lambardar for the excess due to other co-sharers as well as to himself. The position he takes up is that as lambardar he is bound to distribute to each co-sharer the proper amount or profits, and that if any co-sharer therefore has drawn more profits than he is entitled to do, the lambardar is bound to recover the excess from him and distribute it to the co-sharers who are entitled to it. In my opinion this is an extension of the rights and liabilities of a

*First Appeal No 56 of 1911 from an order of H. W. Lyle, District Judge of Agra, dated the 23rd of January, 1911.

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lambardar which is not warranted by law. The ordinary functions of a lambardar are to collect the rents and to distribute the amounts so collected among the co-sharers in proportion to the share of each. Besides the rent so collected he is also liable for any such sums as with due care and diligence he ought to have collected.

"But in some villages, as in the present case, land is held by co-sharers as *sir* or *khudkasht*. The estimated income from this land is set off against their share of the profits, but the lambardar does not collect that income from them and add it to the total amount for distribution. The amount is not recoverable by the lambardar and he could not realize it if he would. Now where a co-sharer holds *sir* and *khudkasht* which gives him an income in excess of his share of the profits the lambardar cannot be held liable to the other co-sharers for this excess. He is not bound to, nor indeed can he, recover this amount in order to re-distribute it in proper proportion. Take a simple instance: A, B, C, are co-sharers in equal shares of a village. A is lambardar, C holds sir which brings him in an estimated income of Rs. 200: the rent of the land let to tenants is Rs 100. This amount is collected by A as lambardar. Now it is clear that B can sue A for his one-third share of the Rs 100 which A has collected in his capacity of lambardar. It is equally clear that C has got Rs. 100 in excess of his proper share and that both A and B are entitled to recover one-third of this, but A cannot sue C [100] for the two-thirds share of Rs 100 due to B and himself with a view to distributing it among other three co-sharers in proper proportions. As lambardar he is entitled to collect rents from tenants and to sue for these, if necessary, but what is due from C is not rent, and A could not recover it from him. When a co-sharer has realized an income in excess of his share of the profits, there is no section which enables a lambardar to recover the balance from him with a view to re-distributing it again among the whole body of co-sharers in proportion. It follows from this that no co-sharer can hold a lambardar responsible for income which another co-sharer draws in excess of his share from *sir* or *khudkasht* land.

"The present plaintiff can sue as a co-sharer for his share in the excess income if any, drawn by the defendants for their *sir* and *khudkasht* land; but such suit is in no way concerned with his position as lambardar. The introduction of the status of lambardar only raises confusion, for the appellant wishes to set off certain rents due from tenants which he says the plaintiff as lambardar ought to have collected. This would be practically to allow costs which would be due in a suit under section 164 to be set off against costs claimed under section 165, a procedure which is certainly not contemplated by the Tenancy Act. I do not say that the plaintiff might not sue all the co-sharers for a complete account, and that in that case all the amounts due to and by him might not be gone into, but that cannot certainly be done in a suit against one individual co-sharer. The lower court's decision was based on a preliminary point in regard to which that decision has been set aside. I must remand the case for decision on the merits. I hold that as the suit is now proved, the plaintiff can only sue as a co-sharer for the amount of his own share, all other points are open, and it will also be open to the lower court to allow the plaint to be amended and to add parties should it think fit."

The plaintiff appealed.

Dr. *Tej Bahadur Sapru*, for the appellant:—

The lambardar is responsible for the payment of the revenue and for the distribution of profits among the co-sharers. He can, therefore, sue for recovery of the excess profits realized by a co-sharer, for the purpose of distributing the excess among the other co-sharers. Having regard to section 194 of the Agra Tenancy Act the lambardar must be treated as the agent of all the co-sharers and can sue on their behalf, as he purports to do in this case. The clause "unless they have appointed an agent to act on behalf of them all" in section 194 (1) takes this case out of the ruling in *Udai Ram* v. *Ghulam Husain* (1). The lambardar is the person who is authorized to represent them all. The position which he actually occupies is that of their agent. The appointment may be inferred from the course of conduct; and he must be deemed to have been appointed to act for them all.

[101] Pandit *Shiam Krishan Dar*, for the respondents, was not called upon.

(1) (1880) 2 Legal Remembrancer, High Court Series, p. 10.

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KNOX and GRIFFIN, JJ. :—The suit out of which this appeal arises is a suit brought by one Babu Bishambhar Nath who represents himself as lambardar of an entire mahal and is the owner of one half of it. He sues the defendants for profits, and his allegation is that the defendants hold land *sir* and *khudkasht* in excess of what they are entitled to with reference to the shares owned by them. The Revenue Court of first instance gave the plaintiff a decree as prayed for. On appeal, the District Judge held that the plaintiff could only sue as a co-sharer for the amount of his own share and could not sue for profits due to other co-sharers. He therefore set aside the decree of the court of first instance and remanded the suit for further trial. In appeal before us it is contended that the view taken by the learned Judge is in error and that the plaintiff as lambardar can maintain the suit to recover his share and the shares of other co-sharers out of excess money realized by the defendants, and this contention is said to be based upon the words contained in section 194 of the Local Act No. II of 1901. It is urged before us that the lambardar must be deemed to be an agent appointed by the co-sharers to act on behalf of them all. We know of no authority derived from either statute or custom which confers such a power upon the lambardar, and we do not think that the words contained in section 194 can be strained into holding this meaning. The appeal is dismissed with costs.

Appeal dismissed.

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34 A. 102 (=8 A. L. J. 1289=12 I. C. 607).

[102] APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

GUR NARAIN (*Plaintiff*) *v.* SHADI LAL AND OTHERS (*Defendants*).*

[26th October, 1911.]

Mortgage—Prior and subsequent incumbrancers—Third mortgagee paying of first mortgage, and claiming priority as against second mortgagee—Presumption as to intention of third mortgagee.

Where a mortgagee pays off prior incumbrances on the mortgaged property it is to be presumed that he does so with the intention of keeping these incumbrances alive and using them as a shield should occasion arise; and he can so use them as much when he is a plaintiff suing for sale as when he is a defendant to an intermediate or subsequent mortgagee's suit. If the payment is made in the form of leaving part of the money with the mortgagee to be paid to the prior mortgagees, the subsequent mortgagee does not thereby become the agent of the mortgagor for the purpose of paying off the prior mortgages.

Gokaldas Gopaldas v. *Puranmal Premsukhdas* (1) *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi* (2) and *Jagatdhar Narain Prasad* v. *A. M. Brown* (3) followed. *Tufail Fatma* v. *Bitola* (4) and *Brij Nath* v. *Murlidhar* (5) dissented from.

[Fol. 47 I. C 882=35 M. L. J. 467=1918 M. W. N. 505=8 L. W. 175.]

THE facts of this case were briefly as follows :—

The plaintiff sued to enforce a mortgage, dated the 25th of June, 1889. The defendants 8 to 16 held a mortgage of the 14th of April, 1888, in

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* First Appeal No. 400 of 1909 from a decree of Prithvi Nath, Subordinate Judge of Mainpuri, dated the 24th of August, 1909.

(1) (1884) I. L. R. 10 Cal. 1035.
(2) (1901) I. L. R. 29 Cal. 154
(3) (1906) I. L. R. 33 Cal. 1133.
(4) (1904) I. L. R. 27 All. 400.
(5) Weekly Notes, 1907, p. 85.

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respect of which they demanded payment. To this the plaintiff replied that when he took the mortgage in suit he had paid off two mortgages of earlier dates than the defendants' mortgage, and that he was entitled to claim priority over the defendants in respect of these. The mortgage of 1889 contained the usual recital that a certain portion of the mortgage money had been "left with the mortgagee" to pay off the earlier mortgages, and this was in fact done. The court of first instance refused the plaintiff the priority claimed by him in respect of these earlier mortgages. The plaintiff appealed to the High Court.

Dr. *Tej Bahadur Sapru* (with him Mr. *B. E. O'Conor*), for the appellant.

Dr. *Satish Chandra Banerji*, for the respondents.

RICHARDS, C. J. and BANERJI, J.—This appeal arises out of a suit brought to enforce a mortgage, dated the 25th of June, 1889. The defendants 8 – 16 held a mortgage, dated the 14th [103] of April, 1888. The plaintiff, however, stated that when the mortgage of the 25th of June, 1889, was executed, two prior mortgages, one dated the 26th of June, 1886, and the other, dated the 28th of June 1887, were paid off, and he accordingly claimed that to the extent of these mortgages, which were paid off, he had priority over the defendants 8—16, notwithstanding that their mortgage was prior in date.

The lower court decided in favour of the defendants 8—16 and held that the plaintiff had no priority.

Two questions have been argued in the present appeal; first, the question whether or not the plaintiff had in fact priority over the defendants 8—16; and secondly, assuming that he had such priority, whether he could enforce it in a suit instituted by himself as plaintiff.

The facts are undisputed. The plaintiff's mortgage provided that money sufficient to discharge the mortgage of the 26th of June, 1886, and the mortgage of the 28th of June, 1887, should be left with the mortgagee, who should pay off the mortgages and get the mortgage-deeds handed over to him. This was duly done, and the plaintiff is able to adduce in evidence the two mortgages of the 26th of June, 1886, and the 28th of June, 1887.

In our opinion the plaintiff is entitled to priority in respect of the mortgages which he paid off in accordance with the terms of his mortgage-deed. It was clearly for the benefit of the mortgagee that the mortgages of the 26th of June, 1886, and the 28th of June, 1887, should be kept alive, and we think that a strong presumption arises that it was the intention of the mortgagee to keep these mortgages alive. This view is in accordance with a vast amount of authority of this Court, and also with the view taken by their Lordships of the Privy Council in the case of *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1) and also in the case of *Dinobundhu Shaw Chowdhry* v. *Joymaya Dasi* (2). The law on the subject is fully set forth in the case of *Jagatdhar Narain Prasad* v. *A. M. Brown* (3) and is well summarised at page 1154.

[104] It was argued on behalf of the respondents that the mortgagee must, under the circumstances of the present case, be deemed to have paid off the prior mortgages merely as the agent of the mortgagor, and that accordingly we ought to hold that those prior mortgages were absolutely extinguished as soon as payment was made. Reliance is placed upon the

(1) (1834) I. L. R. 10 Cal. 1035.
(2) (1901) I. L. R. 29 Cal. 154.
(3) (1906) I. L. R. 33 Cal. 1133.

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decision in the case of *Baij Nath* v. *Murlidhar* (1) and also in the case of *Tufail Fatma* v. *Bitola* (2). It is no doubt true that expressions occur in the judgments in these cases suggesting that it was the opinion of the court that where money is left with the mortgagee to discharge prior mortgages, the mortgagee discharges these prior mortgages merely as agent for the mortgagor. With all due respect, we consider that this view is inconsistent with a great number of cases decided in this Court and also with the view taken by their Lordships of the Privy Council in the cases to which we have already referred.

The second question is the question whether or not the plaintiff is entitled to put forward in a suit instituted by himself the priority which for the purposes of this question it must be assumed that he has. We think that it is not reasonable to hold that a person is entitled to put forward a right in a case in which he is sued and to successfully resist the suit, and that he cannot enforce the very same right as a plaintiff. In the case to which we have referred, namely, the case of *Jagatdhar Narain Prasad* v. *A. M. Brown*, the plaintiff successfully put forward and enforced his claim under a prior mortgage which he had paid off in circumstances similar to those of the present case. There is also an unreported ruling of this Court to the same effect, namely, *Thakur Rudar Singh* v. *Param Sukh* (3). Reliance is placed upon another unreported decision of this Court, viz. *Bhupat* v. *Musammat Ganeshi* (4). The circumstances of that case were not altogether on all fours with the facts of the present case; and the question now raised was not directly decided. In our opinion there is no sound reason why a person who has priority by reason of having paid off a prior incumbrance, should not enforce that priority as plaintiff.

[105] The result is that the appellant succeeds on the two questions which have been argued before us. There is no question as to the amount due upon the prior mortgages, and the plaintiff only seeks interest thereon at the rate mentioned in the later mortgage in his favour. We accordingly allow the appeal to this extent that we vary the decree of the court below by directing that the defendants, other than the defendants 8—16 and 20—23, do pay into Court the amount found due upon the mortgage, the basis of the claim, the said amount to be paid within four months from this date, together with the costs of this suit and future interest at the stipulated rate, up to the date fixed for payment and thereafter at the rate of six per cent. per annum. If the said amount be paid, we direct that out of the money so paid in the plaintiff should be paid the costs of the suit, and the balance should be paid to the plaintiff and to the defendants Nos. 20—23, the plaintiff receiving half, and the defendants Nos. 20—23 the other half. We further direct that if payment be not made as ordered above, the defendants 8—16 shall have the right, within five months from this date, to redeem the mortgages of the 26th of June, 1886, and the 28th of June, 1887, by payment to the plaintiff and the defendants Nos. 20 - 23 of the sum of Rs. 13,926-5-5, together with interest, from the date of this suit to the time fixed for payment at the rate mentioned in the plaintiff's mortgage together with proportionate costs. In the event of the said amount being paid, the plaintiff will have the right to redeem the mortgage held by the defendants 8 - 16 dated the 14th of

(1) Weekly Notes, 1907, p 85.
(2) (1904) I. L. R. 27 All. 400.
(3) S. A. No. 768 of 1909, decided on the 11th of May 1910.
(4) S. A. No. 993 of 1910, decided on the 12th of April, 1911.

April, 1888, within three months from the date when the defendants Nos. 8—16 shall have redeemed the earlier mortgages of 1886 and 1887. Upon such payment being made the plaintiff shall be at liberty to bring to sale the mortgaged property for the aggregate amount of his own mortgage and the mortgage of the defendants 8—16 which he shall have so redeemed and out of the proceeds of such sale will be paid to the plaintiff (1) his costs of the suit, (2) the amount of the mortgage of the defendants 8—16 paid by him to the said defendants, and (3) a moiety of the amount of the mortgage of the 20th of June, 1889. The other half of the said amount will be paid to defendants 20—23, and the surplus, if any, to the persons entitled thereto. In the event of the **[106]** defendants 8—16 not redeeming the prior mortgages of the 26th of June, 1886, and the 28th of June, 1887, the plaintiff shall be entitled to bring to sale the property comprised in his mortgage and out of the proceeds of the sale to realize in the first place the costs of this suit and in the next place a moiety of the amount due to the plaintiff and the defendants 20—23 on foot of the mortgages of the 26th June, 1886, and the 28th of June, 1887, the other moiety being payable to the defendants 20—23. Out of the balance, the defendants 8—16 will, having regard to the circumstances of this case, be entitled to the amount due in respect of their mortgage of the 14th of April, 1888. Out of what will remain after the making of the payments mentioned above, the plaintiff and the defendants 20—23 will be entitled to payment of the balance due upon foot of the mortgage of the 25th of June, 1889, the plaintiff getting half the said amount and the defendants 20—23 getting the other half between them and in the last case the surplus, if any, will be paid to the persons entitled thereto. The appellants will get their costs of this appeal.

Appeal allowed.

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34 A. 102=8 A. L. J. 1289 =12 I. C. 607.

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34 A. 106 (=8 A. L. J. 1241=12 I. C. 587.)

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

MAMRAJ AND ANOTHER (*Judgment-debtors*) *v.* BRIJ LAL CHAKRAVARTI AND OTHERS (*Decree-holders*).*

[30th October, 1911.]

Act No. III of 1907 (*Provincial Insolvency Act*), *sections* 16 *and* 31—*Civil Procedure Code* (1908), *order XXXIV, rule* 6—*Application for decree over against two judgment-debtors, one of whom had been declared insolvent.*

Where one of two mortgagors against whom a decree under order XXXIV, rule 6, of the Code of Civil Procedure was otherwise obtainable had been declared an insolvent under the provisions of the Provincial Insolvency Act, 1907 but the other had not: *Held* that the decree-holders could not be granted a decree over as against the insolvent, but could only prove their debt in the insolvency proceedings. *Barter* v. *Dubeux and Company* (1) referred to.

[Ref : 59 I. C. 710=2 Lah. 95;]

THE facts of this case are briefly as follows :—

The appellant, Mamraj, was declared an insolvent on the 29th of July, 1908. Before the commencement, however, of the insolvency proceedings, the respondents instituted a suit against **[107]** the appel-

* First Appeal No. 75 of 1911, from a decree of Mohan Lal Hukku, Subordinate Judge of Cawnpore, dated the 10th of December, 1910.

(1) (1881) L. R. 7 Q. B. D. 413.

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34 A. 106=8 A. L. J. 1251 =12 I. C. 587.

lants and obtained a decree for sale on a mortgage on the 13th of February, 1909, and an order absolute for sale on the 8th of May, 1909. The mortgaged property was sold, but it failed to satisfy the debt. On the 10th of December, 1910, an application was made under order XXXIV rule 6, of the Code of Civil Procedure. It was resisted on the ground that the appellant Mamraj having been declared an insolvent, no decree under the said order XXXIV, rule 6, could be passed against him. The Subordinate Judge, however, overruled the objection and gave the respondent a decree.

Munshi *Govind Prasad*, for the appellants, contended that the appellant Mamraj having been declared an insolvent, he could not be made personally liable. He relied on section 16 (2) and (5) and section 31 (1) and (6) of Act III of 1907. If execution proceedings are taken out against an insolvent, the object of the Legislature would be defeated. The Court below had no power to pass a decree under order XXXIV, rule 6, of the Code of Civil Procedure, after Mamraj had been declared an insolvent.

Babu *Girdhari Lal Agarwala* (with him Munshi *Gulzari Lal*), for the respondent, submitted that there was nothing in the provisions of the Insolvency Act to prevent a Court from passing a decree under order XXXIV, rule 6, of the Civil Procedure Code, when as a matter of fact, the suit for sale on the mortgage was instituted prior to the commencement of insolvency proceedings.

Munshi *Govind Prasad*, in reply.

CHAMIER, J.—The respondents, who held a mortgage of certain property from the appellant, Mamraj, brought a suit upon the mortgage against Mamraj and his son, Hanuman Das, and obtained a decree for sale which was made absolute on May 8th, 1909. The mortgaged property was sold, but the proceeds of the sale were not sufficient to satisfy the decree. After the institution of the suit but before the decree was passed, Mumraj was adjudicated an insolvent and a receiver was appointed. The respondents applied for a decree for the balance still due to them making the receiver a party to the proceedings. The application was resisted on the ground that as the respondents had enforced their security and recovered a certain amount they could [108] claim nothing more. The objection was overruled. Hence this appeal.

The objection is obviously not sustainable as regards the appellant Hanuman Das, for he has not been adjudicated an insolvent, and the respondents are clearly entitled to continue their suit against him. The respondents as secured creditors were entitled under section 31 of the Provincial Insolvency Act to realize their security, as they did, and to prove for the balance of their claim. The question is whether the respondents are entitled to continue their suit against Mamraj and obtain a decree against him under order XXXIV, rule 6. Section 16 of the Insolvency Act provides that on the making of an order of adjudication no creditor to whom the insolvent is indebted in respect of any debt provable under the Act shall, during the pendency of the insolvency proceedings, have any remedy against the property or person of the insolvent in respect of the debt or commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose. When the sole defendant to a suit for the recovery of a debt is adjudicated an insolvent, it seems clear that the proper course is to stay the suit and leave the plaintiff to prove his debt in the insolvency proceedings. This has been held

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to be the proper course in England—See *Barter* v. *Dubeux and Co.* (1). In the same case it was pointed out that where there is an action against two defendants and one becomes bankrupt, it being a claim against both, of course, the one who does not become bankrupt cannot be made liable unless the action goes on, and such a case is governed by a rule corresponding to order XXII, rule 10, and the trustee in bankruptcy may be made a party. Judgment is not given against the trustee or that he pay out of the estate, but judgment being against the other defendant, the plaintiff is at liberty to prove in the bankruptcy the amount of the claim established, and there the trustee is a party because it is necessary both as against the bankrupt's estate and the other defendant that the action should go on. Many of the provisions of the Indian Insolvency Act, including section 16, are taken from the English Bankruptcy Act, and where the provisions correspond, the decisions of the English courts may properly be **[109]** referred to as guides to the construction of the Indian Act. The respondents' application under order XXXIV, rule 6, was a continuation of their suit for the recovery of the mortgage money. A decree under order XXXIV, rule 6, is plainly a remedy within the meaning of section 16 of the Insolvency Act; therefore the respondents are not entitled to obtain such a decree against the appellant Mamraj. I would, therefore, allow this appeal in part and set aside the decree of the court below so far as it affects the appellant Mamraj or his property or the receiver, and leave the respondents to prove their claim in the insolvency proceedings against the estate of Mamraj. The decree of the court below should stand as against Hanuman Das but not so as to make him personally liable for the amount. I would make no order as regards the costs of this Court.

KARAMAT HUSAIN, J.—I agree.

BY THE COURT.—The order of the court is that the decree of the court below is set aside so far as it affects Mamraj or his property or the receiver. The respondents are left to prove their claim in the insolvency proceedings againgst the estate of Mamraj. The decree of the court below stands as against Hanuman Das, but he will not be personally liable for the amount decreed. We make no order as regards the costs of this court.

Decree modified.

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34 A. 109 (=12 I. C. 604=8 A L. J. 1972.)

APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice and Mr. Justice Banerji.

ZAIB-UN-NISSA BIBI (*Plaintiff*) *v.* THE MAHARAJA OF BENARES AND OTHERS (*Defendants*).*

[30th October, 1911.]

Act No. IX of 1908 (*Indian Limitation Act*), *section* 19—*Limitation—Acknowledgment by agent—Law to be applied to test the validity of an acknowledgment.*

Held that the criterion to be applied to test the validity of an acknowledgment of liability put forward by a plaintiff as extending the period of limitation in his favour is the law in force at the time when the plaintiff's suit would other-

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* Second Appeal No 1116 of 1910 from a decree of Muhammad Ali, District Judge of Mirzapur, dated the 22nd of July, 1910, confirming a decree of Udit Narain Sinha, Subordinate Judge of Benares, dated the 21st of May, 1910.

(1) (1881) L. R. 7 Q. B. D. 413.

courts below have dismissed the suit on the ground that the claim is time-barred. No doubt having regard to the date of the mortgage the claim would be time-barred unless the plaintiff could invoke in aid, as he seeks to do, an acknowledgment said to have been made on the 4th of March, 1868, whereby the mortgage in question was acknowledged by an agent of the predecessor in title of the defendant. This acknowledgment was made when Act No. XIV of 1859 was in force, and under that Act an acknowledgment by an agent was not sufficient to save the operation of limitation. This was held by their Lordships of the Privy Council, whose decision was followed by this and other courts.

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34 A. 109= 12 I. C. 604 =8 A. L. J. 1272.

It is, however, contended on behalf of the appellant that as the mortgage was made in 1823 and the right to bring a suit had not become extinct when Act No. IX of 1871 and Act No. XV of 1877 came into operation. the acknowledgment would, under the provisions of those Acts, give a new start for the computation of limitation if made by an agent duly authorized in that behalf. In our opinion this contention is well founded. No doubt if the plaintiff had to rely on the acknowledgment in a suit which was governed by Act XIV of 1859, an acknowledgment by an agent would not be sufficient, but at the time when the suit of the plaintiff was instituted, the present law of limitation was in force, and [112] therefore the suit would be governed by that law. The provisions of the present Act, namely, Act No. IX of 1908, are similar to those of Act No. IX of 1871 and Act No. XV of 1877 in this respect. If Act No. XIV of 1859 had never been enacted, the plaintiff could, under the provisions of the later Act mentioned above take advantage of the acknowledgment made in 1868, if it was an acknowledgment by an agent duly authorized to make it. The mere fact that the Act of 1859 was for some time in force would not deprive the plaintiff of the benefit of the provisions of the later Acts. This was held by the High Court of Calcutta in *Mohesh Lal* v. *Busunt Kumaree* (1), in which the case law on the subject is set forth, including the case of *Valia Tampuratti* v. *Vira Rayan* (2).

The learned vakil for the respondent has relied on the case of *Rahmani Bibi* v. *Hulas Kuar* (3). In that case the point now raised was neither discussed nor decided. The case of *Hanuman Prasad* v. *Raghunandan Singh* (4) is distinguishable, as in that case the claim on the mortgage had become time-barred before the Limitation Acts of 1871 and 1877 came into operation.

For these reasons we are of opinion that the courts below were wrong in holding that the acknowledgment relied on by the plaintiff, namely, that of the 4th of March, 1868, could not, if made by an agent duly authorized, be availed of for the purpose of saving the operation of limitation. Assuming that the suit filed on the 4th of March, 1868, on behalf of the predecessor in title of the defendant was filed and verified by an agent of the plaintiff's predecessor in title, the statement therein contained would be an acknowledgment by an agent duly authorized within the meaning of section 19 of the Limitation Act of 1908.

We accordingly allow the appeal, set aside the decrees of the courts below and remand the case to the court of first instance under order XLI, rule 23, of the Code of Civil Procedure, for trial on the merits. The

(1) (1880) I. L. R. 6 Cal. 340.
(2) (1876) I. L. R. 1 Mad. 228.
(3) (1878) I. L. R. All. 642.
(4) (1904) 1 A. L. J. 355.

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court will have to determine whether the acknowledgment in question was an acknowledgment made by an agent of the plaintiff's predecessor in title duly authorized [113] in that behalf within the meaning of the Limitation Act, and in the event of finding that question in favour of the plaintiff it will try the other questions raised in the suit.

Appeal decreed.

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34 A. 113 (=9 A. L. J. 48= 11 I. C. 768).

APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

JAGANNATH PRASAD (*Plaintiff*) *v.* BADRI PRASAD AND OTHERS (*Defendants.*)*

[1st August, 1911.]

Partition—Abadi not formally divided, but separate portions thereof taken possession of by the various owners—Agreement amongst owners—Rights of owners as to portions in possession of each.

A village was divided into three mahals, with the exception of the *abadi*, as to which it was found that it had not been divided between the mahals by demarcation on the village map, or on the spot, but the owners of the mahals had been in separate possession of portions of it.

Held that the only possible inference from this finding was that the parties had agreed among themselves as to their possession of the *abadi*, and that, so long as the agreement continued, each party was entitled to use the portion in his possession in any way he pleased, so long as such user or possession did not interfere with the user or possession of the owners of the other mahals. *Kumudini Mazumdar* v. *Rasik Lal Mazumdar* (1) followed.

[Ref. 82 I. C. 31; 83 I. C. 229=39 C. L. J 414.]

THIS was an appeal under section 10 of the Letters Patent from a judgment of Karamat Husain, J. The facts of the case sufficiently appear from the judgment under appeal which was as follows:—

"The plaintiff brought an action against the defendants and asked for the following reliefs:—'It may be declared that the plaintiff is the owner and in possession of the land in dispute; that the defendants have no right whatever to interfere with and offer obstructions to the plaintiff; that they have no right to offer obstructions to the plaintiff in building walls, &c., on the land in dispute and that they have no right of any kind whatever against the plaintiff.' The main defence was that the property was joint. The court of first instance decreed the plaintiff's claim and that decree was affirmed by the lower appellate court. That court found as follows:—'I find that the land in suit is part of the *abadi* of mauza Sisolar, which consists of three mahals, and that this *abadi* has not been divided between the mahals by demarcation on the village map or on the spot; but that the owners of the mahals have been in separate possession of portions of it, and that the plaintiff has been in possession of the land in suit. The defendants have no right to prevent him putting a wall round it.'

[114] "A second appeal is preferred by the defendants, and it is argued by their learned counsel that, the property being joint, the plaintiff has no right to build, and that, he is not entitled to the decree given him. This objection is in my opinion sound. The learned vakil for the respondent, however, argues that having regard to the law laid down in *Madan Mohan Shaha* v. *Rajab Ali* (2) the decree of the lower appellate court should not be disturbed. The ruling relied on by the learned vakil does not go the length of laying down that a co-sharer who is in exclusive possession of a portion of joint property can build upon it without the consent of the co-sharers.

"I therefore allow the appeal; set aside the decrees of the courts below, and dismiss the plaintiff's suit with costs in all courts."

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* Appeal No. 42 of 1911, under section 10 of the Letters Patent.

(1) (1906) 11 C W. N. 517.

(2) (1900) I. L. R. 28 Cal. 228.

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The plaintiff appealed.

Munshi *Damodar Das*, for the appellant.

Mr. *M. L. Agarwala*, for the respondents.

RICHARDS, C. J. and BANERJI, J.:—This appeal arises out of a suit in which the plaintiff claimed a declaration that he was entitled to continue in possession of a plot of land in the *abadi* and that the defendants had no right to interfere with his building a wall. The court of first instance decreed the suit. The lower appellate court affirmed that decree. On appeal to this Court, however, the decrees of the lower courts were set aside and the plaintiff's suit dismissed The findings of the lower appellate court, which are binding upon us, are quoted in the judgment of the learned Judge of this Court as follows :—

"I find that the land in suit is part of the *abadi* of mauza Sisolar, which consists of three mahals, and that this *abadi* has not been divided between the mahals by demarcation on the village map or on the spot, but that the owners of the mahals have been in separate possession of portions of it and that the plaintiff has been in possession of the land in suit."

The clear meaning of this finding is that the owners of each mahal have a separate portion of the *abadi* of which they are in exclusive possession. This was the defendants' own case in the lower appellate court. The dispute there was that the defendants claimed that the particular plot on which plaintiff wanted to build the wall was in their possession and not in the possession of the plaintiff. The learned Judge of this Court says :—"A second appeal is preferred by the defendants, and it is argued by their learned counsel that the property being joint, the plaintiff has no right to build and he is not entitled to the decree given him. This objection is in my opinion sound." It seems to us [113] that the learned Judge altogether lost sight of the finding that the owners of the different mahals were all in exclusive possession of particular plots. The only inference which can be drawn from this is that the parties by mutual consent allowed the owners of the different mahals to separately enjoy the different parts of the *abadi*, in other words, that there was an arrangement between the parties. This agreement must be inferred from the action of the parties themselves. So long, therefore, as this agreement continues, the parties in exclusive possession of a part of the *abadi* are entitled to use it and enjoy it in such way as they please, so long as such use or possession does not interfere with the use of owners of other mahals of what is in their separate possession. This principle was fully recognized in the case of *Kumudini Mazumdar* v. *Rasik Lal Mazumdar* (1). We think that the decisions of the courts below were correct and ought to be restored. We accordingly allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs of both appeals to this court.

Appeal allowed.

(1) (1900) I. L. R. 28 Cal. 228.

(2) (1906) 11 C. W. N. 517.

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REVISIONAL CRIMINAL.

34 A. 115=8 A. L. J. 1239 =12 I. C. 836 =12 Cr. L. J. 572.

34 A. 115 (=8 A. L. J. 1239=12 I. C. 836=12 Cr. L. J. 572).

REVISIONAL CRIMINAL.

Before Mr. Justice Chamier.

EMPEROR *v.* SARDAR AND OTHERS.*

[20th October, 1911.]

Criminal Procedure Code, section 423—Appeal—Power of appellate court to alter finding of acquittal into one of conviction.

An appellate court can, under section 423 of the Criminal Procedure Code in an appeal from a conviction, alter the finding of the lower court, and find the appellant guilty of an offence of which the lower court has declined to convict him. *Queen-Empress* v. *Jabanulla* (1) followed.

[Ref : 41 Cal 350.]

IN this case several persons were charged by a Magistrate with offences under section 147 read with section 225 and section 353 of the Indian Penal Code. The Magistrate convicted six of them under section 147 read with section 225 of the Code and sentenced them to three months' rigorous imprisonment. [116] He also convicted two out of the six, Sardara and Wazira, under section 353 of the Code and sentenced them to three months' rigorous imprisonment each. On appeal the Sessions Judge maintained the conviction of Sardara and Wazira under section 353 and convicted the remaining appellants also under section 353, instead of under section 147 read with section 225. The convicts applied to the High Court in revision urging that it was not open to the appellate Court to convict under section 353 of the Code such of the applicants as had been charged with, but not convicted of, the offence therein defined by the Magistrate.

Mr. *C. Dillon*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

CHAMIER, J.—Hargu obtained a warrant from a Magistrate under section 100 of the Code of Criminal Procedure for the production of a woman named Daulatia, who was said to be in illegal confinement. The Sub-Inspector, some constables and the chaukidar went to get the warrant executed. The appellants, Wazira and Sardara, refused to allow the police to search the house in which the woman was said to be concealed. Ultimately she was brought to the door, but they declined to give her up to the police. Later, Sardara, Wazira and others made an attack upon Hargu and Mula. There was also an attack of some kind on the police. The first court framed a charge against all the accused under sections 147/225 and 353 of the Indian Penal Code. In the result it sentenced six of them, including Sardara and Wazira, to three months' rigorous imprisonment under section 147/225, and convicted Wazira and Sardara under section 353 of the Indian Penal Code also, and sentenced each of them to three months' rigorous imprisonment. On appeal the Sessions Judge modified the order of the Magistrate. It is not quite clear what he intended to do, but I think he intended to confirm the conviction of Wazira and Sardara under section 353 of the Indian Penal Code on account of their attack on the police and the rescue of Daulatia and to convict all six appellants under section 353 of the Indian Penal Code, instead of under sections 147/225, on account of their conduct before Daulatia

*Criminal Revision No. 505 of 1911 from an order of W. J. D. Burkitt, Sessions Judge of Saharanpur, dated the 7th August 1911.

(1) (1896) I. L. R. 23 Cal. 975.

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was arrested. On the facts found it seems to me that all six were rightly [117] convicted under section 353 of the Indian Penal Code. It is contended that the order of the Sessions Judge convicting under section 353 of the Indian Penal Code those whom the Magistrate had declined to convict of that offence was illegal as it was not open to the Sessions Judge to convert an acquittal into a conviction. This point was considered in the case of *Queen-Empress* v. *Jabanulla* (1). The High Court held that an appellate court could, under section 423 of the Code of Criminal Procedure, in an appeal from a conviction under one of several sections of the Indian Penal Code mentioned in the charge-sheet, alter the finding of the lower court and find the appellant guilty of an offence of which he had been acquitted by that court. This ruling is in accordance with the common practice of these provinces. Accused persons are often charged with having committed several offences, and the Magistrate convicts them of one offence only. On appeal the Sessions Court takes a different view and convicts the accused of one of the offences of which the Magistrate has declined to convict the accused. Very little violence was used in this case. I think I may properly reduce the sentences passed on the applicants to two months' rigorous imprisonment each. The sentences upon Wazira and Sardara will be concurrent. In other respects I dismiss this application. The applicants must surrender to their bail to undergo the remaining portion of their sentences.

Application dismissed.

34 A. 118 (=13 I. C. 921=9 A. L. J. 51=13 Cr. L. J. 169).

[118] REVISIONAL CRIMINAL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

EMPEROR v. RAM NARESH SINGH AND OTHERS.*

[26th October, 1911]

Jurisdiction—Offence committed in British India—Accused committed to Sessions—Transfer of territory to native state—Accused discharged for want of jurisdiction—Revision.

Certain persons were charged with committing an offence at a place in British India and were committed to the Sessions Court of Mirzapur, the case being subsequently transferred to the Sessions Court of Benares. Before trial, however, the place where the offence had been committed became part of the newly constituted state of Benares. *Held* that the Sessions Court, whether of Mirzapur or Benares, was not deprived of jurisdiction to dispose of the case which had been committed to it for trial inasmuch as at the time of the transfer to the state of Banares of the place where the alleged offence had been committed the accused were in British India in custody in point of law if not in fact, of a court of competent jurisdiction. *Emperor* v. *Mahabir* (2) followed *Damodhar Gordhan* v. *Deoram Kanji* (3) distinguished.

[Fol : 34 All. 451.]

THE facts of the case were as follows :—

On the 17th of March, 1911, Ram Naresh Singh, Ram Niranjan Singh, Dubri Singh, Dhakelu, Munnu and Jarbandhan were committed to the Court of Session at Mirzapur by a Magistrate of the first class exercising jurisdiction in that district on a charge of having committed murder at a place in pargana Bhadohi in the Mirzapur District, which was, both at the

* Criminal Revision No. 618 of 1911 by the Local Government from an order of G. A. Paterson, Sessions Judge of Benares, dated the 29th of June 1911.

(1) (1896) I. L. R. 23 Cal. 975.

(2) (1911) I. L. R. 33 All. 578. (3) (1876) I. L. R. 1 Bom. 367.

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time of the alleged offence and at the date of the commitment, part of British India. On the 1st of April, 1911, the state of Benares was constituted, and the village where the offence is said to have been committed became part of that state. On the 5th of April, 1911, the case was transferred by the High Court from the Court of the Sessions Judge of Mirzapur to the court of the Sessions Judge of Benares. The Sessions Judge of Benares ultimately came to the conclusion that he had no jurisdiction to try the case and accordingly declined to do so. Against this order an appeal and also an application in revision were filed on behalf of the Local Government.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown.

KARAMAT HUSAIN and CHAMIER, JJ.—On the 17th of March 1911, Ram Naresh Singh, Ram Niranjan Singh, Dubri **[119]** Singh, Dhakelu, Munnu and Jarbandhan were committed to the Court of Session at Mirzapur by a magistrate of the first class exercising jurisdiction in that district on a charge of having committed murder at a place in pargana Bhadohi in the Mirzapur district which was, both at the time of the alleged offence and at the date of the commitment, part of British India. On the 1st of April, 1911, the state of Benares was constituted, and the village where the offence is said to have been committed became part of that state. For reasons, which it is unnecessary to state, this Court, on the 5th of April, 1911, transferred the case from the court of the Sessions Judge, Mirzapur, to the Court of the Sessions Judge of Benares. The latter then referred the case to this Court with a recommendation that the order, transferring the case to Benares, should be set aside on the ground that this Court had no jurisdiction to make such an order. On that this Court made an order which concludes as follows :—

"We do not understand the reference made to us by the learned Sessions Judge of Benares. It is for him to carry out the orders of this Court and not to question them. Let the record be returned to him with instructions to try the case committed to the Court of Session at Mirzapur, and transferred by this Court under order No. 1692, dated the 5th of April, 1911."

The Sessions Judge of Benares did not understand that order to mean that the Sessions Judge of Benares had jurisdiction to try the case. He understood that the question whether he had or had no jurisdiction to try the case was to be decided by him. Accordingly, on the case being called on he took up the question of jurisdiction and decided that he had no jurisdiction to try the case. He seems to have been of opinion that the only court which could try the case was some court in the state of Benares. In support of that view he referred to the order passed by this Court in Criminal Revision No. 149 of 1911—*King-Emperor* v. *Mata Prasad*. That also was a referrence by the Sessions Judgs of Benares. The accused was charged with having committed an offence at a place which formed pert of the Family Domains of the Maharaja of Benares in the Benares district. At the date of the alleged offence the accused would have been properly committed to the Court of Session at Benares. But on the 7th **[120]** of February, 1911, a Government Notification was issued transferring the place in question to the district of Mirzapur, and the question arose whether the case which had been committed to the Court of the Sessions Judge of Benares, should be tried by the Sessions Judge of Benares or by the Sessions Judge of Mirzapur. This Court decided that the case should be tried by the Session Judge of Mirzapur, and under section 185 of the Code of Criminal Procedure directed that the case should be tried by the Sessions Judge of Mirzapur. That

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34 A. 118=13 I. C. 921=9 A. L. J. 51=13 Cr. L. J. 169.

case appears to us to have no bearing upon the present case. The learned Sessions Judge has attempted to distinguish from the present case the case of *Emperor* v. *Mahabir* (1), which was brought to his notice. He says that in that case the question was as to the form of appeal whereas in the present case the question is what court of original jurisdiction has power to try the case. It seems to us that the principle on which the case of *Emperor* v. *Mahabir* was decided applies to the present case. The accused in the present case are charged with having committed an offence at a place which was in British India. They were properly committed to the Court of Session at Mirzapur and that Court had jurisdiction to try them when the State of Benares was constituted. It is impossible to hold that the Session Court at Mirzapur was by the constitution of the State of Benares deprived of jurisdiction to dispose of criminal appeals then pending in it or cases which had been committed to it for trial. The Sessions Judge has referred also te the case of *Damothar Gordhan* v. *Deoram Kanji* (2). It is sufficient to say that the actual decision in that case has no bearing whatever on the question which arises in the present case. The remark at the end of the judgment of their Lordships regarding the effect of a cession of territory upon cases where the jurisdiction over the subject matter and parties is territorial does not apply to the present case. At the date of the constitution of the State of Benares the accused persons were in British India, in the custody, in point of law if not in fact of a court competent to try them. We hold that the Sessions Judge of Mirzapur had [121] jurisdiction to try this case, that it was properly transferred to the Court of Session at Benares, and that the Sessions Court at Benares has jurisdiction to try the case. The Government Advocate presented both an appeal against and an application for revision of the order of the Sessions Judge. In our opinion no appeal lay, inasmuch as there was no order of acquittal, but we have no doubt that we have jurisdiction under section 435 to set aside the order of the Sessions Judge directing that the accused should be set at liberty. One of the six accused has not been arrested. We think that the Sessions Judge should proceed to try the five accused who have been arrested. For the above reasons we set aside the order of the Sessions Judge of Benares, and direct him to proceed with the trial of the five persons who have been arrested. The appeal is formally dismissed.

Appeal dismissed—Application allowed.

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34 A. 121 (=8 A. L. J. 1287=12 I. C. 927).

APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

RAGHUBIR SINGH AND OTHERS (*Plaintiffs*) *v.* RAM CHANDAR (*Defendant*).*

[3rd November, 1911.]

Act No. III of 1907 (*Provincial Insolvency Act*), *sections* 16—*Secured creditor—Landholder and tenant—Suit for arrears of rent—Declaration of insolvency in force at date of suit.*

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* Second Appeal No. 1308 of 1910 from a decree of H. M. Smith, Additional Judge of Aligarh, dated the 30th of August 1910, reversing a decree of Muhammad Abdul Rafay Khan, Assistant Collector, first class, of Aligarh, dated the 30th June, 1910.

(1) (1911) I. L. R. 33 All. 678. (2) (1876) I. L. R. 1 Bom. 367.

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APPELLATE CIVIL.

33 A. 121=8 A. L. J. 1287 =12 I. C. 927.

A land-holder is not as regards an agricultural tenant a secured creditor within the meaning of section 16 (5) of the Provintial Insolvency Act, 1907. Although he possibly may be in a position to distrain even whilst a declaration of insolvency is in force, he cannot without the leave of the court sue for arrears of rent.

[Ref : 62 I. C. 897=19 A. L. J. 439=43 All. 510 (F. B); 83 I. C. 403=22 A. L. J. 217 =46 All. 398; 66 I. C. 214=20 A. L. J. 147=44 All. 296; 67 I. C. 549.]

THE facts of this case are as follows :—

The defendant respondent was declared an insolvent on the 21st of August 1909. The plaintiff appellant brought a suit against him on the 18th of December, 1909, for arrears of rent for the years 1315, 1316, and the *Kharif* of 1317 *Fasli*. The court of first instance dismissed the suit as regards the arrears which had fallen due after he had been adjudicated an insolvent, [122] *i.e.* for the *Kharif* of 1317 *Fasli*, and decreed the rest. The lower appellate court dismissed the suit *in toto*, holding that no separate suit could be brought against an adjudicated insolvent.

The plaintiff appealed.

Babu *Durga Charan Banerji*, for the appellant :—

Section 16 of Act III of 1907 does not bar suits for claims prior to the declaration of insolvency. Plaintiff had received no notice of the application for insolvency. In any case, plaintiff, being a landlord, could come in as a 'secured creditor' under section 16, clause (5), of the Act.

Section 2, clause (*f*), says that the term 'secured creditor' includes a landlord who has a charge on land for the rent of that land.

Dr. *Tej Bahadur Sapru*, for the respondent, was not called upon.

RICHARDS, C. J. and BANERJI, J.—In our opinion the decision of the court below was correct. It is admitted that the defendant was declared an insolvent and that declaration was in full force and effect at the time when this suit was instituted. Section 16 (2) expressly provides that, save as in that section provided, no suit shall be brought against a person who is declared an insolvent without the leave of the court. It is not contended that any leave was obtained. It is next urged that this is a suit for rent brought by a landlord against a tenant and that the landlord ought to be considered a secured creditor having regard to the definition in section 2 (*f*). In our opinion, so far as an ordinary suit for rent is concerned, the landlord is in exactly the same position as any other creditor. It may, no doubt, be that he would have a right to distrain for his rent notwithstanding the declaration of insolvency. The words of section 16, sub-section (5), are "nothing in this section shall affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed." It is quite clear that this clause only refers to dealings with the securities of a secured creditor. It does not apply to the case of a suit for rent.

The appeal fails and is dismissed with costs.

Appeal dismissed.

34 A. 123 (=8 A. L. J. 1265=12 I. C. 603.

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NOV. 7.

REVISIONAL CIVIL.

34 A. 123=8 A. L. J. 1265 =12 I. C. 603.

[123] REVISIONAL CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

GAURA BIBI AND OTHERS (*Plaintiffs*) *v.* GHASITA *Defendants*).*

[7th November, 1911.]

Civil Procedure Code (1908), *order XVII, rule* 3, *order IX, rule* 4—*Adjourned hearing—Suit dismissed on merits—Remedy of plaintiff—Procedure.*

At an adjourned hearing of a suit in the court of a Munsif the plaintiffs were not present and their pleader intimated to the court that he had no instructions to go on with the case The suit was thereupon dismissed under order XVII, rule 3, of the Code of Civil Procedure, 1908, on the ground that the claim was not proved. The plaintiffs then made an application for restoration under order IX, rule 4. The Munsif dismissed the application and his order was affirmed by the District Judge.

Held, on application in revision by the plaintiffs, that no revision lay. The suit having been dismissed under order XVII, rule 3, of the Code, on the merits the plaintiffs' remedy was by way of appeal against the Munsif's decree. *Lalta Prasad* v. *Nand Kishore* (1) followed.

[Ref : 1914 M. W. N. 344=23 I. C. 614.]

THE facts of this case were as follows :—

The original case was posted for hearing for the 5th of August, 1910. The defendant filed her written statement denying the claim. The plaintiffs then applied for the amendment of the plaint. This application was allowed and they were ordered to give a copy of the amended plaint to the defendant and the next day was fixed for the final hearing of the case. On the 6th of August, 1910, one of the plaintiffs was examined and issues were framed. The plaintiffs then applied for postponement of the case in order that they might obtain and produce a certificate to collect the debt in suit. It was ordered that they should first prove the execution of the mortgage bond, the basis of their suit, and in case such evidence was produced, time would be given to produce the certificate. But on this date the plaintiffs' witnesses were not present. The plaintiffs, therefore, applied for an adjournment and the next hearing of the case was fixed for the 30th of August, 1910. On this date the defendant was present but the plaintiffs were absent. Their pleader informed the Court that he had no instruction to go on with the case. The suit was tried on the merits and was dismissed as the execution of the bond in suit was not proved. The Munsif remarked in his [124] judgment :—" As the plaintiffs have failed to give any evidence, I find the issue—*i.e.* about the execution of the bond which was the basis of the suit—in the negative."

On the 12th of September, 1910, the plaintiffs applied to have this order of dismissal set aside. The Munsif dismissed the application and, on appeal, the District Judge upheld this decision.

The plaintiffs then applied in revision to the High Court.

Munshi *Haribans Sahai*, for the petitioners, contended that the dismissal of the suit should be held to fall under order XVII, rule 2, of the Civil Procedure Code. He submitted that the petitioners not having been present and their pleader not having any instruction to go on with the case, rule 3 of order XVII of the Code could not apply. He relied on

* Civil Revision No. 65 of 1911.

(1) (1899) I. L. R. 22 All. 66.

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REVISIONAL CIVIL.

34 A. 128=8 A. L. J. 1265 =12 I. C. 603.

Mariannissa v. *Ramkalpa Gorain* (1) and *Chandramathi Ammal* v. *C. S. Narayanasami Iyer* (2).

Munshi *Ishwar Saran*, for the opposite party, contended that the Court having, as a matter of fact, decided the suit in substance as well as in form on the materials on the record, the remedy the petitioners had against this decision was to appeal against the decree. It was open to the court to dismiss the suit either under rule 2 or rule 3 of order XVII. Assuming that the order of dismissal under rule 3 of order XVII was wrong, it cannot be argued that the court had no jurisdiction to apply this rule to the case. He cited *Sitara Begam* v. *Tulshi Singh* (3), *Badam* v. *Nathu Singh* (4), *Sri Raja Venkataramaya Apparau Bahadur* v. *Anumukonda Rangaya Nayudu* (5), *Lachhman Singh* v. *Bhajan Singh* (6) and *Lalta Prasad* v. *Nand Kishore* (7).

Munshi *Haribans Sahai*, was heard in reply.

KARAMAT HUSAIN and CHAMIER, JJ.—This is an application for revision of an order of the Munsif of Gorakhpur and of an appellate order of the District Judge of Gorakhpur. The facts are as follows:—The applicants brought a suit against the respondent in the court of the Munsif of Gorakhpur in which [125] summons was issued for final disposal of the suit for the 5th of August, 1910. On that date the respondent filed a written statement denying the claim. The applicants applied for amendment of the plaint. This was allowed, and the case was put off to the following day, when one of the applicants was examined and issues were struck. The applicants then applied for the postponement of the case in order that they might obtain and produce a succession certificate. The court ordered them to produce their evidence first and said that in case the mortgage deed in suit was proved, time would be granted to them to produce the certificate. The applicants' witnesses were not in attendance. The applicants, therefore, asked for a postponement of the case. This was allowed, and the case was fixed for August the 30th, 1910 On that date the respondent was present, but the applicants were absent. Their pleader, who was present in court, said that he had no instructions to go on with the case. The Munsif then dismissed the suit. A perusal of the Munsif's order leaves no doubt whatever that he intended to act under order XVII, rule 3. He says distinctly that he dismisses the applicants' claim because the document in suit has not been proved. Twelve days later the applicants presented a petition to the court under order IX, rule 4, for restoration of the case. The Munsif held that that rule did not apply, inasmuch as he had disposed of the case on the merits. He dismissed the application, and his order has been confirmed on appeal by the District Judge. In support of this application for revision it is contended that the Munsif ought to have proceeded under order XVII, rule 2, inasmuch as order XVII, rule 3, should not be resorted to where rule 2 is applicable. We have been referred to a number of decisions of different courts on the question, the latest and most important of which are *Mariannissa* v. *Ramkalpa Gorain* (1), *Ningappa Virtappa Yelloor* v. *Gawdappa* (8), *Maharaja of Vizianagram* v. *Lingam Krishna Bhupati* (9) and *Chandramathi Ammal* v. *C. S. Narayanasami Iyer* (10). These decisions show that there is some conflict of opinion as to the circumstances in which rules 2 and 3

(1) (1907) I. L. R. 34 Cal. 235.
(2) (1909) 19 M. L. J. 760.
(3) (1901) I. L. R. 23 All. 462.
(4) (1902) I. L. R. 25 All. 194.
(5) (1883) I. L. R. 7 Mad. 41.
(6) Weekly Notes, 1893, p. 84.
(7) (1899) I. L. R. 22 All. 66.
(8) (1905) 7 Bom. L. R. 261.
(9) (1902) 12 M. L. J. 473.
(10) (1909) 19 M. L. J. 760.

of order XVII, should be resorted to. We [126] do not think it is necessary to consider or decide the question. It is perfectly clear that the Munsif proceeded under order XVII, rule 3. That being so, according to the decision of the Full Bench in *Lalta Prasad* v. *Nand Kishore* (1), the applicants' remedy was by way of appeal against the decree of the Munsif. We hold that this application is not maintainable. It is accordingly dismissed with costs.

Application dismissed.

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34 A. 126 (=8 A. L. J. 1294=13 I. C. 6).

APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

NAND RAM (*Plaintiff*) *v.* BHUPAL SINGH AND OTHERS (*Defendants*).*
[7th November, 1911.]

Hindu law—Mitakshara—Joint Hindu family—Money borrowed by father at a high rate of interest—Legal necessity—Burden of proof.

When money is borrowed by the father of a joint Hindu family on the security of the family property at a very high rate of interest, it is for the lender seeking to enforce his claim to prove not only that there was necessity for borrowing the money, but also that there was necessity for borrowing it at an exorbitant rate of interest. *Chandradeo* v. *Mata Prasad* (2), *Hurro Nath Rai Chowdhri* v. *Randhir Singh* (3) and *Kameswar Pershad* v. *Run Bahadur Singh* (4) referred to.

[Fol : 19 I. C. 639; Ref : 51 I. C. 52=17 A. L. J. 738=41 All. 609; 17 A. L. J. 580; 50 I. C. 434=36 M. L. J. 521=21 Bom. L. R. 484=1919 M. W. N. 498=30 C. L. J. 76; 56 I. C. 867=1920 Pat. 211; 71 I. C. 933=44 M. L. J. 615=1923 M. W. N. 382 =2 Pat. 285=33 C. L. J. 25 (P. C.); 74 I. C. 695=2 Pat. 488; 80 I. C. 791=20 L. W. 285=47 M.L.J. 329=35 M. L. T. 177=22 A. L. J. 959 (P. C.); 48 M. L. J. 584.]

THIS was a suit brought by the plaintiff appellant to enforce a mortgage, dated the 8th February, 1888, for Rs. 80, executed by Bahadur Singh, ancestor of the defendants Nos. 1—5. The rate of interest stipulated for in the mortgage deed is Rs. 2-4-0 per cent. per mensem, compound interest, with half-yearly rests. The plaintiff alleged that in accordance with the terms of the mortgage the total amount due to him exceeded Rs. 17,000, but he claimed to recover Rs. 2,500 only.

The court of first instance was of opinion that the mortgage was made for the payment of Government revenue, but that it had not been established that there was any necessity for borrowing money at the high rate provided for in the [127] mortgage deed. That court made a decree for simple interest at the rate of 18 per cent. per annum, and the total amount decreed by it was Rs. 432-1-0, that is, more than five times the principal amount borrowed.

The plaintiff appealed and the defendants filed objections under order XLI, rule 22, of the Code of Civil Procedure. The lower appellate court came to the conclusion that no undue influence had been exercised on the mortgagor and varied the decree of the court of first instance and allowed

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* Second Appeal No. 1351 of 1910 from a decree of Prem Behari, officiating Second Additional Judge of Moradabad, dated the 20th of September, 1910, modifying a decree of Gauri Shankar, Subordinate Judge of Moradabad, dated the 28th of February, 1910.

(1) (1889) I. L. R. 22 All. 66.
(2) (1909) I. L. R. 31 All. 176.
(3) (1890) I. L. R. 18 Cal. 311.
(4) (1880) I. L. R. 6 Cal. 648.

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APPELLATE CIVIL.

34 A. 126=8 A. L J. 1294 =13 I. C. 5.

simple interest at the rate of Rs. 2-4-0 per cent. per mensem, that is, Rs. 27 per annum.

The plaintiff appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellant.

Mr. *A. H. C. Hamilton*, for the respondents.

RICHARDS, C. J. and BANERJI, J.—This appeal arises out of a suit brought by the plaintiff appellant to enforce a mortgage, dated the 8th February, 1888, for Rs. 80, executed by Bahadur Singh, ancestor of the defendants Nos. 1—5. The rate of interest stipulated for in the mortgage deed is Rs. 2-4-0 per cent. per mensem, compound interest, with half-yearly rests. The plaintiff alleged that in accordance with the terms of the mortgage the total amount due to him exceeded Rs. 17,000, but he claimed to recover Rs. 2,500 only.

The court of first instance was of opinion that the mortgage was made for the payment of Government revenue, but that it had not been established that there was any necessity for borrowing money at the high rate provided for in the mortgage deed. That court made a decree for simple interest at the rate of 18 per cent. per annum, and the total amount decreed by it was Rs. 432-1-0, that is, more than five times the principal amount borrowed.

The plaintiff appealed and the defendants filed objections under order XLI, rule 22, of the Code of Civil Procedure. The lower appellate court in a somewhat sketchy judgment came to the conclusion that no undue influence had been exercised on the mortgagor and varied the decree of the court of first instance and allowed simple interest at the rate of Rs. 2-4-0 per cent. per mensem, that is, Rs. 27 per annum.

[128] This was an inconsistent judgment, because the court should either have allowed compound interest at Rs. 37 per cent. per annum, which was the contract rate of interest, or if it considered that it was competent to interfere with the contract of the parties and reduce the rate, it ought to have set forth reasons for interfering with the decision of the court below.

The plaintiff, however, was not satisfied with the decree of the lower appellate court and preferred this appeal claiming compound interest as stipulated in the mortgage deed. The defendants have preferred the connected appeal No. 1364 of 1910, in which they urge that the court below ought not to have raised the rate of interest allowed by the court of first instance. We are of opinion that the plaintiff's appeal must fail. It has been held by a Full Bench of this Court in *Chandradeo Singh* v. *Mata Prasad* (1), that where a plaintiff seeks to enforce a mortgage made by the father or manager of a joint Hindu family as against the joint family property, it lies on the plaintiff to show that the loan was contracted for the necessities of the family. We are bound to follow this Full Bench ruling, and therefore it lay on the plaintiff to prove that there was necessity not only for borrowing the money but for borrowing it at the exorbitant rate mentioned in the mortgage deed. In the case of *Hurra Nath Rai Chowdhri* v. *Randhir Singh* (2), their Lordships of the Privy Council held, in a case in which money had been advanced to a Hindu for the payment of Government revenue, that the plaintiff ought to have proved that there was a necessity to borrow the money at the high rate of interest agreed upon in the mortgage deed. This was, no doubt, the case of a widow acting as guardian of an infant, but in view of the Full Bench ruling

(1) (1909) I. L. R. 31 All. 176.

(2) (1890) I. L. R. 18 Cal. 311.

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34 A. 126=8 A. L. J. 1294 13 I. C. 5.

of this Court to which we have referred, and also of the decision of their Lordships of the Privy Council in *Kameswar Pershad* v. *Run Bahadur Singh* (1), the principle which governs the case of a guardian of a minor and of a Hindu widow should be applied to the case of the father of a Hindu family. In this case the court of first instance found that the property mortgaged was of such value as to make the borrowing of money [129] at such a high rate of interest unnecessary. It was also of opinion that it had not been established that there was any necessity for borrowing at such high rate of interest. This finding was never seriously attacked, nor do we see how it could have been. We must, therefore, hold that, although there was necessity for borrowing the money, there was no necessity for borrowing at the high rate contracted for in the mortgage deed. and we are of opinion that in view of the long delay which the plaintiff has made in instituting his suit, the court of first instance was justified in reducing the rate of interest claimed to simple interest at the rate of Rs. 18 per cent. per annum. The result is that we must dismiss this appeal with costs, and we order accordingly.

Appeal dismissed.

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34 A. 129 (=8 A. L. J. 1318=12 I. C. 601).

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

ABDULLA AND OTHERS (*Defendants*) *v.* RAM LAL AND OTHERS (*Plaintiffs*).*

[9th November, 1911.]

Hindu law—Mitakshara—Hindu widow—Gift—Consent of next reversioner not sufficient to validate gift in favour of sister's son.

Held that a gift of her deceased husband's estate made by a Hindu widow in possession thereof as such widow to her sister's son was invalid and could not be rendered operative by the consent of the next reversioner. *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (2) discussed.

[Ref. 24 I. C. 435; 36 M. L. J. 493=50 I. C. 498=17 A. L. J. 536=29 C. L. J. 539=23 C. W. N. 777=1919 M. W. N. 262=42 Mad. 523=46 I. A. 72; 79 I. C. 1007; 68 I. C. 394.]

THE facts of this case were as follows:—

Dudh Nath and Bhola Nath were two brothers. They were separate, Bhola Nath died without issue, and his widow, Musammat Phul Kunwar, came into possession of his property. Dudh Nath was the next reversioner. On the 27th of August, 1898, Musammat Phul Kunwar executed a deed of of gift of the property in favour of her nephew. Dwarka Prasad, who sold the property to the appellants on the 9th of April, 1908. Dudh Nath joined Musammat Phul Kunwar in executing the deed of gift. Dudh Nath died in 1902 or thereabouts. In 1909, the plaintiffs, who were the next reversioners at that time, brought a declaratory suit against Musammat Phul Kunwar and the heirs of Dwarka [130] Prasad and the appellants (vendees). The court of first instance held that Dudh Nath and Bhola Nath had been joint. The lower appellate court held that they had been

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* Second Appeal No. 157 of 1911, from a decree of Guru Prasad Dube, Second Additional Judge of Gorakhpur, dated the 9th of September, 1910, reversing a decree of Gauri Prasad, Additional Munsif of Deoria, dated the 21st of August 1909.

(1) (1880) I. L. R. 6 Cal. 843. (2) (1907) I. L. R. 30 All. 1.

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APPELLATE CIVIL

33 A. 129=8 A. L. J 1318 =12 I. C. 601.

separate, but that the gift by the widow was not binding on the plaintiffs, and decreed the suit. The defendants appealed.

Babu *Surendra Nath Sen* (with him the Hon'ble Pandit *Sundar Lal* and Pandit *Shiam Krishna Dar*), for the appellants :—

It is settled law that a transfer made by a Hindu widow, with the consent of the next reversioner, is valid, although the transfer may not have been made for legal necessity ; *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1). Dudh Nath alone was the next reversionary heir ; his consent, therefore, validates the alienation. He not only consented but actually joined in executing the deed of gift. The view that the consent of the nearest reversioner would validate such an alienation is fully affirmed by the Privy Council—*vide* page 21 of the report. They overruled the case of *Ramphal Rai* v. *Tula Kuari* (2) and held that a Hindu widow could validly accelerate the next succession by surrender of her rights to the next reversioner and could make a valid alienation with his consent. The widow alone, no doubt, represents a limited estate, but the widow and the next reversioner together represent the whole estate. The case of *Bakhtawar* v. *Bhagwana* (3), which is against me, proceeded to distinguish the Privy Council case, cited above, on the ground that the latter was a case of sale, whereas that in I. L. R. 32 All. was one of gift. There seems to be, in principle, no distinction between these two forms of transfer so far as the present question is concerned. Dudh Nath was the nearest reversioner; and whatever practical interest he may have had in the property, legally he had such an interest that by joining the widow in an alienation he could fully supplement her limited interest. I must, however, admit that the case of *Pitu bin Appa Nalvade* v. *Babaji bin Naru Mang* (4) is against my contention.

[131] Munshi *Govind Prasad* (with Babu *Satya Chandra Mukerji*), for the respondents :—

The Privy Council case in I. L. R. 30 Allahabad is to be considered with reference to its facts. In that case the remote reversioners were held to be bound by the act of relinquishment of their predecessors in title who had received valuable consideration ; no general principle was meant to be laid down. The consent of the reversioners makes the alienation valid only on the ground that it raises a presumption as to the existence of legal necessity for the alienation. I rely on the cases, already cited, in I. L. R. 6 Allahabad and I. L. R. 34 Bombay. In the case of a gift there can be no question of legal necessity, and, therefore, consent is of no avail. The Privy Council case should not be taken to have meant to overrule the whole of the reasoning of the case in I. L. R. 6 Allahabad. The case in I. L. R. 32 Allahabad fully meets the facts of the present case.

Babu *Surendra Nath Sen* replied.

CHAMIER J.—Dudh Nath and his brother Bhola Nath each owned a nine pie share in a village. Bhola Nath died childless about 25 years ago, leaving a widow Phul Kunwar who took possession of his share. In 1898, Phul Kunwar transferred that share by deed of gift to her sister's son Dwarka Prasad. Dudh Nath joined in the deed. Dwarka Prasad ten years later sold the share to the appellants for Rs. 1,342. Dudh Nath died a few years ago and was succeeded by the respondents who were his heirs. They brought this suit in 1909, praying for a declaration that the deed of gift of 1898 was not binding on them as the presumptive, reversionary heirs of Bhola Nath. The Munsif dismissed the suit holding that

(1) (1907) I. L. R. 30 All. 1.
(2) (1883) I. L. R. 6 All. 116.
(3) (1910) I. L. R. 32 All. 176.
(4) (1909) I. L. R. 34 Bom. 165.

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Dudh Nath and Bhola Nath were joint in estate, consequently Phul Kunwar had no interest which she could transfer to her nephew. On appeal the Additional Judge held that Dudh Nath and Bhola Nath had separate interests—a finding which must be accepted by this Court in second appeal—and, following the decision of this Court in *Bakhtawar* v. *Bhagwana* (1), that the deed of gift was not bind ng upon the respondents notwithstanding that Dudh Nath who was at the date of the [132] deed the presumptive reversionary heir of his brother had joined in the gift.

The appellants rely upon the decision of their Lordships of the Privy Council in the case of *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (2) as establishing the rule that a transfer of her husband's estate by a Hindu widow is binding on the person who becomes entitled to the estate on the death of the widow, if the person who is presumptive reversioner at the date of the transfer joins with the widow in making it, whatever the nature of the transfer may be. The respondents rely upon the decision of this Court in *Bakhtawar* v. *Bhagwana* (1), where it was held that the decision of the Privy Council did not apply at all to the case of a gift by a widow.

In the case before their Lordships of the Privy Council there had been several sales of portions of her husband's estate by a Hindu widow, the alienations taken together amounting to the transfer of the whole estate. Their Lordships begin by referring to previous decisions of the Board in *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (3) and *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (4) as establishing the principle that an alienation by a Hindu widow which would not otherwise be legitimate may be validated by the consent of her husband's kindred, and they observe that upon the practical application of the general principle there had been much discussion in the High Courts in India. They disapprove of the view expressed by this Court in *Ramphal Rai* v. *Tula Kuari* (5), that the consent of the person who was presumptive reversioner at the date of the alienation cannot make the alienation binding upon the person who turns out to be the actual reversioner at the widow's death. Next they refer to three decisions of the Calcutta and Madras High Courts in which the view taken was that as it was established law that a widow could surrender her estate to the next reversioner it followed that she could alienate it with his consent without any legal necessity. Lastly, their Lordships quote a decision of the [133] Bombay High Court in which JENKINS, C. J., while disapproving the Calcutta view that the widow's interest was a life estate, the surrender of which to the next reversioner accelerated his estate, came to the conclusion that an alienation by a widow otherwise than for legal necessity may be validated by the consent of the reversioners, but the consent of the reversioners must be of such kindred, the absence of whose opposition raises a presumption that the alienation is a fair and proper one. After this review of the cases their Lordships say "the principle being thus admitted by the High Courts in India, the question of quantum of consent necessary only remains. . . . They [their Lordships] agree with the High Court of Calcutta that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible."

(1) (1910) I. L. R. 32 All. 176.
(2) (1907) I. L. R. 30 All. 1; L. R. 35 I. A. 1.
(3) (1861) 8 Moo. I. A. 529.
(4) (1869) 13 Moo. I. A 209.
(5) (1883) I. L. R. 6 All. 116.

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34 A. 129=8 A. L. J. 1318 =12 I.C. 601.

If their Lordships affirmed the correctness of the Calcutta view, we must hold that even a gift of the whole estate by a Hindu widow (the Calcutta High Court have always confined their rule to transfers of whole estates) is binding upon the actual reversioner, if made with the consent of the person who was presumptive reversioner at the date of the gift. If, on the other hand, their Lordships approved of the Bombay view, we should hold that the consent of the presumptive reversioner does not validate a gift, as in the present case, of the whole estate to a relation of the widow, for such consent cannot lead to the inference that the transfer was a fair and proper one. In the case of *Pilu bin Appa Nalvade* v. *Babaji bin Naru Mang* (1) SCOTT, C. J., and BATCHELOR, J., held that the principle according to which a widow's alienation may be validated by the consent of the presumptive reversioner is ordinarily limited to transfers for consideration and cannot be extended to gifts where there is no room for the theory of legal necessity. They evidently considered that the decision of the Privy Council had not touched the previous Bombay rulings on the subject.

In *Ramkrishna Kuppuswami* v. *Tripurabai* (2) SCOTT, C. J. and RAO, J., after referring to the decision of the Privy [134] Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (3) held that the consent of the next reversioner was not always sufficient in every case to validate an alienation by the widow. This Court, as already stated, has held that the decision of the Privy Council in that case does not apply to a gift by a widow.

I am not satisfied that their Lordships of the Privy Council intended to accept the Calcutta view and reject the Bombay view. Had that been their intention, they would, I think, have expressed themselves in different language. It is to be noticed that in the case before their Lordships the presumptive reversioners, being in the fourth degree, and other reversioners in the fifth degree of relationship to the widow's husband had consented to the alienation. The appellants are described as *claiming through* two reversioners in the fifth degree (a view which it is difficult to reconcile with some other decisions). If the consent of all the reversioners in the fourth degree was sufficient, it is not clear why their Lordships referred at all to the consent given by the reversioners in the fifth degree. It is to be noticed also that the Judicial Commissioners had definitely rejected the Calcutta view, yet their Lordships did not say that they were wrong in so doing. They agreed with the Judicial Commissioners that the consent proved was sufficient.

On the whole, I think, that there is sufficient reason for holding that their Lordships' decision was not intended to reject the Bombay view which was the view taken by the Judicial Commissioners in the case before them. If the Bombay view is to prevail, it is clear that the consent given by Dudh Nath is of no value. He was an old man who had really no interest in the property and no prospect of succeeding to it. With or without such consent the gift to the widow's sister's son cannot by any process of reasoning be held to be a legitimate transaction. I would dismiss this appeal with costs.

KARAMAT HUSAIN, J.—I agree.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

(1) (1909) I. L. R. 34 Bom. 165.
(2) (1911) 13 Bom. L. R. 940.
(3) (1907) I. L. R. 30 All. 1.

34 A. 135 (=9 A. L. J. 54=13 I. C. 34.)

[135] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

GANPAT RAI (*Defendant*) *v.* MUNNI LAL AND ANOTHER (*Plaintiffs*).*

[8th November, 1911.]

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APPELLATE CIVIL.

34 A. 135=9 A. L. J. 54 =13 I C. 34.

Hindu Law—Mitakshara—Joint Hindu family—Debt incurred by managing member of family—Presumption as to family necessity or benefit—Burden of proof.

There is no presumption that a debt contracted by the manager of a Hindu firm or family is contracted for the benefit of the firm or family, and the plaintiff who seeks to bind the other members of the joint family will have to prove that it was a debt contracted for their benefit or with their consent, or that there was an urgent family necessity therefor. *Soiru Padmanabh Rangappa* v. *Narayanrao bin Vithalrao* (1), *Sunkur Pershad* v. *Goury Pershad* 2), *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (3) and *Krishna Ramaya Naik* v. *Vasudev Venkatesh Pai* (4) referred to. *Sheo Pershad Singh* v. *Saheb Lal* (5) distinguished.

[**Ref**: 36 M L. J. 563=50 I. C. 775=1919 M. W. N. 301=42 Mad. 629; 60 I. C. 610; 63 I. C. 515; **Dist** : 79 I. C. 517=22 A. L. J. 295=46 All. 364 ; **Rel** : 74 I. C. 484 =4 Lah. 200]

THE facts of this case are fully stated in the judgment of the court. The Hon'ble Pandit *Moti Lal Nehru* (with whom Pandit *Mohan Lal Sandal* and Pandit *Shiam Krishna Dar*), for the appellant.

The Hon'ble Pandit *Sunder Lal* (with whom Dr. *Satish Chandra Banerji*), for the respondents.

KARAMAT HUSAIN and CHAMIER, JJ. :—The following pedigree will show the relation of some of the parties to this case :—

Gordhan Das.

Ram Prasad. | Khairati Lal.

Raghunath Das. Manohar Lal. | Keshab Deo.

Kashi Nath.

The plaintiffs, Munni Lal and Chhedi Lal, instituted this suit against Ram Prasad, Raghunath Das, Manohar Lal, Keshab Deo, Kashi Nath, Ganpat Rai and Puran Chand on the following allegations. Ram Prasad, defendant No. 1, was the proprietor and manager of the firm styled Gordhan Das Ram Prasad, at Agra. In order to carry on the business of the said firm he borrowed from the plaintiffs Rs. 16,000, by hypothecating the [136] family property, known as the Putaria Mahal in the city of Agra, under a registered bond, dated the 25th of January, 1903. Out of the amount of principal and interest due on the mortgage, Rs. 13,170 were paid by Babu Puran Chand, defendant No. 6, on the 4th of September, 1906. The balance, amounting to Rs. 6,585, has not been paid by the defendants. Keshab Deo, after the execution of the mortgage bond dated the 25th of January, 1903, in order to defraud the plaintiffs and other creditors, sold a portion of the hypothecated property to Ganpat Rai by a

*First Appeal No. 58 of 1910 form a decree of J. L. Johnston, Additional Judge of, Agra, dated the 24th of November, 1909.

(1) (1893) I. L. R. 18 Bom. 520.
(2) (1879) I. L. R. 5 Cal. 321.
(3) (1908) 7 C. W. N. 725.
(4) (1896) I. L. R. 21 Bom. 808.
(5) (1892) I. L. R. 20 Cal. 453.

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deed, dated the 14th July 1905, alleging himself to be the adopted son of Khairati Lal. Keshab Deo and his representative in interest, Ganpat Rai, are bound to pay the balance due on the mortgage bond inasmuch as the property of the family was mortgaged for the payment of debts contracted in the ordinary course of the business of the firm and for the benefit of Keshab Deo and his representative Ganpat Rai. The plaintiffs, on the above allegations, prayed for the recovery of the balance by sale of the property hypothecated. The pleas put forward by Ganpat Rai were to the effect that Keshab Deo was the adopted son of Khairati Lal; that the mortgage deed, dated the 25th of January, 1903, was a fraudulent transaction; that no consideration passed for it; that the debts for payment of which the mortgage deed was executed were not contracted for any legal necessity, nor were they of such a nature as to be binding on Keshab Deo or his representative; that Ram Prasad at the time of the execution of the mortgage deed was not the manager of the firm, and that he had no authority to transfer the joint family property, nor did he in that capacity execute the mortgage deed in question. The court below framed the following issues :—(1) Whether Ram Prasad was the manager and working agent of the firm Gordhan Das Ram Prasad; whether he in the same capacity executed the mortgage deed, dated the 25th of January, 1903, and whether the said deed was executed for consideration. (2) Whether Keshab Deo is an adopted son of Khairati Lal and how far he and his representative, Ganpat Rai, are bound by the mortgage deed in suit. (3) Whether the plaintiffs are entitled to the interest claimed. Is there any mistake in the calculation of the amount? (4) Whether two-thirds of the house purchased by defendant No. 6 are not liable for the plaintiffs' **[137]** claim. (5) To what reliefs are the plaintiffs entitled? The Court found as a fact that Ram Prasad was the manager and working agent of the firm Gordhan Das Ram Prasad; that he executed the mortgage deed in his capacity of a managing member of the firm; that the deed was executed for consideration; that Keshab Deo was the adopted son of Khairati Lal; that there was no sufficient evidence of the fact that the debts for the payment of which the mortgage deed was executed were gambling debts, and that Ganpat Rai, the representative of Keshab Deo, was bound by the mortgage in suit. On these findings the court below decreed the plaintiff's suit. Lala Ganpat Rai, the vendee under the deed of 14th July, 1905, has appealed, and the plaintiffs have filed objections. The substance of the pleas taken in the memorandum of appeal is that the mortgage deed was executed without consideration; that it was a fraudulent transaction; but Ram Prasad was not competent to borrow the money; that he was not the manager of the firm at the time of the execution of the mortgage deed; that the mortgage deed was not executed for the benefit of the firm or for legal necessity or for the benefit of Keshab Deo or with his consent, and that the share of Keshab Deo now in the possession of the appellant as a *bona fide* purchaser was not liable for the payment of the debt contracted by Ram Prasad. The substance of the objections taken by the plaintiffs is that the adoption of Keshab Deo is not proved nor is it proved that Khairati Lal authorized his wife to adopt a son. For the reasons stated by the learned Additional Judge in his judgment, we agree with him that Ram Prasad was the manager of the firm styled Gordhan Das Ram Prasad; that the mortgage deed dated the 25th of January, 1903, is not a fraudulent transaction, and that it was executed for consideration. The only points which remain for determination are the following :— Is Keshab Deo the adopted son of Khairati Lal? Are the debts for the

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payment of which the family property in question was mortgaged gambling debts? Is the share of Keshab Deo, which was purchased by the appellant, Ganpat Rai, liable for the payment of the mortgage debt?

[A portion of the judgment dealing with the evidence as to the first and second points is here omitted. The court found that [138] Keshab Deo was the adopted son of Khairati Lal. The judgment thus continued :—]

We therefore, disagreeing with the learned Judge of the court below, hold that the debts for the payment of which the mortgage deed of 25th January, 1903, was executed by Ram Prasad were gambling debts. That being so, they cannot be regarded as the debts contracted by Ram Prasad in his capacity of a manager of the firm in the course of the ordinary business of firm, and if the statement of Munni Lal that he lent the money to Ram Prasad alone be taken into account, it becomes evident that Ram Prasad was not raising funds for the ordinary business of the firm. There is no evidence to show that there was any urgent necessity for raising that money by the mortgage of the family property, nor is there any evidence that Keshab Deo was in any way benefited by that loan or that it was raised with his consent. In these circumstances it is necessary to see what is the law applicable to the facts of the case. In *Soiru Padmanabh Rangappa* v. *Narayanrao bin Vithalrao* (1) it is laid down that there is no presumption that a loan contracted by a manager of a joint Hindu family has been contracted for family purposes. In *Sunkur Pershad* v. *Goury Pershad* (2) it is laid down :—"The condition of a Hindu family is *prima facie* joint, and, therefore, property held by the managing member of a Hindu family is *prima facie* joint;" but as there is nothing to prevent an individual managing member from contracting debts on his own account there is no presumption that a " debt contracted by him is joint." In *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (3) it was held that in order to make the brother of the manager liable it was necessary to find (1) whether the trading business was a joint family business, (2) whether the note given was for the purposes of the trading business of the family, and (3) whether the amount covered by the note was appropriated to the purposes of such trading business. In *Krishna Ramaya Naik* v. *Vasudev Venkatesh Pai* (4) it is laid down that there is no presumption that money borrowed by a manager was borrowed for family purposes. The above cases are authority for the proposition that there is no [139] presumption that a debt contracted by the manager of a firm or family was contracted for the benefit of the firm or family, and the plaintiff who seeks to bind the other members of the joint family will have to prove that it was a debt contracted for their benefit or with their consent, or that there was an urgent family necessity therefor. During the course of his argument the learned advocate for the respondents relied on *Sheo Pershad Singh* v. *Saheb Lal* (5). But that case does not touch the points which we have to determine. In that case the debt was incurred in the ordinary course of business, and a decree was passed in execution of which the family property in dispute in that case was sold, and the plaintiffs as members of a joint Hindu family sued for a declaration that their shares were not liable. The Calcutta High Court with reference to the facts of that case came to the conclusion that the plaintiffs were not entitled to

(1) (1893) I. L. R. 18 Bom. 520.
(2) (1879) I. L. R. 5 Cal. 321.
(3) (1903) 7 C. W. N. 725.
(4) (1896) I. L. R. 21 Bom. 808, (815).
(5) (1892) I. L. R. 20 Cal. 453.

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the declaration they sought. As in the case before us the plaintiffs have failed to prove that there was any real necessity for the loan, or that the loan in question was taken with the consent of Keshab Deo, or that he in any way was benefited thereby, and as there is evidence that the debts for the payment of which the family property was mortgaged were gambling debts, we are of opinion that the share of Keshab Deo which was sold to Ganpat Rai is not liable for the payment of those debts. The result is that we allow the appeal and set aside the decree of the court below in respect of the property which was sold by Keshab Deo to Ganpat Rai.

Appeal decreed.

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34 A. 140 (=13 I. C. 19=8 A. L. J. 1297).

[140] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

SHANKAR LAL AND ANOTHER (*Defendants*) *v.* SARUP LAL AND ANOTHER (*Plaintiffs*).*

[10th November, 1911].

Civil Procedure Code (1908), *order XLI, rule* 22—*Procedure—Cross objections entertainable although appeal was not so—Act No.* I *of* 1877 (*Specific Relief Act*), *sections* 39 *and* 42—*Separate suits for cancellation of a document and for possession—Practice.*

A respondent may file cross-objections and the appellate court may act upon them notwithstanding that the appeal in which such objections are filed is not maintainable.

Ordinarily where a plaintiff is out of possession and he is in a position to claim a decree for possession he should not be permitted to obtain merely a decree for the cancellation of an instrument according to which, if genuine, he has no title.

[**Ref.** 34 All. 419; **cf.** 54 I. C. 506=10 L. W. 605; 41 Mad. 904 (F. B)=35 M. L. J. 236 =8 L. W. 240=1918 M. W. N. 688.]

ONE Roshan Lal, the owner of certain property in the Saharanpur district, died in May 1907. His stepmother then applied for a succession certificate, and Shankar Lal and another thereupon produced a will in their favour said to have been executed by Roshan Lal. The heirs of Roshan Lal brought a suit for cancellation of the will. The suit was dismissed, but it was found that it was not proved that the will was executed by Roshan Lal. The defendants appealed against this finding, and the plaintiffs filed cross-objections. The lower appellate court (additional District Judge of Saharanpur) found that no appeal was maintainable and dismissed it; but, on the plaintiffs' objections, reversed the decree below and decreed the claim for cancellation of the will. The defendants appeal to the High Court.

Mr. *Nihal Chand*, for the appellants.

Babu *Durga Charan Banerji* (with him the Hon'ble Pandit *Sundar Lal*), for the respondents.

KARAMAT HUSAIN and CHAMIER, JJ.:—Roshan Lal, the owner of certain property in the Saharanpur district, died of plague in May 1907. After his death his stepmother applied for a succession certificate and thereupon the defendants to this suit produced a will in their favour which they alleged had been executed by Roshan Lal. The plaintiff in this suit and his [141] brother, who is the father of one of the defendants, appear to be the

*Second Appeal No. 369 of 1911 from a decree of C.E. Guiterman, Additional Judge of Saharanpur, dated the 21st of March, 1911, reversing a decree of Pramatha Nath Banerji, Subordinate Judge of Saharanpur, dated the 13th of January, 1910.

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34 A. 140=13 I. C. 19=8 A. L. J. 1297.

heirs of Roshan Lal. Mansa Debi, the stepmother, is admittedly not an heir, but she is in possession of the property. The plaintiff asks for a decree declaring that the will is a forgery and void against him, and that it should be delivered up and cancelled. The first court found that the will was not proved to have been executed by Roshan Lal, but it dismissed the suit on the ground that it was governed by section 42 of the Specific Relief Act, and that the claim for a declaration was not maintainable as the plaintiff was entitled to claim possession of the property. In the decree of the first court dismissing the suit the finding that it was not proved that Roshan Lal had executed the will is distinctly set out. The defendants, fearing apparently that this finding would prejudice them hereafter, filed an appeal. The plaintiff filed an objection under order XLI, rule 22, to the effect that the suit was not one for a declaration of title under section 42 of the Specific Relief Act, but was a suit under section 39 of the same Act. The Additional Judge dismissed the defendant's appeal, and on the plaintiff's objections held that the suit was one under section 39 and not under section 42 of the Specific Relief Act, and that the plaintiff was not under the necessity of claiming any relief other than the cancellation of the will. He therefore allowed the cross-objections and decreed the plaintiff's claim. This is a second appeal by the defendants. The first question for consideration is whether the lower appellate court had power to set aside the decree of the first court on the cross objections filed by the plaintiff. According to the decisions of this Court the defendants were not entitled to file an appeal against the decree of the first court, for the decree was entirely in their favour. A qestion was raised as to whether a respondent is entitled to file cross-objections where the appellant's appeal is not maintainable at all. We are of opinion that a respondent is entitled to do so in such a case as this. The respondent in the lower appellate court had a right to appeal, and we think that he did not lose his right to file cross-objections merely because his opponents filed an appeal which was found to be not maintainable. On the question on which the courts below have differed, namely, whether the suit is governed **[142]** by section 39 or section 42 of the Specific Relief Act. We think there can be no doubt that the suit is governed by section 39. The plaintiff nowhere seeks a declaration of his title. He asked only that the will may be declared void and delivered up to be cancelled. The language used in the prayer for relief leaves no doubt that the plaintiff intended to rest his claim upon section 39. That section provides that any person against whom a written instrument is void . . . . . may sue to have it adjudged void . . . . . and the court may in its discretion so adjudge it and order it to be delivered up and cancelled. It seems to us that ordinarily where a plaintiff is out of possession, and he is in a position to claim a decree for possession, he should not be permitted to obtain merely a decree for the cancellation of an instrument according to which, if genuine, he has no title to the land. Ordinarily a court would we think, exercise its discretion wisely if it declined to adjudge such an instrument void and would do well to leave the plaintiff to a suit for possession. The result of allowing a suit to be maintained under section 39 and another suit for possession to be brought immediately afterwards is that the defendant is put to unnecessary expense. In the present case though the Additional Judge does not say very much about it, we think we must hold that he has exercised his discretion, and, inasmuch as he

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has decided that the document is void and both the lower courts agree that the will has not been proved, we do not feel called upon to set aside his decree. The appeal is dismissed with costs.

Appeal dismissed.

34 A. 143 (=9 A. L. J 1=13 I. C 80).

[143] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

SHAMI NATH CHAUDHRI (*Plaintiff*) *v.* RAMJAS AND OTHERS (*Defendants*).*

[13th November, 1911.]

Act No. I of 1872 (*Indian Evidence Act*), *section* 44—*Compromise decree—Suit to set aside decree on the ground that agreement was caused by undue influence—Suit maintainable—Jurisdiction.*

A decree obtained by consent or on a compomise can be attacked in a separate suit, not only upon the ground of fraud but upon any ground which would be a sufficient reason for invalidating the agreement upon which the decree was based. *The Huddersfield Banking Company, Limited* v. *Henry Lister and Son, Limited* (1) followed. *Musammat Gulab Kuar* v. *Badshah Bahadur* (2) and *Sarbesh Chandra Basu* v. *Hari Dayal Singh* (3) referred to.

[Ref. 39 I. C 891.]

THIS was a suit to set aside a decree based on a compromise on the ground that the compromise was obtained by the exercise of undue influence. The plaintiff brought a suit for partition of joint family property. The suit was compromised and a decree was passed in terms of the compromise. The plaintiff then brought the present suit to set aside the consent decree on the ground that undue influence was exercised on him.

The defendants pleaded (*inter alia*) that a suit to set aside a consent decree on the ground of undue influence was not maintainable. The Subordinate Judge gave effect to that plea and dismissed the suit. The plaintiff appealed.

Pandit *Rama Kant Malaviya* (with whom Dr. *Tej Bahadur Supru* and the Hon'ble Pandit *Madan Mohan Malaviya*), for the appellant:—

The consent decree being based on a compromise which was obtained ed by undue influence, the suit was maintainable. He relied on:—*Ashutosh* v. *Tara Prasanna* (4), *Musammat Gulab Kuar* v. *Badshah Bahadur* (2), *Sarbesh Chandra* v. *Hari Dayal Singh* (3), *Huddersfield Banking Company* v. *Henry Lister* (1).

Babu *Jogendro Nath Chaudhri* (with whom Munshi *Govind Prasad* and Munshi *Purushottam Das Tandan*), for the respondent:—

A decree can be set aside only on the ground of fraud. In other cases the party aggrieved must proceed by way of a motion [144] for review of judgment. Section 44 of the Evidence Act lays down the law to the same purport. The case in 14 C. W. N. is distinguishable, inasmuch as the administrator having granted a lease in excess of his powers had acted unlawfully.

Pandit *Ram Kaant Malaviya* was not heard in reply.

KARAMAT HUSAIN and CHAMIER, JJ.:—This appeal arises out of a suit brought by the appellant to set aside a decree for partition of a joint

* First Appeal No. 150 of 1910 from a decree of Guru Prasad Duae, Additional Subordinate Judge of Gorakhpur, dated the 16th of February, 1910.

(1) (1895) L. R. 2 Ch. 273.
(2) (1909) 13 C. W. N. 1197.
(3) (1910) 14 C. W. N. 451.
(4) (1884) I. L. R. 10 Cal. 612.

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34 A. 143=9 A. L. J. 1 =13 I. C. 80.

family property which was passed upon a compromise between the parties. The ground of suit is that the consent of the appellant to the compromise was obtained by undue influence exerted on him by the defendant respondent, Ramjas Chaudhri. The suit has been dismissed by the court below on the ground that no such suit is maintainable. The Subordinate Judge was of opinion that a decree could not be set aside by suit except on the ground of fraud or collusion. In the course of his judgment he refers to section 44 of the Evidence Act. But that section does not purport to enumerate the grounds on which a decree can be attacked by a separate suit. There are cases no doubt which suggest that where a decree is attacked by a party on any ground other than that of fraud, he should proceed by way of motion or application for review of judgment. But all the recent authorities are to the effect that whether or not a party may proceed by way of motion or application for review of judgment he may proceed by suit. In the case of *The Huddersfield Banking Company Limited* v. *Henry Lister and Son, Limited* (1) a consent order had been made for the sale of some power-looms. The Banking Company afterwards ascertained that the power-looms had been affixed to certain mills so as to become part of the property comprised in a mortgage security. At the time of the consent order it was supposed that the machinery was not affixed to the mills and therefore was not part of the security. The Company brought an action to have the order set aside. The action was resisted on the ground that the arrangement having merged in an order of the court could not be set aside. VAUGHAN WILLIAMS, J., said :—" The real truth of the matter is that order is a mere creature of the agreement, and to say that the court can set aside the agreement, and it was **[145]** not disputed that this could be done if a common mistake were proved, but that it cannot set aside an order which is the creature of that agreement seems to me to be giving the branch an existence which is independent of the tree. Under the circumstances I have come to the conclusion that I can set aside the order and give effect to what are the true rights of the parties." His views were affirmed by the Court of Appeal. LINDLEY, L. J., said :—" I have not the slightest doubt that a consent order can be impeached not only on the ground of fraud but on any ground which invalidates the agreement which it expresses in a more formal way than usual. To my mind the only question is whether the agreement on which the consent order was based can be invalidated or not. Of course if that agreement cannot be invalidated, the consent order is good. If it can be, the consent order is bad." LOPEZ and KAY, L. JJ., expressed themselves to the same effect. The decision in that case was followed in *Musammat Gulab Kuar* v. *Badshah Bahadur* (2) and in *Sarbesh Chandra Basu* v. *Hari Dayal Singh* (3). The judgment of the court in the last mentioned case contains an exhaustive review of the authorities both as to the grounds on which a decree obtained by consent or upon a compromise can be attacked and as to the procedure to be adopted in such cases. In our opinion the decision of the court below is wrong. We allow the appeal, set aside the decree of the Subordinate Judge, and remand the suit in order that it may be restored to the file of pending cases and disposed of according to law.

Appeal allowed—Cause remanded.

(1) (1895) L. R. 2 Ch. 273.
(2) (1909) 13 C. W. N. 1197.
(3) (1910) 14 C. W. N. 451.

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REVISIONAL.
CRIMINAL.

34 A. 146=8
A.L.J. 1324=
13 Cr. L. J. 8
=13 I. C.
101.

34 A. 146 (=8 A. L. J. 1324=13 Cr. L. J. 8=13 I. C. 101.)

[146] REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* BEHARI LAL AND ANOTHER.*

[16th November, 1911.]

Act No. XVIII of 1878 (*Northern India Ferries Act*), *section* 22—*Ferry—Illegal toll taken by servants of lessee—Lessee himself not responsible.*

Held that the lessees of a ferry could not be held responsible under section 22 of the Northern India Ferries Act, 1878, for the taking of unauthorized tolls by their servants when they were not present and took no part in the extortion. *Queen-Empress* v. *Tyab Ali* (1) distinguished.

BEHARI LAL and Bashir-ud-din, lessees of a ferry, employed certain persons to attend to the ferry and to collect tolls. These servants in contravention of the law extorted unauthorized and excessive tolls from certain passengers, thereby committing an offence under section 22 of the Northern India Ferries Act, 1878. For this the lessees, who apparently were not present and took no part in the extortion, were prosecuted, convicted and fined. They applied to the Sessions Judge of Farrukhabad in revision, and the Sessions Judge referred the case to the High Court under section 438 of the Code of Criminal Procedure recommending that the convictions and sentences should be set aside.

The applicants were not represented.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown.

TUDBALL, J.—This is a reference by the Sessions Judge of Farrukhabad. The facts of the case are as follows:—The applicants for revision in the Court below, namely, Behari Lal and Bashir-ud-din are the lessees of Singhi Rampur Ferry. As such lessees, they employed certain persons to attend to the ferry and collect the tolls. These servants in contravention of the law extorted unauthorized and excessive tolls from certain passengers, thereby committing an offence under section 22 of the Ferries Act. The lessees, who apparently were not present and took no part in the extortion, have been prosecuted for this offence and have been convicted and fined, apparently on the ground that whatever the servants have done in the course of their employment, that act is the act of the masters. The learned Government Advocate has called my attention to a ruling in **[147]** *Queen-Empress* v. *Tyab Ali* (1). That is a case under the Arms Act. The accused therein was a licensed vendor of arms and ammunitions and he employed a certain man as a salesman. The latter sold certain military ammunition to certain persons without previously ascertaining that such persons were legally authorized to possess the same. It was pointed out in the judgment of that case that the question for decision was whether the accused had or had not "*delivered*" the stores as section 22 of the Indian Arms Act, 1878, makes penal a "*delivery*" of military stores, *et cetera*. The learned Judges who decided the case remarked as follows:—"We fail to see how it can be contended that under these circumstances a delivery of goods by the man in charge would not be a delivery by the owner of the shop. It is not a question of intention, *mens rea*, or of knowledge; it is the delivery which the Act makes penal, and the delivery by the manager is clearly in this case a delivery by the licensee." The rule laid down in *Attorney-General* v. *Siddon* runs as follows:—"What-

* Criminal Reference No. 598 of 1911.

(1) (1900) I. L. R. 24 Bom. 423.

ever a servant does in the course of his employment with which he is entrusted and as a part of it is the master's act." The offence in the present case is a very different one. It consists of extortion of unauthorized tolls from passengers. The servants in doing this act did something which was outside the scope of their employment. In this very offence there is decidedly a *mens rea*, a criminal intent. If it were an act done by the servants within the scope of their employment, then the conviction of the master would in the present case be a good one. But in my opinion the principle laid down in *Attorney-General* v. *Siddon* does not apply to the present offence. The conviction of the lessees is bad in law. I accept the reference and set aside the conviction and sentence. The fine, if paid, must be refunded.

Conviction set aside.

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REVISIONAL CRIMINAL.

34 A. 146 =8 A. L. J. 1324 =13 Cr, L. J. 8=13 I. C. 101.

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34 A. 148 (=12 I. C. 926=8 A. L. J. 1300).

[148] REVISIONAL CIVIL.

Before Mr. Justice Tudball.

HURAN BIBI AND ANOTHER (*Applicants*) *v.* HINGAN BIBI (*Opposite Party*).*

[16th November, 1911.]

Act No. VII of 1889 (*Succession Certificate Act*), *sections* 19, 20—*Munsif invested with functions of District Court—Appeal—Jurisdiction.*

Held, that an appeal from an order of a Munsif invested under section 26 of the Succession Certificate Act, 1859, with the functions of a District Court lies to the District Judge, and cannot be transferred for disposal to any other Court, such as the Subordinate Judge or Judge of the Small Cause Court, not empowered under section 56.

THE facts of this case were as follows:—

One Musammat Hingan Bibi applied under the Succession Certificate Act for a certificate enabling her to recover certain debts due to her deceased husband. She was opposed by two persons, who are sisters of the deceased. The application was made to the Munsif, who was invested, under section 26 of the Succession Certificate Act, with the functions of a District Court. The Munsif granted a certificate to the applicant. The non-applicants appealed to the District Judge, who transferred the appeal to the Court of Small Causes. That court dismissed the appeal. The non-applicants thereupon applied to the High Court in revision, mainly upon the ground that the Court of Small Causes had no jurisdiction to hear the appeal.

Munshi *Damodar Das*, for the applicants.

Babu *Durga Charan Banerji*, for the opposite party.

TUDBALL, J.—This is an application in revision which has been made under the following circumstances. One Musammat Hingan Bibi applied under the Succession Certificate Act for a certificate enabling her to recover certain debts due to her deceased husband. She was opposed by two persons, who are sisters of the deceased. The application was made in the court of the Munsif, which is a court empowered by the Local Government under section 26, clause (1) of Act VII of 1889, to deal with such applications. The Munsif after some proceedings decided in favour of the applicant for the certificate. The two sisters who had objected, preferred an appeal to the District Court. The District Judge trans-

* Civil Revision No. 70 of 1911.

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REVISIONAL.
CIVIL.

34 A. 143=12
I. C. 926=8
A. L. J. 1300.

ferred the appeal for hearing and decision [149] to the Court of the Judge of Small Causes at Cawnpore. That court has dismissed the appeal. The applicants have come here in revision, and it is urged that the Judge of the Court of Small Causes had no jurisidiction to hear the appeal, which could only be heard and decided by the District Judge. Of this I think there can be no doubt. The Act in itself gives power to two courts, namely, the District Court and the High Court to take action in such matters. But in section 26 it gives the Local Gevernment power by notification to invest any court inferior to a district court with the functions of a district court under the Act. In those cases, however, provision has been made for an appeal from an order of the inferior court—*vide* sub-section (1) of section 19—to the District Court. The Local Government by notification invested the Munsif with powers under this Act. But neither the Subordinate Judge nor the Judge of the Court of Small Causes has been invested with powers under this Act. It is quite clear, therefore, that an appeal from an order of the Munsif would lie only to the District Court, and that none of the other courts subordinate to the District Court have power to hear appeals in such cases. They have no jurisdiction at all under the Act. It is a special Act and the appeal lies only to the District Court and cannot possibly be heard by any such inferior courts. I therefore grant the application and set aside the order of the lower court. I direct that the appeal be heard and tried by the District Judge himself. Costs of this application will abide the result.

Application allowed.

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34 A. 150 (=8 A. L. J. 1312=13 I. C. 79).

[150] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Tudball.

JAGARNATH OJHA (*Plaintiff*) *v.* RAM PHAL AND OTHERS (*Defendants*).*

[21st November, 1911.]

Civil Procedure Code (1903), *order XXI, rule* 35—*Suit for recovery of joint possession—Form of decree—Practice.*

Held that a plaintiff who is entitled to possession jointly with other persons can be granted a decree for joint possession, whether the plaintiff was originally in joint possession and was subsequently dispossessed, or whether he had never been in possession. *Phani Singh* v. *Nawab Singh* (1) dissented from. *Bhairon Rai* v. *Saran Rai* (2), *Rahman Chaudhri* v. *Salamat Chaudhri* (3), *Watson & Co.* v. *Ram Chand Dutt* (4) and *Bhola Nath* v. *Buskin* (5) referred to.

[Ref. 63 I. C. 802=19 A. L. J. 780; 63 I. C. 433; 71 I. C. 455=45 All. 157; 71 I. C. 649; 74 I. C. 331; 84 I. C. 2.]

THE facts of this case are briefly as follows:—

The plaintiff appellant brought a suit for joint possession of certain zamindari property, and for damages. The court of first instance gave him a declaratory decree in respect of his share. The lower appellate Court affirmed this decree, holding that plaintiff had failed to prove that he was ever in physical possession of the lands jointly with his co-sharers. The plaintiff appealed.

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*Second Appeal No. 1050 of 1910 from a decree of Sri Lal, District Judge of Ghazipur, dated the 27th of June, 1910, confirming a decree of Ganga Nath, Officiating Munsif of Ballia, dated the 24th of February, 1910.

(1) (1906) I. L. R. 28 All. 161.
(2) (1904) I. L. R 26 All. 588.
(3) Weekly Notes, 1901, p. 48.
(4) (1890) I. L. R. 18 Cal. 10.
(5) Weekly Notes, 1894, p. 127.

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APPELLATE CIVIL.

34 A. 150=8 A. L. J. 1312 =13 I. C. 79.

The case coming on before a single Judge was referred to a Division Bench by CHAMIER, J., under the following order : —

This was a suit by the appellant for joint possession of land with the respondents. The land belonged to one Lachmi Ojha, on whose death it passed to his widow. On the widow's death the property devolved upon the appellant, the respondents and others. The respondents resisted the suit on the ground that the widow had transferred it to them for lawful necessity. They also relied upon a compromise arrived at in a suit. It has been found, and it is now admitted, that the compromise is not binding upon the appellant and that the transfers by the widow were not supported by necessity. The courts below have given the appellant a declaration of his right in the property and have declined to give him a decree for joint possession. The only point taken in second appeal is that the appellant should have been given a decree for joint possession with the respondents.

[151] It was contended by counsel for the appellant that although a decree could not be made for joint possession before the passing of the new Civil Procedure Code, V of 1908, order XXI, rule 35, of the first schedule to that Code had made the passing of such a decree possible, and that in cases like this a decree should be made for joint possession. The first part of this argument is plainly untenable. The courts have always recognized a right to joint possession and have passed decrees for joint possession in certain cases. See for example the case of *Bhairon Rai* v. *Saran Rai* (1), where the plaintiff had been ousted from joint possession by the defendant, and the court restored the plaintiff to possession by giving him a decree for joint possession. In England it has always been recognized that ejectment or its modern equivalent may be maintained by one co-owner against another where there has been an actual ouster (see the cases cited in Carr on Collective Ownership, Chaper VII). TUDBALL, J., in *Sheo Pher Singh* v. *Bhola Singh* (2), held that order XXI, rule 35, has made no change in the law but has merely shown how a decree for joint possession may be executed. I entirely agree.

If a decree can be passed to put a plaintiff *back* into joint possession, there is no reason why it should be considered impossible to pass a decree for joint possession in the case of a plaintiff who has never been in possession. Whether such a decree ought in any particular case to be passed is another question—see the remarks of AIKMAN, J., in *Ram Charan Rai* v. *Kauleshar Rai* (3). Instances of cases in which this Court has held that a decree for joint possession should not be passed will be found in *Phani Singh* v. *Nawab Singh* (4). The actual decision in that case was that a decree for joint possession should not be passed in favour of one co-sharer against another, where on the death of the tenant of the land the defendant, who was one of the co-sharers " quietly appropriated the land " and applied for mutation of names in his favour alone. One of the reasons given for the decision was that it was only by partition that a co-sharer could obtain physical possession of an area equivalent to his fractional share if he was not already in possession, and a Civil Court **[152]** could not make a partition of a mahal. It seems to me that this is not a reason for refusing to give a decree for *joint* possession, but if it is a sufficient reason for refusing a decree for joint possession where the plaintiff has never been in possession, it is also a sufficient reason for refusing such a decree where he has been in possession.

(1) (1904) I. L. R. 26 All. 588.
(2) S. A. No. 1229 of 1910.
(3) (1904) I. L. R. 27 All. 158.
(4) (1905) I. L. R. 28 All. 161.

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APPELLATE CIVIL.

34 A. 150=8 A. L. J. 1312 =13 I. C. 79.

Counsel for the appellant has referred me to the recent decision of BANERJI, J., in *Tund Man* v. *Chedda* (1). In that case two persons, Chatur Das and Jiwan Das, had leased a shop to the defendants. The plaintiffs acquired the rights of Chatur Das and the defendants acquired the rights of Jiwan Das. The defendants declined to give the plaintiffs their share of the rent and denied their title. BANERJI, J., held that the plaintiffs were entitled to a decree for joint possession, saying that it was manifest from the provisions of the present Code of Civil Procedure that a decree for joint possession could be granted. He might, I think, have rested his decision on the ground that there had been an actual ouster of the plaintiffs by the defendants. As I have already said, I do not think that the present Code of Civil Procedure has altered the law as regards the competency of courts to give a decree for joint possession. The judgment of their Lordships of the Privy Council in *Watson & Co.* v. *Ram Chand Dutt* (2), shows that a decree for joint possession *can* be given, and that the question whether one co-owner is entitled to a decree for joint possession with another co-owner depends on the circumstances. The judgment of their Lordships shows that it is important to ascertain whether what the defendant is doing with the land is done in denial of the plaintiff's title. In the present case the defendants respondents have all along denied the appellant's title and have kept him out of possession, saying that they alone are entitled.

But for the decision of this Court in *Phani Singh* v. *Nawab Singh* and other like cases, I should have been disposed to give the appellant a decree for joint possession. In doing so I should have the support of the decision of the Calcutta High Court in *Surendra Narain* v. *Hari Mohan* (3) and of BANERJI, J., in [153] *Tund Man* v. *Chedda*. It has been the practice in Oudh for years to pass decrees for joint possession in such cases as this. In the circumstances the proper course seems to be to refer this appeal to a Bench of two Judges. I refer it accordingly.

On this appeal.

Babu *Surendra Nath Sen*, for the appellant :—

There has been some difference in the past as to a decree for joint possession. I therefore pray for a decree under order XXI, rule 35. I rely on *Watson & Co.* v. *Ram Chand Dutt* (2) and *Bhola Nath* v. *M. Buskin* (4).

Mr. *Ahmad Kareem*, for the respondents :—

The law is the same as it was of old. I submit that no change has been made ; *Phani Singh* v. *Nawab Singh and others* (5). There is a distinction between cases in which no physical possession has been obtained and cases in which there has been ouster from such possession. A decree may be granted in the latter case, but not in the former. Reference was also made to *Bhairon Rai* v. *Saran Rai* (6) and *Jagarnath Singh* v. *Jainath Singh* (7).

Babu *Surendra Nath Sen* was not heard in reply.

BANERJI and TUDBALL, JJ. :—The only question in this appeal is whether a plaintiff, who had never been in possession but was entitled to possession jointly with other persons, could be granted a decree for joint possession. The facts of the case are fully set forth in the order of our

(1) S. A No 948 of 1910.
(2) (1890) I. L. R. 18 Cal. 10.
(3) (1906) I. L. R. 33 Cal. 1201.
(4) Weekly Notes, 1894, p. 127.
(5) (1905) I. L. R. 28 All. 161.
(6) (1904) I. L. R. 26 All. 588.
(7) (1904) I. L. R. 27 All. 88.

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34 A. 150=8 A. L. J. 1312 =13 I. C. 79.

brother CHAMIER, by which he referred this case to a Bench of two Judges. They are briefly these:—The property in suit, which is a share of zamindari, originally belonged to one Lachmi Ojha. It passed on his death to his widow, and on the widow's death to the plaintiffs, to the respondents, and to others. As the plaintiff did not obtain possession of the property, he brought the suit out of which this appeal has arisen for possession jointly with the defendants. He also claimed damages, but that part of the claim has not been pressed in this Court. Other reliefs were asked for with which we are not concerned in this appeal. The court of first instance decreed a part of the claim, but refused to grant a decree for joint possession. This decree was affirmed by the lower appellate court. The [154] contention before us is that a decree for joint possession ought to have been passed in the plaintiff's favour. For the opposite contention reliance is placed upon the decision of a Bench of this Court in *Phani Singh* v. *Nawab Singh* (1). That case, no doubt, supports the view taken by the courts below, but with great deference we are unable to agree with it. In the Full Bench case of *Bhairon Rai* v. *Saran Rai* (2) it was held that where the plaintiff had been ousted from joint possession by the defendants, a decree could be made in his favour for restoration to joint possession. We fail to see that on principle there is any distinction between the case of a person who was in joint possession but was subsequently dispossessed, and the case of a person who was entitled to joint possession, but had not obtained such possession. As pointed out by our brother CHAMIER, an action for joint possession is a well-known form of action, both in England and in this country, and before the decision of the case of *Rahman Chaudhri* v. *Salamat Chaudhri* (3) decrees were always made for such possession. There may, no doubt, be cases in which the court may not deem it reasonable in the interests of all the parties concerned to make a decree for joint possession. An instance of such a case is that of *Watson & Co.* v. *Ram Chand Dutt* (4). Another case of the same kind is that of *Bhola Nath* v. *M. Buskin* (5). That a decree for joint possession can be made has until recently in this Court always been regarded as settled law, but if any doubt existed on the point, it has been removed by the clear provisions of order XXI, rule 35, of the present Code of Civil Procedure. In our opinion the circumstances of the present case are such as to entitle the plaintiff to a decree for joint possession. The courts below were, therefore wrong in not granting him such a decree. We accordingly allow the appeal, and vary the decree of the courts below by adding to the decree made by those courts a decree in the plaintiff's favour for joint possession of the property decreed. The appellant will have his costs in this Court and in the courts below.

Appeal allowed.

(1) (1906) I. L. R. 28 All. 161.
(2) (1904) I. L. R. 26 All. 588.
(3) Weekly Notes, 1901, p. 48.
(4) (1890) I. L. R. 18 Cal. 10.
(5) Weekly Notes, 1894, p. 127.

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NOV. 21.

APPELLATE CIVIL.

34 A. 155=8 A. L. J. 1308 =12 I. C. 922.

34 A. 155 (=8 A. L. J. 1308=12 I. C. 922.)

[155] APPELLATE CIVIL.

Before Mr. Justice Banerji, and Mr. Justice Tudball.

KEDAR NATH KASONDHAN AND ANOTHER (*Plaintiffs*) *v.* NAIPAL SINGH AND OTHERS (*Defendants*).*

[21st November, 1911.]

"Mandadari" tenure—Nature of such tenure—Land held under it not transferable—Occupancy holding.

Held that land held under what is known, in Gorakhpur chiefly, as a *mandadari* tenure is nothing more than an occupancy holding and is not therefore transferable. Such land cannot therefore be sold in execution of a decree upon a mortgage thereof.

THE facts of this case are briefly as follows :—

One Debi Sahai held a simple money decree against defendant No. 1 in 1860. On the 21st of July, 1868, he purchased the property in suit under an auction sale. On the 17th of April, 1882, it was resold by Debi Sahai to defendants Nos. 1 and 2 for Rs. 475. Out of the consideration, Rs. 414 were paid, and for the remaining Rs. 61 a bond of simple mortgage was executed, hypothecating the above property to the vendor. This bond was renewed on the 27th of December, 1891, the mortgage money then amounting, with interest, to Rs. 182-6-0. A suit was brought on this bond by plaintiffs Nos. 1 and 2, the son and grandson, respectively, of Debi Sahai, deceased. Defendants Nos. 1 to 3 did not contest the suit. Defendants Nos. 4 to 7, being the puisne mortgagees and their successors in interest, raised a number of defences, one of them being that the property in suit was the cultivatory holding of the defendants and could not be hypothecated according to law.

The plaintiff pleaded that the mortgage was not void, as the property, which was situated in pargana Bhowapar, of the Gorakhpur district, was held under *mandadari* tenure, and could therefore be the subject of transfer according to custom.

The court of first instance dismissed the claim holding that there was no evidence as to the alleged custom. The lower appellate court confirmed the decree, relying on an unreported decision of this High Court (Case No. 2163 of 1886, STRAIGHT and BRODHURST, JJ.) which held that "it is a much safer course to hold that *mandadari* rights of the land [156] involved in the present case come within the definition of occupancy rights, and, as such, they are not transferable."

The plaintiffs appealed.

Babu *Surendra Nath Sen*, for the appellant :—

Mandadari tenure is a form of customary tenure prevailing in the Gorakhpur district. Vide *District Gazetteer*, pages 131-132, *Settlement Report* of Gorakhpur, paragraph 507. It is equivalent to an occupancy tenancy with a right of transfer. It may be said to amount to a fixed rate holding, only Gorakhpur is not a permanently settled district. This is a customary tenure, not created by Statute, and is independent of it. Defendants stand in the shoes of the original mortgagors. They are estopped from contesting our title. If the mortgage was invalid, it cannot be challenged by those who were parties to it. They were not aware that a *mandadari* tenure was not transferable according to law.

* Second Appeal No. 223 of 1911, from a decree of E. R. Neave, Additional Judge of Gorakhpur, dated the 10th of December, 1910, confirming a decree of Hidayat Ali, Munsif of Gorakhpur, dated the 23rd of May, 1910.

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34 A. 165=8 A. L. J. 1308 13 I. C. 922.

The *District Gazetteer* says that this form of tenure has been recognized repeatedly by Government. Reference was made to *Bagirath Changa* v. *Sheikh Hafiz-ud-din* (1).

Munshi *Govind Prasad*, for the respondents, was not called upon.

BANERJI and TUDBALL JJ. :—This appeal arises out of a suit brought by the plaintiffs appellants to enforce a mortgage of the 27th of December, 1891, executed by the first two defendants. Defendants Nos. 4 and 5 are puisne mortgagees of the property mortgaged. and defendants Nos. 6 and 7 are the sons of defendant No. 5. The property mortgaged, which the plaintiffs seek to sell, is what is known in the Gorakhpur district as a *mandadari* tenure. The courts below have held that such a tenure is not saleable and otherwise transferable, and that a suit for the sale of such a tenure is not maintainable. It is admitted that if the plaintiffs cannot obtain a decree for sale, they are not entitled to a decree for money only as more than six years had elapsed from the date on which the mortgage money became due before the institution of the suit. The only question which we have to consider is whether a *mandadari* tenure is transferable and a decree can be made for the sale of [167] such a tenure. It is not contended on behalf of the plaintiffs that the mortgagors had any proprietary interest in the mortgaged property. There is no evidence to show how *mandadari* tenures originated, and the learned vakil for the appellants does not contend that there is evidence on the record to show that a *mandadari* tenure is transferable. It is admitted that the only right, which the holder of such a tenure has, is the right to occupy it as an occupancy tenant. If the land in question is an occupancy holding, it is not transferable and is not liable to sale in execution of a decree. Section 9 of Act XII of 1881, which was in force at the time when the mortgage in question was executed, clearly provides that an occupancy holding is not transferable in execution of a decree. If it is not transferable in execution of a decree, a court cannot make a decree ordering the sale of such property. The nature and incidents of a *mandadari* tenure were considered by this Court in an unreported case referred to in judgment of the court below, namely, case No. 2163 of 1886, decided by STRAIGHT and BRODHURST, JJ. Those learned Judges held that a *mandadari* tenure was nothing more than an occupancy holding, and was not therefore transferable. We see no reason to come to a different conclusion. The courts below were, therefore, right in refusing to make a decree for sale.

The only other point urged before us was that the defendants were estopped from raising the plea that the property mortgaged by the persons from whom they derived title was not capable of being mortgaged. We are unable to accede to this contention, inasmuch as both parties must be deemed to have known the law, and if the plaintiffs took a mortgage of the property which was not transferable under the law with the knowledge that it was unlawful for the mortgagors to make such a mortgage, they cannot be allowed to raise the plea of estoppel. The appeal fails and is dismissed costs.

Appeal dismissed.

(1) (1900) 4 C. W. N. 679.

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NOV. 18.

APPELLATE CIVIL.

34 A. 158=13 I. C. 138=9 A. L. J. 72.

34 A. 158 (=13 I. C. 138=9 A. L. J 72.)

[158] APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

RAM SARUP (*Plaintiff*) *v.* JASODHA KUNWAR AND OTHERS (*Defendants*).*

[18th November, 1911.]

Act No. I of 1872 (*Indian Evidence Act*), *section* 91—*Suit on promissory note—Note inadmissible in evidence—Plaintiff held entitled to fall back on original cause of action.*

If a creditor has a cause of action for the recovery of money, for which his debtor has executed a promissory note, separate from and independent of the note, he can recover upon such cause, in case the note for any reason cannot be put in evidence. Nor is the creditor necessarily debarred from suing on the original cause of action by the fact that it arose out of the same transaction in the course of which the promissory note was executed. *Parsotam Narain* v. *Taley Singh* (1) overruled. *Sheikh Akbar* v. *Sheikh Khan* (2), *Krishnaji* v. *Rajmal* (3), *Virbhadrappa* v. *Bhimaji* (4), *Banarsi Prasad* v. *Fazal Ahmad* (5) and *Sri Nath Das* v. *Angad Singh* (6) referred to.

[Ref: 60 I. C. 107 ; 65 I. C. 37 ; 76 I. C. 522=1 Rang. 121 ; Fol: 74 I. C. 959=1923 All. 529 ; 74 I. C. 813=26 O. C. 361 ; Cf: 51 I. C. 945=29 C. L. J. 508 ; 2 Lah. 380=1922 Lah. 807; 38 Mad. 660=26 M. L. J. 19 (no decree could be given); 54 I. C. 84.]

THE facts of this case are as follows :—

The plaintiff, Ram Sarup, had money dealings with one Bhup Singh deceased, the ancestor of the defendants. Bhup Singh purchased some cloth and borrowed some money from the plaintiff on different occasions. The loan was entered in the plaintiff's *bahi khata*, but a note of hand was also executed by Bhup Singh in favour of the plaintiff for the amount due from him. The note of hand was in the form of a letter addressed by Bhup Singh to the plaintiff and contained a request for the loan undertaking to repay the same with interest. The plaintiff brought this suit against the heirs of Bhup Singh. The defendants denied the loan and further pleaded that the promissory note being a paper the stamp on which was not properly cancelled, was not admissible in evidence, and consequently the debt could not be proved otherwise. The court of first instance held that the note was not admissible in evidence, but that the debt could be proved otherwise and decreed the suit on the finding that money was borrowed by Bhup Singh. The lower appellate court held that the suit could not be maintained [159] independently of the promissory note, and dismissed the claim so far as it was covered by the note. The plaintiff appealed.

Munshi *Gokul Prasad*, for the appellant :—

The *ruqqa* has been cancelled in the proper manner and is, therefore, admissible in evidence. It was not strictly a promissory note, and did not require to be stamped. Even if it could not be produced in court, the entry of the loan in the *bahi khata* would be sufficient evidence to prove the debt. The debt could be proved although the promissory note could not be admitted in evidence. He cited *Dhondbhat Narharbhat* v. *Atmaram*

* Second Appeal No 13) of 1911, from a decree of Pitambar Joshi, Second Additional Judge of Moradabad, dated the 22nd of November, 1910, modifying a decree of Gauri Shankar, Munsif of Hardoi, dated the 22nd of December, 1909

(1) (1903) I. L. R. 26 All. 178.
(2) (1881) I. L. R., 8 Cal. 256.
(3) (1899) I. L. R. 24 Bom. 360.
(4) (1904) I. L. R. 28 Bom. 432.
(5) (1905) I. L. R. 28 All. 298.
(6) (1910) 7 A. L. J. 459.

Moreshvar (1), *Queen-Empress* v. *Somasundaram Chetti* (2), *Bharata Pisharodi* v. *Vasudevan Nambudri* (3), *Hira Lal* v. *Data Din* (4), *Siraj Husain* v. *Bulaki Ram* (5), *Banarsi Prasad* v. *Fazal Ahmad* (6), *Sheikh Akbar* v. *Sheikh Khan* (7), *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (8), *Moti Lal Saha* v. *Monmohan Gossami* (9), *Sri Nath Das* v. *Angad Singh* (10) and *Radhakant Shaha* v. *Abboychurn Mitter* (11) to prove that he could produce evidence *aliunde* concerning the original consideration. The stamp cannot be said to be cancelled effectively; *Virbhadrapa bin Adrashapa Javli* v. *Bhimaji Balaji Saraff* (12).

Mr. *M. L. Agarwala*, for the respondent :—

The rulings cited are under Act I of 1879. There was no definition of a promissory note in that Act. In Act II of 1899, the Legislature has deliberately departed from the definition in the Negotiable Instruments Act XXVI of 1881. A comparison of the two sections will show that the definition in section 2, clause (22) of Act II of 1899, is much wider. The two Acts were enacted for entirely different purposes. In the definition in Act II of 1899, the Legislature purposely incorporated the ruling in *Channamma* v. *Ayyanna* (13). Formerly the Stamp Law used to be evaded The words of section 2, clause (22) fully cover the present case. It is not necessary that there **[160]** should be an actual receipt of money side by side with the promise to pay. Plaintiff is not entitled to fall back on the entry in the *bahi khata*. There were two entirely separate transactions—a loan and a security. Section 91 of the Evidence Act bars the production of other evidence to prove the debt. I rely on the judgment of GARTH, C. J. in *Sheikh Akbar* v. *Sheikh Khan* (7) and on *Pothi Reddi* v. *Velayudasivan* (14).

Munshi *Gokul Prasad* was not heard in reply.

RICHARDS, C. J. and BANERJI, J.—This appeal arises out of a suit in which the plaintiff sought to recover certain money. A portion of the money was due upon accounts pure and simple for goods sold. Another portion of it the plaintiff claimed as having been advanced by him to the defendant and for which a certain document, alleged to be a promissory note, was passed. The claim is then made for Rs. 35-11-6 the price of cloth ; Rs. 400 principal and Rs. 140-6-0 interest, that is Rs. 540-6-0, in respect of a cash debt, in all Rs. 576-1-6, due under account books together with the costs of the suit and future interest. It will thus be seen that the plaintiff bases his claim upon his account books, and it is a claim for money lent. When the document to which we have referred was produced, it appears that the stamp was cancelled by means of two lines drawn crosswise upon it.

The court of first instance decreed the plaintiff's claim, but holding that the stamp was not effectively cancelled, allowed other evidence, including the account books, to be given as evidence of the loan. The document, which it held to amount to a promissory note, was excluded from evidence.

The defendants appealed, and the lower appellate court, adopting the view of the court of first instance that the document was a promissory

(1) (1889) I. L. R. 13 Bom. 669.
(2) (1899) I. L. R 23 Mad 155.
(3) (1903) I. L. R. 27 Mad. 1.
(4) (1881) I. L. R. 4 All. 135.
(5) (1908) 5 A. L. J. 162.
(6) (1905) I. L. R. 28 All. 298.
(7) (1881) I. L. R. 7 Cal. 256.
(8) (1896) I. L. R. 23 Cal. 851.
(9) (1900) 5 C. W. N. 56.
(10) (1910) 7 A. L. J. 459.
(11) (1882) I. L. R. 8 Cal 721.
(12) (1904) I. L. R. 28 Bom. 432.
(13) (1892) I. L. R. 16 Mad. 283.
(14) (1886) I. L. R. 10 Mad. 94.

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34 A 158=
13 I. C. 138=
9 A. L. J. 72.

note and that the stamp was not effectively cancelled, refused to allow the plaintiff's claim, except for the price of the cloth and reduced the decree of the court of first instance accordingly.

The plaintiff comes here in second appeal. As to whether or not the stamp was effectually cancelled, we offer no opinion. [161] The appellant has not raised the question specifically in his memorandum of appeal.

The next point which was discussed was whether the document in question was a promissory note, within the meaning of the Stamp Act of 1899. On the face of it, it is a request for the loan of money with a promise to repay the loan with interest. In the view that we take of the case, it does not become necessary to decide whether or not the document is a promissory note within the meaning of the Act. We shall, therefore, assume for the purposes of our decision, first, that the document in question amounted to a promissory note; secondly, that the stamp on it, although sufficient, was not effectually cancelled; and, thirdly, that the taking of the loan and the giving of the note were simultaneous transactions. The appellant contends that even on all these assumptions, he is (provided he can prove that the money was lent without the help of the note), entitled to succeed in his claim not only for the price of the cloth but also for the money, claiming it as he does, as money lent. The evidence that the money was in fact lent is overwhelming and is not disputed in the present appeal. We, therefore, have only to decide whether on the assumptions that we have made the plaintiff must fail notwithstanding that the money was in truth and in fact duly lent.

The defendants strongly rely on the case of *Sheikh Akbar* v. *Sheikh Khan* (1). The learned counsel for the defendants admits that in ordinary cases where, for instance, a plaintiff took a promissory note for the price of goods sold and delivered, if he failed for any reason on his note, he would be entitled to fall back upon the original consideration, namely the price of goods so delivered, provided that he was able to prove the delivery of the goods, and that such a claim was open to him upon the pleadings. In like manner, of course, he concedes that if the money was lent and subsequently a note was given for the amount, the plaintiff failing on the note would be entitled to fall back upon a claim for money lent. He, however, contends that where the lending of the money and the taking of the note was a simultaneous transaction, and the parties all along contemplated [162] that the loan should be secured by the giving and the receiving of the note, the plaintiff must stand or fall by the claim based upon the promissory note, and that if he is unable to give the note in evidence the whole suit fails. For this purpose he relies, as we have stated above, upon the case of *Sheikh Akbar* v. *Sheikh Khan*.

The facts in that case were somewhat peculiar. But there is no doubt that the giving of the note was the consideration for the deposit of a certain sum of money by the plaintiff. GARTH, C. J., in holding that the plaintiff must stand or fall by his claim on his promissory note, says as follows (at page 260 of the Report):—"But when the original cause of action is the bill or note itself, and does not exist independently of it, as for in-tance, when in consideration of *A* depositing money with *B*, *B* contracts by a promissory note to repay it with interest at six months' date here there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the

(1) (1881) I. L. R. 7 Cal. 256.

parties, and if for want of a proper stamp, or some other reason, the note is not admissible in evidence, the creditor must lose his money."

It is contended that what the learned Chief Justice meant was that wherever a loan and the giving of a note are simultaneous, the plaintiff cannot fall back upon his claim for money lent. If this be the view of the learned Chief Justice, we are unable to agree with him. As far back as the year 1800, Lord KENYON, in the case of *Farr* v. *Price* (1), after holding that the plaintiff could not succeed on a promissory note on the ground of an error in the stamp observed that "as there were other general counts in the declaration, if the plaintiff could give other evidence of a consideration paid by him to the defendants, he would not be concluded from recovering by the fact of the defendants having given this imperfect promissory note for it."

There is a footnote to the report as follows :—" Where a promissory note had been given for money lent but when produced in court was unstamped, Lord KENYON, Chief Justice, permitted the plaintiff to recover on a common count for money **[163]** lent by proving that when the money for which the loan had been given was demanded of the defendanthe acknowledged the debt".

The case of *Sheikh Akbar* v. *Sheikh Khan* was considered in *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (2). There, as in the present case, a promissory note had been given for money lent, but the note was insufficiently stamped, and was therefore inadmissible in evidence. It was held that the plaintiff had a cause of action independently of the document. PETHERAM, C. J., says (at page 853 of the Report) :—"The case which has been relied upon by the defendant is that of *Sheikh Akbar* v. *Sheikh Khan.*" The leared Chief Justice then quotes the passage from the judgment of GARTH, C. J., which we have mentioned above and proceeds :—" These words taken alone may seem to indicate that when a bill or note is taken for a debt, the action must be brought upon the bill or note : and that if for any reason the document is excluded, the action must fail, but a reference to the earlier portion of the judgment shows that such was not the meaning of the Chief Justice, and that when he spoke of a deposit he did not mean a loan, as he then says where money is lent and a bill or note given for the loan which is not paid at maturity, the creditor may disregard the note and sue on the original consideration."

In the case of *Krishnaji Narayan Parkhi* v. *Rajmal Manikchand Marwari* (3), where the suit was a suit exactly similar in principle to the present case, JENKINS, C. J., also quotes the judgment of GARTH, C. J., in *Sheik Akbar's* case and says (at page 373 of the report) :—" It is apparent from this that the actual *ratio decidendi* was that there was no loan independently of the note, so that it does not govern this case, if, as I think, there was a loan independently of the note."

The Chief Justice was clearly of opinion that where the loan could be proved without having recourse to the note the plaintiff was entitled to recover. In the same case CANDY, J., took the same view, and refers at length to the authorities.

[164] In the case of *Virbhadrapa bin Adrashapa Javli* v. *Bhimaji Balaji Saraff* (4) the question arose whether or not the drawing of two parallel lines over a receipt stamp was, or was not, an effectual cancellation of it. It was held that it was not. The court then went on to

(1) (1800) 1 East, 55 (57).
(2) (1896) I. L. R. 23 Cal. 851.
(3) (1899) I. L. R. 24 Bom. 360.
(4) (1904) I. L. R. 28 Bom. 432.

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consider whether the plaintiff could be allowed to sue for money lent independently of the promissory note, and held that the plaintiff could sue.

The same view was taken by a Bench of this Court consisting of STANLEY, C. J., and KNOX, J., in the case of *Banarsi Prasad* v. *Fazal Ahmad* (1). The learned Chief Justice and Mr. Justice GRIFFIN adhered to the same view in *Sri Nath Das* v. *Amjad Singh* (2).

The only case really in point, where a contrary view was taken, was the case of *Parsotam Narain* v. *Taley Singh* (3). In that case, no doubt, AIKMAN, J., held that where the parties contemplated at the time of the loan that a note should be taken, the plaintiff must stand or fall by a suit based on the note itse'f. It is quite clear that the learned Judge relied upon what he supposed was the view of Sir RICHARD GARTH in *Sheikh Akbar's* case. We are unable to follow this case, in view of our own opinion and the authorities we have quoted. We consider that, where the plaintiff, as in the present case, is able to prove the loan independently and without the assistance of the note, he ought to succeed.

We accordingly allow the appeal, and vary the decree of the lower appellate court by restoring the decree of the court of first instance with costs in all courts.

Appeal decreed.

34 A. 165 (=9 A. L. J. 4=13 I. C. 53).

[165] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Tudball.

ABDUL HAKIM KHAN AND ANOTHER (*Defendants*) *v.* CHANDAN AND OTHERS (*Plaintiffs*).*

[22nd November, 1911.]

Act No. XVI of 1908 (*Indian Registration Act*), *sections* 73,74, 77—*Registration—Refusal to register—Inquiry ordered, but application dismissed on account of parties failing to attend—Suit to compel registration.*

A Sub-Registrar refused to register a document presented to him, and on the application of one of the parties the Registrar directed an inquiry under section 74 of the Indian Registration Act, 1908. On the date fixed for the inquiry, however, the parties failed to appear, and the Registrar accordingly dismissed the application. *Held* that this amounted to a refusal to register within the meaning of section 77 of the Act and a suit to compel registration would lie. *Sajibullah Sirkar* v. *Haji Khosh Mohamed Sirkar* (4) followed. *Udit Upadhia* v. *Imam Bandi Bibi* (5) distinguished.

THE facts of this case were as follows :—

A sale deed was executed by the defendants appellants in favour of the plaintiffs respondents on the 14th of July, 1908. On the 1st of September, 1908, the plaintiffs applied for registration. Notice was issued to the defendants, but they did not appear, and registration was refused by the Sub-Registrar on the 20th of December, 1908. On the 6th of January 1909, the plaintiffs applied to the Registrar under section 73 of the Registration Act. A date was fixed for holding the inquiry, but as neither party put in an appearance, the Registrar also refused registration.

*Second Appeal No. 762 of 1911, from a decree of C.E. Guiterman, Additional Judge of Saharanpur, dated the 27th of January, 1911, confirming a decree of Parmatha Nath Banerji, Subordinate Judge of Saharanpur, dated the 15th of July, 1909.

(1) (1905) I. L. R. 28 All. 298.
(2) (1910) 7 A. L. J. 459.
(3) (1903) I. L. R. 26. All. 178.
(4) (1886) I. L. R. 13 Cal. 264.
(5) (1902) I. L. R. 24 All. 402.

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34 A. 165=9 A. L. J. 4 =13 I. C. 83.

The plaintiffs brought the present suit for compulsory registration on the 19th of March, 1909. The defendants pleaded that the suit was not maintainable. The courts below decreed the claim. The defendants thereupon appealed to the High Court.

Pandit *Braj Nath Vyas*, for the appellants :—

The application before the Registrar under section 73 was barred, the plaint having been presented more than thirty days after the order. The order of the Registrar was not an 'order refusing registration' within the meaning of section 77, it being simply an order of dismissal for default. By their abandonment of all proceedings before the Registrar, the plaintiffs must be held to have failed to comply with the provisions of sections **[166]** 73 and 74 the word 'shall' in section 74 is imperative. Reference was made to *Udit Upadhia* v. *Imam Bandi Bibi* (1) and *Sajibullah Sarkar* v. *Haji Khosh Mohamed Sirkar* (2).

Mr. *S. A. Haidar*, for the respondents : —

It was admitted in the lower court that the application was within time. I rely on *Sajibullah Sirkar* v. *Haji Khosh Mohamed Sirkar* (2), which has been followed in *Raj Lakhi Ghose* v. *Debendra Chundra Mojumdar* (3). The case of *Intizam Fatima* v. *Ali Baksh* (4) is also in my favour.

BANERJI AND TUDBALL, JJ.—This appeal arises out of a suit brought by the plaintiffs respondents, under section 77 of the Registration Act, to secure registration of a sale deed which was admittedly executed by defendant No. 1, as general attorney of defendant No. 2. The suit was contested by both the defendants. Registration was refused by the Sub-Registrar on the 20th of December, 1908. Within the period of thirty days from that date the plaintiffs respondents applied to the Registrar under section 73 of the Act. A date was fixed by the Registrar for an inquiry to be made under section 74. On the date fixed the parties did not appear, and the Registrar recorded an order dismissing the application. The plaintiff then brought the present suit. The suit was resisted chiefly on the ground that there had been no inquiry by the Registrar under section 74 of the Act, and that, therefore, there had been no such refusal to register as is contemplated by section 77. A plea has been raised in this Court that the application to the Registrar had not been made within the time allowed by law. There is no substance in this plea, as it was admitted by the parties in the court below that that application was made within thirty days of the order passed by the Sub-Registrar. This is manifest from the opening lines of the appellate court's judgment, and it has not been shown to us that the statement contained in the judgment is incorrect. Both the courts below decreed the plaintiffs' suit relying upon the ruling in *Sajibullah Sirkar* v. *Haji Khosh Mohamed Sirkar* (2). They have held that the order of the Registrar is a refusal within the meaning of section 77. The point taken before **[167]** us is that the applicants, that is, the present plaintiffs, not having appeared before the Registrar and not heaving adduced evidence, the inquiry which is ordered by section 74 was not made, and therefore the order of the Registrar is not a refusal, such as is contemplated by the law. Reliance is placed upon certain observations in *Udit Upadhia* v. *Imam Bandi Bibi* (1). The question for decision in that case was not that which is now before us. In that case the plaintiff, Musammat Imam

(1) (1902) I. L. R. 24 All. 402.
(2) (1886) I. L. R. 13 Cal. 264.
(3) (1897) I. L. R. 24 Cal. 668.
(4) (1911) 8 A. L. J. 626.

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34 A. 165=9 A L. J. 4=13 I. C. 83.

Bandi Bibi, had made an application to the Registrar to obtain an order for registration more than thirty days after the order of the Sub-Registrar refusing registration. It was, therefore, held that she had not fulfilled one of the conditions precedent to the bringing of a suit under section 77. In the course of the judgment certain observations were made by one of the learned Judges. On pages 406 and 407, BURKITT, J. says:—" The words ' refuses to order the document to be registered under section 76' imply, in my opinion, that the application must have been presented in time under section 73, and that after inquiry the Registrar has refused to direct it to be registered." Stress is laid upon the words "*that after inquiry the Registrar has refused to direct it to be registered.*" At the bottom of page 406 the judgment continues:—" Finally, I would point out that the right of suit given by section 77 of the Act is a right consequential on a refusal under section 76, which refusal is based on the inquiry directed by section 74, and if there be no such refusal, no right to sue accrues under section 77." In so far as those observations touch on the question of the inquiry made after an application, they were quite unnecessary for a decision on the point in issue in that case. In the case now before us there is no material on the record to show to us what exactly happened and we are not prepared to hold that where the District Registrar on an application duly presented within time has fixed a date for the purposes of an inquiry and has then refused to register the document because no evidence has been adduced before him, no such refusal has been made as is contemplated by section 77. There is nothing in the circumstances of the case to show that the application [168] under section 73 was not a *bona fide* application which the plaintiff's did not intend to prosecute. It is clear that they neither withdrew nor abandoned their application. The Registrar's order dismissing the application was one merely refusing to register the document because no evidence of the execution thereof had been placed before him. We agree with the remarks in *Sajibullah Sirkar* v. *Haji Khosh Mohamed Sirkar* (1). In our opinion the decision of the court below is correct. The appeal fails.

Appeal dismissed.

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34 A. 168 (=9 A. L. J. 8=13 I. C. 94.)

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

GANPAT PRASAD AND ANOTHER (*Defendants*) v. SARJU (*Plaintiff*).*

[23rd November, 1911.]

Act No. IX of 1872 (*Indian Contract Act*), *section* 235—*Principal and agent—Untrue representation by agent as to extent of his authority—Liability of agent.*

Held that section 235 of the Indian Contract Act, 1872, applies as much to the case of a person who untruly represents the extent of the authority given to him by another as to that of a person who represents himself to be the agent of another when in fact he has no authority from him whatever. *Collen* v. *Wright* (2) referred to.

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*Second Appeal No 385 of 1911 from a decree of Muhammad Ali, District Judge of Banda, dated the 25th of March, 1911, modifying a decree of Achal Behari, Subordinate Judge of Banda, dated the 31st of January, 1910.

(1) (1886) I. L. R. 13 Cal. 264. (2) (1857) 27 L. J. Q. B. 215: 7 E. & B. 301.

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34 A. 168=
9 A. L. J. 8
=13 I. C. 94.

THE facts of this case were as follows :—

One Munna Lal, who was the proprietor of a shop at Katni, had some 500 bags of grain stored at Badausa in the Banda district. He authorized the defendants appellants, who owned a shop at Karwi in the latter district, to sell the above-mentioned grain at the rate of $9\frac{1}{4}$ seers to rupee. On the 25th of December, 1907, defendants sold the 500 bags of grain to the plaintiff respondent, Sarju, who was also a shop-keeper at Karwi at the rate of 9 seers 6 chhataks to the rupee, and the latter paid Rs. 51 as earnest money. Delivery was to be taken in 8 days. Munna Lal prohibited the defendants from selling the grain at the lower rate, and delivery was not effected. Thereupon Sarju brought a suit against Munna Lal which was dismissed on the ground that the sale was not complete. The defendants were not parties to this suit. The plaintiff's then sued **[169]** the present defendants, claiming Rs. 51 on account of the earnest money paid, Rs. 252-1-0, on account of costs of the former suit, and Rs. 424-0-3, on account of loss occasioned by the representation of the defendants that they were authorized to sell the grain at the rate agreed upon. The defence was that there was no misrepresentation and that the sale was not complete. The court of first instance held that section 230 of the Contract Act applied and dismissed the suit, awarding only Rs. 51 on account of the earnest money paid. The lower appellate court reversed the decree holding that the case was governed by section 235 of the Contract Act. It did not award any costs of the previous litigation. The defendants appealed.

Dr. *Tej Bahadur Sapru* (with him Munshi *Benode Bihari*), for the appellants :—

The sole question is whether section 230 or 235 of the Contract Act is applicable. Section 235 applies only to a person untruly representing himself to be the authorized agent of another. There was no such untrue representation in the present case. Agency was admitted by all parties. There was no such untrue representation as comes within section 235. That section refers to an untrue representation as to the very fact of agency, not as to its terms. He referred to *Collen* v. *Wright* (1) and *Hoare* v. *Dresser* (2).

[CHAMIER, J. referred to *Starkey* v. *Bank of England* (3) ; and *Chr. Salvesen and Co* v. *Rederi Aktiebolaget Nordstjernan* (4) was also referred to by the other side.]

The rule of English law is larger than the Indian law. Section 235 has not been framed wide enough to cover those cases. It only refers to a case of total absence of authority. Sections 226 to 238 refer to cases between principal and agent or between principal and third parties. None of these can apply where an agent is sued himself by a third party. He is not personally bound in such a case. Section 230 applies. In the case of warranty, too, the Indian Legislature has given it a very narrow and limited meaning. It must have been its express intention to do so.

[170] Mr. *M. L. Agarwala* (with him Munshi *Damodar Das*,) for the respondents, was not called upon.

KARAMAT HUSAIN and CHAMIER, JJ.—There has been some discussion in this Court as to what the lower appellate court intended to find, but in our opinion the findings are perfectly clear. The appellants here were commission agents carrying on business at Karwi in the Banda district.

(1) 7 E. and B. 301.
(2) (1-59) 7 H. L. 290.
(3) (1903) A. C. 114.
(4) (1905) A. C. 302.

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NOV. 28.

APPELLATE CIVIL.

34 A. 168=9 A. L. J. 8 =13 I. C. 94.

One Munna Lal, the proprietor of a shop at Katni in the Central Provinces, had five hundred bags of grain stored at Badausa in the Banda district. On the 25th of December, 1907, the defendants acting as commission agents on behalf of Munna Lal, sold the five hundred bags of grain to the respondent at the rate of 9 seers 6 chataks to the rupee, and the respondent paid them Rs. 51 as earnest money. Delivery of the grain was to be given in eight days; but Munna Lal, the owner of the grain, refused to allow the appellants to deliver it to the respondent on the ground that he had not authorized them to sell the grain at the rate at which it was sold. The learned Judge finds distinctly that the appellants were authorized by Munna Lal to sell the grain at the rate of $9\frac{1}{4}$ seers to a rupee and were not authorized to sell it, as they did, at the rate of 9 seers 6 chataks to a rupee. He also finds distinctly that the appellants did not inform the respondent at the time of the sale that they were not authorized to sell the grain at the rate of 9 seers 6 chataks to a rupee. He says:—"It follows from this finding that they untruly represented themselves to be authorized agents of Munna Lal to sell his grain at the rate of 9 seers 6 chataks to a rupee and are therefore liable under section 235 of the Indian Contract Act to compensate the respondent for the damages sustained by him." He gave the respondent a decree for Rs. 425, but refused to give him the costs spent by him in a previous suit against Munna Lal on the ground that he might have impleaded the appellants in the previous suit and so have saved the expense of the present suit. The respondent has filed cross-objections with regard to the refusal of the learned Judge to give him the costs of the previous suit. The objections were filed beyond time and the reason given for not filing them within time is unsatisfactory. We decline to consider the cross-objections.

[171] On behalf of the appellant it is contended that section 235 of the Contract Act does not apply to the case. Dr. *Tej Bahadur* argues that it was intended to apply only to the case of a person who represents himself to be the agent of another when in fact he has no authority from him whatever, but not to the case of a person who untruly represents the extent of the authority given to him by another. Dr. *Tej Bahadur* concedes that the case of *Collen* v. *Wright* (1), on which section 235 is obviously based, has been applied to both classes of cases in England. It seems to us clear that section 235 was intended to apply to both classes of cases. There is no distinction in principle between the case of a man who represents that he has authority from another when he has no authority whatever, and the case of a man who represents that he has certain authority from another when he has authority of another description. In neither case can the man who makes the representation be said to be the authorized agent of the other with reference to the matter on which he has no authority. We agree also with the learned Judge of the court below that the appellants must be taken to have untruly represented themselves to be authorized by Munna Lal to sell his grain at the rate of 9 seers 6 chataks to a rupee. For, as it was said in the case of *Collen* v. *Wright*, if a man makes a contract as agent, he promises that he is what he represents himself to be, and he is liable for the breach of his contract, whether or not he is aware that he is acting beyond the scope of his authority. In our opinion the decision of the court below is perfectly right, and we dismiss the appeal.

Appeal dismissed.

(1) (1857) 7 E. & B 301.

34 All. 172 (=9 A. L. J. 111=13 I. C. 154).

1911
NOV. 25.

APPELLATE CIVIL.

34 A. 172=9 A. L. J. 111 =13 I. C. 154.

[172] APPELLATE CIVIL.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

BANDE ALI (*Plaintiff*) v. GOKUL MISIR AND OTHERS (*Defendants*).*

[25th November, 1911.]

Civil Procedure Code (1882), *section* 43—*Suit for injunction—Suit dismissed on the ground that plaintiff had failed to prove his possession—Subsequent suit for possession.*

Held that the dismissal of a suit for an injunction in respect of certain property upon the ground that the plaintiff has not proved his possession of the property in respect of which the injunction is sought is no bar to a subsequent suit for possession of the same property. The principle of the decisions in *Darbo* v. *Kesho Rai* (1), *Sarsuti* v. *Kunj Behari Lal* (2) and *Mohan Lal* v. *Bilaso* (3) followed.

[Ref. 52 I. C. 434.]

THE facts out of which this appeal arose were as follows :—

One Bande Ali brought an action against Gokul and others on the allegation that he was the owner in possession of 5/16th share in a certain grove as purchaser from the heirs of one Bakas, and that the defendants had appropriated the fruit and the trees. The relief sought by the plaintiff was a permanent injunction restraining the defendants 1 to 4 from cutting down the trees of the grove and for recovery of Rs. 34-5-9 as the value of his share of fruit in 1303 Fasli and of certain trees appropriated by them. The pleas of the defendants in that suit were, *inter alia*, that the grove had been in possession of Baha-ud-din, and of the defendants as mortgagees from him under a mortgage deed of the 1st of September, 1898, for upwards of twelve years before the institution of the suit, and that the suit was barred by limitation. The issues framed by the court of first instance were to the following effect :—(1) Was the plaintiff or his vendor in possession of the *bagh* within twelve years before the institution of the suit, or was the suit barred by time? (2) Was the suit barred by section 42 of the Specific Relief Act? (3) What were the rights and interests of the plaintiff vendor on the date of the sale deeds of the 14th and 17th of July, 1905, and what rights did the plaintiff acquire by his purchase? (4) What damages was the plaintiff entitled to? On the second issue the first court found that the plaintiff was not in possession, that he ought to have claimed possession, and that his suit was barred by section 42 of the Specific Relief Act. [173] On the first and third issues that court found that the title of the defendants had not ripened into ownership by adverse possession, and that the plaintiff was owner of 5/16th share in the *bagh*. On the fourth issue it found that in consequence of the agreement between the parties the amount of damages was Rs. 15. On the above findings the first court dismissed the claim for an injunction and decreed it for damages.

The plaintiff thereupon on the 13th of June, 1908, brought the suit out of which this appeal arose. The reliefs sought in the present suit were the following :—(*a*) A decree for establishment of the right of possession jointly with the defendants over a 5/16th share of the grove ; (*b*) Rs. 123-7-0 on account of the produce of the grove for 1314 and 1315

* Appeal No. 87 of 1910, under section 10 of the Letters Patent.

(1) (1879) I. L. R. 2 All. 356.
(2) (1883) I. L. R. 5 All. 345.
(3) (1892) I. L. R. 14 All. 512.

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Fasli. One of the pleas in defence was that the suit was barred by the provisions of sections 13 and 43 of the Code of Civil Procedure. The Court of first instance came to the conclusion that the cause of action in the two suits being the same, the suit was barred, but it did not specify whether it was barred under section 13 or section 43. The plaintiff appealed to the lower appellate court, which reversed the decree of the court of first instance and gave the plaintiff a decree for possession of 5/16ths of the grove, and Rs. 31 as damages and costs.

The defendants preferred a second appeal to the High Court. A single Judge of the High Court reversed the decree, holding that a second suit for possession would be barred if in a previous suit for injunction the plaintiff could not prove his possession.

The judgment of the single Bench (KARAMAT HUSAIN, J.) as to the point of law involved was as follows :—

"In order to see whether section 13, explanation II or section 43 of the Code of Civil Procedure, 1882, bars the present suit, the following introductory remarks are necessary.

"The object of the rule *res judicata*, observes Lord BLACKBURN, 'is always put upon two grounds—the one, public policy, that it is the interest of the state that there should be an end of litigation, the other, hardship on the individual that he should not be vexed twice for the same cause'. *Lockyer* v. *Ferryman* (1). Out of the two grounds vexation to a defendant more than once is the only ground on which explanation II of section 13 and section 43 of the Code of Civil Procedure rest. Both of them are enacted in his interests, and to save him from the repetition of vexation on a single cause of action.

[174] "The expression 'cause of action' is sometimes used in the sense of some infringement by the defendant which furnishes an immediate cause of action to the plaintiff. At others it is used in the sense of infringement together with the right infringed. The latter sense is wider of the two and a Full Bench of this Court has held that the cause of action in section 43 is used in the wider sense (2).

"That ruling is binding on me, but, with all the respect due to the learned Judges, I cannot help thinking that the expression simply means some infringement of some right by some one which entitles the owner of the right to seek the assistance of the court. When it is used to denote the entire group of facts which the plaintiff has to prove to have the judgment of the court in his favour, it denotes the elements of success and not the cause of action. The concepts of 'infringement' 'cause of action' and 'relief' are closely connected with one another. The one and the same act which is an infringement, is also the entire cause of action or a competent element thereof, and the relief is the restoration of the owner of right to the position in which he was before the infringement, and if that be impossible, to compensate him for the loss. In this connection I deem it my duty to observe that the words and groups of words used in expressing legal concepts ought to be used in only one sense, and that each legal concept ought to be expressed by one word or group of words. The practice of vaguely expressing one concept by several terms or using one term in more than one sense, is a fruitful source of the multiplicity of suits and of moral and social evil of the first magnitude.

"The cause of action, according to some rulings, must be sought for within the four corners of the plaint—*Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (3), *Nanoo Singh Monda* v *Anand Singh Monda* (4). But in *Nathu* v. *Budhu* (5) the Court expressed an opinion *obiter* that section 43 must be applied, as if the fact had been as found by the Court and not alleged in the plaint. This view, with due respect to the learned judges who take a different view, is, in my judgment, sound. If the determination of a cause of action is to depend upon the allegations made by the plaintiff in the plaint with a complete disregard to the pleas in defence and to the findings of the Court on the pleadings of the parties, matters are left to the sweet will of the plaintiff, who can invent as many causes of action as suits his fancy, and can drag a helpless defendant into Court many times for one single cause of action in spite of the provi-

(1) (1877) 2 App. Cas. 519.
(2) (1883) I. L. R. 16 All. 166.
(3) (1882) I. L. R. 8 Cal. 819 (822).
(4) (1885) I. L. R. 12 Cal. 91, 2.
(5) (1893) I. L. R. 18 Bom. 537, (542)

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sions of section 43. This will tend to increase the multiplicity of suits and give a handle to the malice of unscrupulous plaintiffs against innocent defendants. Further, if the parties to a suit be not agreed as to the cause of action, it is the function of the Court to find what the cause of action is, and bare allegations in the plaint cannot be sufficient for determining it. The allegations in the plaint may estop the plaintiffs from averring differently, but they cannot furnish a sufficient basis for the determination of a cause of action. Again, to set the machinery of law in motion is a very serious matter, and a plaintiff who intends to seek the assistance of a court is under the obligation of exercising reasonable [175] care to find out what his real cause of action is, and what is the relief to which he is entitled. If without doing so, he rushes into court, he does so at his own risk. The defendant is also a party to the suit. and to give preference to the allegations in the plaint over the pleas in defence in determining the cause of action in a particular suit is not consonant with justice. One of the elements of explanation II is, that the cause of action in the two suits must be the same. If it is not the same, the omission of a ground of attack or defence cannot take place. Another element is that the ground must be such as could help success or failure in the previous suit. A third element is that it must have been known to the party who could advance it—*Manikbai* v. *Virchand* (1)—inasmuch as the party could not be barred from raising a ground which was not known to him. The element of the doctrine of *res judicata* that the matter must be heard and finally decided is no element of explanation II. For, adjudication upon a ground which has been omitted is impossible. The bar created by explanation II rests on the omission by a party and not on adjudication by a competent court. This is founded on the maxim *nemo debet bis vexari pro una et eadem causa* and not upon *interest reipublicæ ut sit finis litium*. It has a close affinity to estoppel and has no connection with *res-judicata*. The absence of adjudication on the omitted ground is conclusive to show that the matter cannot be *res judicata*. But as the rule of *res judicata* is treated by the English lawyer as a branch of the law of estoppel and as the practical results are the same whether the explanation finds a place under *res judicata* or under estoppel, much regard has not been paid to assign a proper place to it. As the omission has been dealt with under the rule of *res judicata*, the Courts have tried to explain how it can come under that rule. In *Hari Narayan Brahme* v. *Ganpatrav Davji* (2) the matter is said to be *constructively* in issue:—'The law of *res judicata* is contained in section 13 of Act X of 1877; but the matter in issue in the present suit was obviously not heard and finally decided by the Poona Court unless it can be said to have been *constructively* in issue in the former suit under explanations I and II of section 13. In some cases the opportunity of obtaining a decision is deemed tantamount to actual decision. If the parties have had an opportunity of controverting, that is the same thing if the matter has been actually controverted and actually decided—*Newington* v. *Levy* (3); *per* MARTIN, B., citing *Greathead* v. *Bromley* (4); *Langmead* v. *Maple* (5); see also *per* BLACKBURN, J., 6 C. P. p. 193; *Rukhal Dass Singh* v *Heera Motee Dossee* (6) The point, that for the application of explanation II a final decision of the omitted ground is not necessary, has been noticed by SHARF-UD-DIN AND COXE, JJ., in *Mohim Chandra Sarkar* v. *Anil Bandhu Adhikary* (7), and no reasonable doubt in the soundness of this view is possible, but it is strange to find that according to some cases—*Woomesh Maitra* v. *Baroda Das Maitra*, (8) and *Kailash Mondal* v. *Baroda Sundari Dasi* (9)—the [176] II, unless there is a judicial determination, express or implied, on the matter not put directly. Section 43, like explanation II, deals with an omission and is based on the maxim which prohibits vexing a defendant more than once for one cause. It bars a subsequent suit for a portion of the relief which is omitted in the previous suit on the same cause of action. The omitted portion of the relief is termed in second paragraph of section 43 of Act XIV of 1882, 'portion of his claim', and in the third paragraph it is termed a 'remedy'.

"If the term 'relief' be taken in its widest sense, that is, the 'thing' or 'the object of right or the compensation therefor' to which the plaintiff, on the happening of a specific cause of action, is entitled, the 'portion of his claim,' and the remedy' both become sub-classes of the 'portion of the relief,' and the distinction between the two sub-classes turns out to be physical. When his claim, that is the thing claimed, is of a homogeneous character, such as money or tangible property, the omitted portion

(1) (1907) 9 Bom. L. R. 1020.
(2) (1883) I. L. R. 7 Bom. 272.
(3) (1870) L. R 6 C. P. 180 (188).
(4) (1798) 7 T. R. 456.
(5) (1865) 18 C. B. N. S. 255 (270).
(6) (1874) 2 W R. 282.
(7) (1909) 13 C. W. N. 513.
(8) (1900) I. L. R. 28 Cal. 17 (21).
(9) (1879) I. L. R. 24 Cal. 711.

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of the relief is spoken of as 'any portion of this claim.' When the relief consists of several component reliefs, such as a simple money decree and a mortgage decree, the omitted portion of the relief is spoken of as a 'remedy.' The points of agreement between explanation II and section 43 are that both deal with an omission, that the cause of action under both must in two cases be the same and that the bar in both is to avoid repeated vexations to the defendant, and is due to the omission of the party and not to adjudication by the court.

"The points of difference between them are, that the omission under explanation II, is the omission of ground of attack or defence in respect of the relief, while, under section 43, it is the omission of a portion of the relief itself, that the omission under the former may be either by the plaintiff or by the defendant, but that under the latter it must always be by the plaintiff.

"A suit for a declaration is very distinct from a suit for permanent injunction. The former is brought under section 42 and the latter under section 54 of the Specific Relief Act. In a suit for a declaration the plaintiff may or may not be in possession of the property in respect of which a declaration is sought. In a suit for a permanent injunction the plaintiff must be in possession of the property in respect of which the permanent injunction is sought. A plaintiff out of possession may sue for a temporary injunction, but that is very different from a permanent one. In the former, a mere declaration can be made and in the latter the defendant is restrained from some infringement, and hence the former decree is unfit to be executed. A permanent injunction is a remedy or relief against the defendant, while a declaration is a mere declaration:—'I can understand an injunction being a relief,—*Marsh* v. *Keith* (1)—but I do not understand how a decree which declares a right merely and gives no relief can be termed a remedy.' *Kalidhun Chuttapadhya* v. *Shiba Nath Chuttapadhya* (2). In a declaratory suit possession may be a consequential relief, but in a suit for permanent injunction possession can never be a consequential relief. Hence possession as a relief may be added to a declaration as a relief, but it cannot be added as a relief to a permanent injunction. If 'the declaration of title to a property,' 'the possession of it,' and 'the [177] permanent injunction to restrain from doing some irreparable damage to it' be deemed to be one chain of reliefs, declaration will represent the first link, possession the second, and injunction the third. In other words, declaration will precede possession and injunction will follow.

"It follows that a dispossessed owner ought to sue for possession and ought not to sue first for the declaration of title and next for possession, inasmuch as the law is "that a plaintiff will not be allowed to make two allegations when the whole matter can be disposed of in a single suit." (I. L. R. 8 Cal. 483, 503).

"The case-law, however, is that a previous suit for a declaration of title is no bar to a subsequent suit for possession. The way in which this has come to pass is not only interesting but of material help in deciding the case before me. I, therefore, set out its history.

"The Courts of Equity in England were at one time different from the Courts of Common Law, and therefore a declaration was first obtained from the Equity Courts, and then a suit for consequential relief was instituted in the Common Law courts.

"Now, in a country where there are different Courts administering different portions of the substantive law, it may be quite possible that a right may have to be established in one court before a consequential relief can be had in another court—*Kalidhun Chuttapadhya* v. *Shiba Nath Chuttapadhya* (3). Owing to the separation of the two sets of courts, the rule that a Civil Court may make a declaratory decree without consequential relief was first enacted in a statutory form in 15 and 16 Vict. Cap. LXXXVI, section 50. That section was re-enacted in India for the old Supreme Court in section 29 of Act VI of 1854. It was then reproduced in the same form in section 15 of the old Code of Civil Procedure (Act VIII of 1859):—"No suit shall be open to objection on the ground that declaratory decree or order is sought thereby and it shall be lawful for a Civil Court to make binding declarations of right without granting consequential relief.' Section 43 of the Specific Relief Act, which came into force on the first of May, 1877, materially altered the law on this subject. The last paragraph of that section is in these terms:—'Provided that no court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so.' The above history of the legislation on the subject shows that a Civil Court under section 15 of Act VIII

(1) (1860) 1 Dr. and Sm. 342.
(2) (1882) I. L. R. 8 Cal. 483 (496).
(3) (1882) I. L. R. 8 Cal. 483 (504).

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of 1859 had the power of 'making binding declarations of right without granting consequential relief' and that that power was taken away by the proviso to section 42 of the Specific Relief Act. The former section in terms confers that power and the latter puts an end to it. There is nothing in either of the two sections to throw any light on the fate of a subsequent suit for a consequential relief.

"In *Kalidhun Chuttapadhya* v. *Shiba Nath Chuttapadhya* (1) there are observations which go to show that such a suit would but for section 15 be barred. 'If section 7 stood alone, unqualified by any other provision in the law it would, indeed, be very difficult to contend that the present suit [178] was not barred. It is obvious that the plaintiff's real object in the first suit was to obtain an account from the defendant, and that the declaratory decree with which they were then content, was only a means to effect that end. It would seem, therefore, impossible to say, that in suing for that decree, they sued for their whole claim in respect of their cause of action. But then it is contended that section 15 of the Code is intended to modify section 7 and removes any difficulty which the plaintiff's might otherwise have had in enforcing their present claim. It seems to me that this contention is well founded. I think that section 15 is intended to modify the provisions of section 7, and the present case is one of those to which the section is intended to apply. This was evidently the view taken by the Allahabad High Court in *Tulsi Ram* v. *Ganga Ram* (2), and I entirely agree with that decision.' A reasonable inference from the above remarks is that after the repeal of section 15 of Act VIII of 1859 by section 42 of the Specific Relief Act, a subsequent suit for consequential relief would be barred by the principle of section 7 of Act VIII of 1859 which was re-enacted with an enlarged scope in section 43 of Act X of 1877 and of Act XIV of 1882. Such, however, is not the case-law. *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (3), which was a case under Act X of 1877, lays down:—'Where a previous suit for a declaration of title and confirmation of possession of certain land has been dismissed on the ground that the plaintiff was not in possession at the time of the suit, a subsequent suit on the same title for recovery of possession is not barred under section 43 of the Code of Civil Procedure.' The rule is based on the following reasoning:—'On the whole we are of opinion that there has been no splitting of remedies in this case within the meaning of section 43 of the new Code of Civil Procedure, and that this suit is not barred in consequence.' With due respect to the learned Judges I find myself unable to hold that there is no splitting of remedies. If a consequential relief is not a portion of the relief (using that term in its widest sense) to which a plaintiff is entitled, a sum of one hundred rupees is also not a portion of five hundred rupees. This case entirely ignores the observations of GARTH, C. J., in *Kalidhun Chuttapadhya* v. *Shiba Nath Chuttapadhya* (4), and the express provisions of section 43 of Act X of 1877, which raise a bar by the omission of any portion of his claim,' as well as of 'a remedy,' and it is exceedingly difficult to contend that a consequential relief is not a remedy which it is open to a plaintiff to seek. This case is followed in *Komola Kaminy Debia* v. *Loke Nath Kur* (5). The learned Judges note that the point decided in *Kali Dhun's* case cannot arise under the present law as section 42 of the Specific Relief Act forbids such a suit. They, however, go on to say:—"But we cannot think that where a plaintiff, mistakenly believing himself to be in possession, sues merely for a declaratory decree, and where in accordance with this rule the court finding him not to be in possession, dismisses his suit on this ground without any inquiry into his rights, he is precluded from subsequently suing for his entire cause of action.'

"The reasoning shows that the principle of repeated vexation is made inapplicable because of the ignorance of the fact of possession at the date of [179] suit, and therefore the case is no authority for the plaintiff, who at the date of his suit knows that he is not in possession and yet omits to seek that relief. This case was also followed in *Mohan Lal* v. *Bilaso* (6), but the judgment, with the greatest possible respect, is very short. In *Akbar Khan* v. *Turban* (7) it is laid down that the dismissal of a suit for a declaration of title is no bar to a subsequent suit for possession. The proposition is laid down as elementary. *Ram Sewak Singh* v. *Nakched Singh* (8) rests on the basis that in the former suit the cause of action for the relief of possession had not arisen, and is, therefore no authority for a case in which at the institution of the former suit the cause of action for possession exists. *Tulsi Ram* v. *Ganga Ram* (9) lays down as follows:—'The fact that, at the time

(1) (1882) I. L. R. 8 Cal. 483, (512.)
(2) (1876) I. L. R. 1 All. 252.
(3) (1882) I. L. R. 8 Cal. 819.
(4) (1882) I. L. R. 8 Cal. 483.
(5) (1882) I. L. R. 8 Cal. 825 note.
(6) (1892) I. L. R. 14 All. 512.
(7) (1908) 5 A. L. J. 640.
(8) (1882) I. L. R. 4 All. 261.
(9) (1876) I. L. R. 1 All. 262.

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when the purchaser of certain lands sued with a view of confirming his title to the lands under his purchase, for a decree declaring such title, he was in a position to have sued for possession of the lands was no bar under the provisions of section 7 of Act VIII of 1859, to his subsequently suing for possession of the same.' The *ratio decidendi* will appear from the following portion of the judgment :—' The lower appellate court considered that section 7 applies to cases in which the plaintiff omits to seek relief in respect of a portion of his claim, and not to cases in which, although he may be entitled to claim more than one kind of relief he seeks for the time one remedy only. In our judgment the lower appellate court has properly interpreted the provisions of the section referred to. We have not now to consider whether the plaintiff ought to have obtained a declaratory decree, seeing that he might have obtained that relief in an ordinary suit for possession. We have to determine whether in seeking a declaratory decree to establish his purchase deed and omitting to sue for possession, he can be held to have omitted any portion of the claim arising out of the cause of action he then put in suit. The cause of action he then put in suit did not necessarily involve any breach of the contract to deliver possession. The plaintiff might have obtained a declaratory decree without entering on the question of possession. For these reasons we hold that section 7 is inapplicable . . .' This rule with reference to the terms of section 7 of Act VIII of 1859 is quite correct, and the words 'the plaintiff might have obtained a declaratory decree without entering on the question of possession' may have reference to the provisions of section 15 of that Act. The rule, however, would be incorrect under section 43 of Act X of 1877, or Act XIV of 1882, in both of which the omission of a 'remedy' is placed on the same footing as the omission of 'a portion of his claim.'

" *Darbo* v. *Kesho Rai* (1) also lays down that a suit for a declaration of title does not bar a subsequent suit for possession. The judgment is in the following terms:— 'In so far as the appellant now claims possession of property to which she formerly claimed a declaration of title, we are of opinion that the suit is not clearly barred; she is seeking a different relief, and the relief she formerly sought was refused her in respect of this property on the ground that the court ought not to exercise its discretionary power of awarding a declaration of title when relief can be obtained by an ordinary suit for possession.'

[180] " A very important point noticeable in all the cases reviewed is that each of them deals with a suit for a declaration of title. None of them touches the effect of a previous suit for a permanent injunction by a plaintiff who is out of possession on a subsequent suit by him for possession.

"The plea of explanation II may be dismissed in a few words. The relief sought in the present suit is different from the one sought in the former suit. That being the case, the question of omitting a ground of attack in the former suit cannot arise. Besides, joint possession which is sought in the present case can in no way be a ground of attack for obtaining a permanent injunction. On the analogy of the case-law as to declaratory decrees, it is, however, contended that a suit for a permanent injunction is no bar under section 43 to a subsequent suit for possession. This analogy in the first place cannot hold good, inasmuch as the facts are dissimilar. A suit for a declaration of title, as has already been explained, stands on a footing totally different from a suit for a permanent injunction, and the rule applied to a suit for declaration is not applicable to a suit for a permanent injunction. Moreover, the case-law regarding declaratory suits is in direct opposition to the principle which is the foundation of section 43, and is not therefore to be extended to suits for permanent injunctions. So far as I am aware there is no authority for the proposition that a suit by an owner out of possession for a permanent injunction against the defendant who holds the property in dispute adversely to him does not bar a subsequent suit for possession on the same cause of action. Such a suit on principle must be barred. I have already explained that section 43 of Act XIV of 1882 is enacted in the interest of the defendant and protects him from repeated vexation. That being the object of the rule, it is perfectly immaterial whether the repetition of vexation is in respect of a portion of the relief or in respect of an entire relief. The case of a plaintiff who omits the entire relief to which he on a specific cause of action is entitled and starts a suit for some relief to which he on that cause of action is not entitled is in no way distinguishable from the case of a plaintiff who omits only a portion of the relief. So far as the repetition of vexation is concerned, the former case is worse than the latter. In the latter there is the consolation of the termination of liability for a portion of the relief, but there is no such thing in the former. If the omitter of an entire relief, to which he, on a specific cause of action, is enti-

(1) (1879) I. L. R. 2 All. 356.

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tled, were not barred by the principle of section 43 from seeking it in a subsequent suit, a wide door for the repetition of vexation would be opened, and unscrupulous plaintiffs would harass innocent defendants as often as they choose by keeping the relief to which they on a specific cause of action were entitled and putting forward sham reliefs to which they were not entitled. In the previous case between the parties it was found that the plaintiff was out of possession, and that the fact was known to him when he instituted the previous suit. The relief sought by him in that suit was a permanent injunction to which he was not entitled on the cause of action brought about by dispossession, and the entire relief of possession to which he was entitled on that cause of action was omitted by him. With reference to those facts I hold that his present suit for possession is barred by the principle on which section 43 is founded. It [181] may be contended that the cause of action in the previous suit was different from the cause of action in the subsequent suit, and that, therefore, section 43 has no application. Having regard to the findings of fact in the previous suit that the plaintiff was not in possession and that he knew that he was not in possession, and to the facts that in the present suit the relief sought is based on the same cause of action which had arisen before the institution of the present suit, and that no fresh cause of action, save the former one, is alleged, I have no hesitation in holding that the cause of action in both suits is one and the same.

"The rulings relied on by the lower appellate court have no application to the facts of the case before me, inasmuch as none of them deals with the fate of a subsequent suit for possession after a suit for permanent injunction on one and the same cause of action. The result is, that I allow this appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs."

Against this judgment the plaintiff appealed.

Babu *Piari Lal Banerji* (for Maulvi *Muhammad Ishaq*), for the appellant :—

The present suit is not barred by section 43, Civil Procedure Code. In the first suit, the plaintiff prayed for an injunction and damages. He was found not to be in possession and was referred to a separate suit. If the suit were one for declaration only, the present suit would not have been barred. He referred to *Sursuti* v. *Kunj Behari Lal* (1), *Mohan Lal* v. *Bilaso* (2), *Akbar Khan* v. *Turaban* (3). There is no distinction in principle between the case of a declaration being dismissed or a suit for injunction being dismissed on the same ground.

Babu *Lalit Mohan Banerji* (for Babu *Surendra Nath Sen*) : On the date that he brought the first suit, the plaintiff was at any rate doubtful whether he had possession. He ought to have claimed possession also. The whole question is whether the suit is or is not on the same cause of action. The ruling in 14 All. was really the first case after the passing of the Specific Relief Act. It merely follows *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (4). In all these cases the plaintiff said that he was in possession, but he never said so here.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of a suit in which the plaintiff claimed joint possession of a certain share in a grove. The defence was that the suit was barred by [182] section 43 of Act XIV of 1882, having regard to previous litigation between the parties. The previous litigation consisted of a suit in which the plaintiff sued the defendants for a permanent injunction restraining them from interfering with his possession and appropriating the fruits of the grove. There was also a claim for damages. This last mentioned suit was dismissed on the ground that the plaintiff was not in possession, and that neither injunction nor damages could, therefore, be claimed. The court of first instance dismissed the present suit. The court of first appeal reversed the court of first instance and held that the suit was not

(1) (1883) I. L. R. 5 All. 345.
(2) (1892) I. L. R. 14 All. 512.
(3) (1908) I. L. R. 31 All. 9.
(4) (1882) I. L. R. 8 Cal. 819.

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barred by section 43. The learned Judge of this Court in a very careful and elaborate judgment reversed the court of first appeal and restored the decree of the court of first instance. The plaintiff comes now in appeal under the Letters Patent.

Section 43 of Act XIV of 1882 is as follows:—"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court. If a plaintiff omits to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

If we had to decide the question in the absence of authority, we might have some difficulty in dissenting from the view taken by our learned brother. We think, however, that the authorities show that for a long time it has been accepted in this Court and in other High Courts that the dismissal of suits of this nature on the ground that the plaintiff is not or has not proved that he is in possession, is no bar to a subsequent suit for possession. As early as the year 1879, a Full Bench of this Court in the case of *Darbo* v. *Kesho Rai* (1) decided that the dismissal of a suit for a declaration of title on the ground that the plaintiff was not in possession, was no bar to a subsequent suit for possession. It is true that the decision in that case was under section 7 of Act VIII of 1859, and it is also true that the judgment in that [183] case is a very short one. The same question arose in *Sarsuti* v. *Kunj Behari Lal* (2). In that case the majority of a court consisting of Mr. Justice STRAIGHT, Mr. Justice OLDFIELD, Mr. Justice BRODHURST and Mr. Justice TYRRELL, decided the same way, namely, that the suit was not barred. That also was a decision under section 7 of Act VIII of 1859. In this case Sir ROBERT STUART, C. J; who was a party to the previous decision in *Darbo* v. *Kesho Rai*, dissented. Again in the case of *Mohan Lall* v. *Bilaso* (3) a Bench of this Court consisting of EDGE, C. J. and BLAIR, J. decided that the dismissal of a suit for a declaration of title on the ground that the plaintiff was not in possession was no bar to a subsequent suit for possession. The learned Judges followed *Jibunti Nath Khan* v. *Shib Nath Chukerbutty* (4). The decision of this Court in *Darbo* v. *Kesho Rai* (1) does not appear to have been cited to the Court in that case. These cases clearly show that it has been the well-established practice of this Court not to dismiss a suit for possession merely on the ground that a previous suit had been brought for a declaration of title and dismissed on the ground of the plaintiff not being in possession. In the present case the previous suit was a suit for an injunction, and it was dismissed on the ground that the plaintiff was not in possession. In our opinion no distinction in principle can be drawn between the dismissal of a suit for a declaration of title on the ground that the plaintiff was not in possession, and the dismissal of a suit for an injunction on the same ground. Following the rulings and established practice of this Court we thnik that the appeal ought to be allowed. We accordingly allow the appeal, set aside the decree of this Court, and restore the decree of the lower appellate court with costs.

Appeal allowed.

(1) (1879) I. L. R. 2 All. 356.
(2) (1883) I. L. R. 5 All. 345.
(3) (1892) I. L. R. 14 All. 512.
(4) (1882) I. L. R. 8 Cal. 819.

34 A. 184 (=8 A. L. J. 1329=13 I. C. 185.)

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34 A. 184=8 A. L. J. 1329 =13 I. C. 185.

[184] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

TARA CHAND MUKERJI (*Plaintiff*) v. AFZAL BEG AND OTHERS (*Defendants*).*

[29th November, 1911.]

Act No. VII of 1870, *Court Fees Act schedule II, article* 17 (*vi*)—*Court fee payable on plaint—Suit by plaintiff in joint possession to have share partitioned—Fixed fee ten rupees.*

In a suit for partition, where the plaintiff alleges that he is in possession and merely claims partition of the property and separate possession of his share, a court fee stamp of 10 rupees is sufficient. *Reoti* v. *Lachhman* (1), *Wali-ullah* v. *Durga Prasad* (2) and *Bidhata Rai* v. *Ram Chariter Rai* (3) followed.

[Fol: 48 Mad. 396=38 M. L. J. 92=1920 M. W. N. 124=55 I. C. 517; Ref: 81 I. C. 643; 81 I. C. 1052=3 Pat. 618; Contra : 73 I. C. 788.]

THE facts of this case were as follows :—

The plaintiff sued for partition of a house in which his share was three-fourths and the defendants' one fourth. The plaintiff alleged that he was in joint possession with the defendants. The prayer was that partition be made by metes and bounds and possession be given to the plaintiff according to his share mentioned. The court fee paid was Rs. 10. The lower court was of opinion that an *ad valorem* fee was needed, and, after giving time for the payment of the balance, which was not paid, dismissed the suit. The plaintiff appealed.

Dr. *Satish Chandra Banerji*, for the appellant :—

The plaintiff's allegation is that he is in joint possession. The suit falls under article 17 (*vi*) of the second schedule of the Court Fees Act. I rely on the case of *Reoti* v. *Lachhman* (1), which followed the cases of *Kirty Churn Mitter* v. *Aunath Nath Deb* (4) and *Mohendro Chandra Ganguli* v. *Ashutosh Ganguli* (5). It is by the allegations in the plaint that the court fee is to be determined. The latest case is that of *Bidhata Rai* v. *Ram Chariter Rai* (3). The lower court has relied on the ruling in *Wali-ullah* v. *Durga Prasad* (2), but that ruling is not at all against me.

Maulvi *Muhammad Ishaq*, for the respondents :—

I rely on the cases of *Reference under Court Fees Act, section* 5 (6) and *Balvant Ganesh* v. *Nana Chintamon* (7).

KARAMAT HUSAIN and CHAMIER, JJ.—This was a suit by the appellant for partition of a house and its appurtenances in [185] Dehra Dun. The appellant paid a court fee stamp of Rs. 10 on his plaint under the Court Fees Act, schedule II, article 17 (vi). The respondents pleaded that the court fee paid was insufficient. They contended that it should be calculated on the value of the property. The court below acceded to this contention and appointed a commissioner to inquire into the value of the property. The commissioner reported that the value of the whole property was Rs. 22,000 and that the value of the plaintiff's share therein was Rs. 16,500. The court then held that the plaint should have borne a court fee stamp of Rs. 57 and called on the

* First Appeal No. 284 of 1910, from a decree of H. A. Lomas, Subordinate Judge of Dehra Dun, dated the 24th of May, 1910.

(1) Weekly Notes, 1900, p. 90.
(2) (1906) I. L. R. 29 All. 340.
(3) (1907) 12 C. W. N. 37.
(4) (1882) I. L. R. 8 Cal. 757.
(5) (1893) I. L. R. 20 Cal. 762.
(6) (1694) 4 M L. J. 110.
(7) (1893) I. L. R. 18 Bom. 209.

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appellant to make good the deficiency. The appellant having declined to do so, the court dismissed the suit. Several decisions were cited in the court below. We think that it is unnecessary to set them out here.

In the case of *Reoti* v. *Lachhman* (1) this Court, following decisions of the Calcutta High Court, held that a plaint in which the plaintiff being jointly in possession with the defendant of property prayed that the plaintiff's share might be partitioned was sufficiently stamped with a Court fee stamp of Rs. 10. To the same effect is the decision of this Court in *Wali-ullah* v. *Durga Prasad* (2). These decisions are supported by a recent decision of the Calcutta High Court in *Bidhata Rai* v. *Ram Chariter Rai* (3). In all these cases it has been held that where the plaintiff, as in the present case, alleges that he is in possession and merely claims partition of the property and separate possession of his share, a court fee stamp of Rs. 10 is sufficient. But where the plaintiff is out of possession and claims possession and partition, then he must pay a court fee calculated on the value of the share claimed by him. The decision of the court below is, in our opinion, erroneous. We allow the appeal and remand the case with directions that it be re-admitted on the file of pending cases and disposed of according to law.

Appeal decreed.—Cause remanded.

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34 A. 186 (=9 A. L. J. 19=13 I. C. 134).

[186] APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Chamier.

ISHAR DAS AND OTHERS (*Auction purchasers*) *v.* ASAF ALI KHAN AND OTHERS (*Decree-holders*).*

[5th December, 1911.]

Civil Procedure Code (1908), *order XXI, rule* 89—*Execution of decree—Property sold by judgment-debtor to a third person after execution sale—Judgment-debtor not competent to apply to have auction sale set aside.*

Where a judgment-debtor, after the sale in execution of his immovable property, sold such property to a third party, it was *held* that the judgment-debtor was not competent thereafter to apply under order XXI, rule 89, of the Code of Civil Procedure, 1908, to have the execution sale set aside. *Debi Prasad Pandit* v. *Muhammad Unis Arabi* (4) approved.

[Appr: 38 Mad. 775; Fol: 40 Bom. 557=37 I. C. 211; Ref: 4 Pat. L. J. 340=51 I. C. 873; 25 M. L. T. 182; 9 L. W. 347=1919 M. W. N. 407=42 Mad. 503; 52 I. C. 331=42 All. 7; Not fol: 63 I. C. 937=40 M. L. J. 497=13 L. W. 498=1921 M. W. N. 272=44 Mad. 554 (F. B.); Ref: 68 I. C. 289=26 C. W. N. 149=49 Cal. 454; 74 I. C. 778=21 A. L. J. 313=45 All. 425 (F. B).]

IN this case certain immovable property was sold at auction in execution of a decree on the 21st of August, 1910. On the 20th of September, 1910, the judgment-debtor paid into the treasury the sum requisite under order XXI, rule 89, of the Code of Civil Procedure, 1908, the court being closed on that date, and, on the 5th of October, when the court reopened, applied to have the sale set aside. Subsequently to the auction sale, but prior to the 20th of September, the judgment-debtor had sold

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*First Appeal No. 38 of 1911 from an order of Banke Behari Lal, Subordinate Judge of Aligarh, dated the 23rd of January, 1911.

(1) Weekly Notes, 1900, p. 90.
(2) (1903) I. L. R. 28 All. 340.
(3) (1907) 12 C. W. N. 37.
(4) (1910) 14 Oudh Cases, 33.

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all his interest in the property in question, and his application was opposed by the auction purchaser mainly on the ground that after having divested himself of all interest in the property the judgment-debtor was not competent to apply under order XXI, rule 89. The court of first instance allowed the judgment-debtor's application. The auction purchaser thereupon appealed to the High Court.

Mr. *W. K. Porter* (with him Munshi *Gulzari Lal*), for the appellants.
Mr. *B. E. O'Conor* and Mr. *Abdul Raoof*, for the respondents.

TUDBALL, J.—This appeal arises out of a sale of immovable property in execution of a decree. The property was sold on the 21st of August, 1910.

On the 20th of September, 1910, the judgment-debtor, who is the respondent in this appeal, paid into the Treasury the amount which was necessary under order XXI, rule 89, to enable him to [187] have the sale set aside. On this date the court was closed and it did not re-open until the 5th of October, 1910.

It is an admitted fact that subsequently to the auction sale and prior to the 20th of September, 1910, the judgment-debtor transferred by sale all his interest in the property to a third party, so that on the latter date he could no longer be said to be the owner of the property. On the 5th of October, he applied to the court to set aside the sale under order XXI, rule 89.

To this the auction purchaser, who was not the decree-holder, objected. Several points were raised by these objections, the chief one being that as the judgment-debtor had parted with his interest in the property by sale to a third party, prior to his application but subsequently to the sale, he was no longer qualified to apply under order XXI, rule 89. The lower court decided all the questions in favour of the judgment-debtor, hence this appeal by the auction purchaser, who raises for decision the same points which were before the lower court, the chief one being that mentioned above.

In my opinion the decision of the lower court on this, the chief point, is wrong. Under order XXI, rule 89, "any person, either owning the property or holding an interest therein by virtue of a title acquired before such sale" may apply to have the sale set aside. This language clearly precludes the transferee from the judgment-debtor in the present case from making any such application. Does the fact that the judgment-debtor has parted, by sale, with the whole of his interest, after the auction sale, also preclude him from making the application? The lower court has held (and the same argument has been pressed upon us in this Court) that after the auction sale and until it is set aside, no interest is left to the judgment-debtor capable of transfer, and hence the sale by him in this case is virtually a nullity and he therefore remains in the same position as on the date of the auction sale. With this I cannot agree. Until the auction sale is confirmed the judgment-debtor has a very substantial interest in the property. He still retains a right either to recover his property under order XXI, rule 89, or to have the sale set aside on the ground of irregularity or fraud (order XXI, rule 90); even [188] though the title may vest in the auction purchaser from the date of the sale when once the sale has become absolute.

The rule in order XXI is a special indulgence to a judgment-debtor or any person holding an interest in the property at the date of the sale. It gives them a last chance of saving the property *for themselves*. It was

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never intended that the property should be saved for persons to whom the property might be sold privately after the auction sale had taken place. The language of the rule (which differs considerably from that of section 310 A of the former Code) clearly points to this. It clearly shuts out all persons who purchase or acquire an interest *after the auction sale.* It seems to me that the Legislature had clearly in mind the case of a purchaser at a private sale from the judgment-debtor after the sale in execution, in respect to whose right to apply under section 310 A of the old Code, there were conflicting rulings (*vide* 1 C. W. N., 279 and I. L. R., 30 Mad., 214.)

It is therefore incorrect to say that the private sale in the present case was a mere nullity and that the judgment-debtor remained the "owner of the property" in spite thereof.

To allow the present application would, it seems to me, be to defeat the very object of the rule. The person making the application is, no doubt, the judgment-debtor, but the person who will benefit by it is the person who has acquired the ownership (or at least an interest in the property) subsequently to the sale in execution, the very person whom the law now in clear terms precludes from making the application. The ruling in *Debi Prasad Pandit* v. *Muhammad Unis Arabi* (1) is the only direct decision on the point which has been laid before the Court. With that decision I am in full agreement and would hold that the judgment-debtor by denuding himself of all his interest by sale to a third party after the sale in execution, is no longer the person owning the property within the meaning of order XXI, rule 89. In this view it is unnecessary to decide the minor points which arise in the case. I would allow the appeal and set aside the order of the court below.

[189] CHAMIER, J.—I concur. I think that there can be no doubt that order XXI, rule 89, was intended to give persons owning or holding interests in immovable property the subject of an execution sale a last chance of saving the property. But the words "owning such property or holding an interest therein" evidently refer only to persons who own the property or hold an interest therein at the date of the application, and whether the applicant be the owner of or only the holder of an interest in the property he must show that he acquired his title before the execution sale. As I read the rule, neither the owner nor the holder of an interest who has parted with his title since the sale or who has acquired title since the sale can apply under rule 89. That was the view taken in the Oudh case cited. I agree that the appeal should be allowed.

BY THE COURT.—The appeal is allowed. The order of the Court below is set aside. The sale in favour of the appellants will stand confirmed.

Appeal allowed.

(1) (1910) 14 Oudh Cases, 83.

34 A. 189 (=13 I. C. 320=9 A. L. J. 105.)

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

CHHITTAR KUNWAR (*Plaintiff*) *v.* GAUR KUNWAR (*Defendant*).*

[18th December, 1911.]

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APPELLATE CIVIL.

34 A. 189=13 I. C. 320=9 A. L. J. 105.

Hindu law—Hindu widow—Co-widow—Partition—Right to partition when joint enjoyment impossible.

Although Hindu widows taking a joint interest in the inheritance of their husband have no right to enforce an absolute partition of the joint estate between them, yet where the widows cannot go on peaceably in the enjoyment of the property, they can by mutual agreement or otherwise separately hold the property, although they have no right to partition in the proper sense of the term, and the share of one will go by right of survivorship to the other notwithstanding the separation. *Gajapathi Nilamani* v. *Gajapathi Radhamani* (1), *Kathaperumal* v. *Venkabai* (2) and *Bhagwandeen Doobey* v. *Myna Baee* (3) referred to.

THE facts of this case were as follows:—

One Madan Mohan Lal, a Kurmi, died leaving two widows—Gaura Kuar and Chittar Kuar. The latter had a daughter by him; while the former was childless. Gaura applied to the Revenue Court for partition of her share. The plaintiff objected [190] and was referred to the Civil Court. She accordingly brought the present suit for a declaration that according to a custom prevailing in the family, a childless widow was only entitled to maintenance and was not entitled to partition, and also that under the general law a Hindu widow cannot claim partition from her co-widow. The lower court found that the custom was not established. It held further that a co-widow was entitled to have her share partitioned without prejudice to the right of survivorship of the other widow and dismissed the suit. The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant, submitted that on a proper interpretation of the *wajib-ul-arzes* and consideration of the evidence, the custom set up had been proved. He further submitted that one of the co-widows who were in possession of property could not apply for partition, inasmuch as the other co-widow was entitled to get her share by right of survivorship. He relied on *Kathaperumal* v. *Venkabai* (2) and *Gajapathi Nilamani* v. *Gajapathi Radhamani* (4). A co-widow cannot compel partitition, but she may enjoy it under a mutual arrangement; *Bhugwandeen Doobey* v. *Myna Baee* (5), Mayne's Hindu Law, seventh edition, paragraph 554, page 752.

The Hon'ble Pandit *Sundar Lal* (with him Babu *Lalit Mohan Banerji*), for the respondent, was not called upon.

RICHARDS, C. J., and BANERJI, J.—The appellant, who is one of the two widows of one Madan Mohan Lal, brought the suit out of which this appeal has arisen against the other widow of the aforesaid deceased, for a declaration that the defendant, being childless, was only entitled to maintenance and had no right to have the zamindari villages belonging to her deceased husband, partitioned between the two widows. It appears that Madan Mohan Lal died sometime in the year 1909, leaving two widows, who are the parties to this suit. The plaintiff has a daughter, but the defendant has no issue. The names of both the widows were entered

* First Appeal No. 236 of 1910 from a decree of Srish Chandra Basu, Subordinate Judge of Bareilly, dated the 1st of July, 1910.

(1) (1877) I. L. R. 1 Mad. 290.
(2) (1880) I. L. R. 2 Mad. 194.
(3) (1867) 11 Moo. I. A. 487.
(4) (1877) I. L. R. 1 Mad. 290 (300).
(5) (1867) 11 Moo. I. A. 487 (575).

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in the revenue records. The defendant applied to the Revenue Court for partition of a half share. The plaintiff objected and was referred to the Civil Court. Thereupon [191] she instituted the present suit. She put forward her claim on two grounds ; first, that under a custom prevailing among kurmis, to which caste the parties belong, a childless widow only receives maintenance and has no right to the estate of her husband ; and secondly, that under the general Hindu law a widow cannot claim a partition.

The court below has dismissed the plaintiff's claim, being of opinion that the custom alleged had not been proved and that as both the widows inherited the property of their husband, they were entitled to joint enjoyment of the property and to divide it between themselves for the purpose of such enjoyment.

The plaintiff has preferred this appeal, and her first contention is that the custom alleged by her is proved. We are of opinion that this contention has no force. A number of witnesses were examined, who spoke generally as to the existence of the alleged custom, but with the exception of one witness none of the others was able to refer to any instance in which a childless widow was excluded by another having a female child. The only instance which was referred to was that of Hari ; but one instance does not establish a custom. The wajib-ul-arzes of some of the villages were referred to. Some of these wajib-ul-arzes are declarations made by a single owner; and even according to these wajib-ul-arzes, it is manifest that where a widow has a male child, that male child excludes the widow and the childless widow has only a right to receive maintenance from the son. In the original wajib-ul-arzes the vernacular word used is *aulad* (issue), but judging by the context it is manifest that this word was meant to apply to male issue only.

The next contention on behalf of the appellant is that under the Hindu law a widow is not entitled to claim partition. We were referred to the following cases, namely, *Gajapathi Nilamani* v. *Gajapathi Radhamani* (1), *Kathaperumal* v. *Venkabai* (2) and *Bhugwandeen Doobey* v. *Myna Baee* (3). In the case first mentioned, their Lordships, no doubt, observe that " widows taking a joint interest in the inheritance of their husbands have no right to enforce an absolute partition of the [192] joint estate between them." But their Lordships further held that where the widows could not go on peaceably in the joint enjoyment of the property, they could by mutual agreement or otherwise separately hold the property, although they had no right to partition in the proper sense of the term, and that the share of one would go by right of survivorship to the other, notwithstanding the separation. In the case before us, the two widows, although entitled to enjoy the property, appear to be unable to do so peacefully unless they divide it ; in fact the plaintiff in this suit has tried to exclude the defendant altogether from the whole of the property left by her husband, admitting her only to a bare right to maintenance. That being so, we are enable to hold that the defendant has no right to apply for a partition such as would unable her to enjoy her share of the property of her husband for her life. Such a partition would in no way affect the plaintiff's right of survivorship in the event of her surviving the defendant.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

(1) (1877) I. L. R. 1 Mad. 290.
(2) (1880) I. L. R. 2 Mad. 194.
(3) (1867) 11 Moo. I. A. 487.

34 A. 192 (=9 A. L. J. 97=13 Cr. L. J. 122=13 I. C. 778).

REVISIONAL CRIMINAL.

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34 A. 192=9 A. L. J. 97=13 Cr L. J. 122=13 I. C. 778.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

EMPEROR v. BALMAKUND.*

[19th December, 1911.]

Act No. II of 1899 (*Indian Stamp Act*), *section* 65—*Receipt—Money remitted by postal money order and receipt signed on post office form—Further receipt not exigible from payee.*

Where money is remitted by postal money order and the payee has signed the receipt in duplicate on the post office form he cannot legally be compelled to give a further receipt to the payer, and his refusal to do so will not render him liable under section 65 of the Indian Stamp Act, 1899.

THE facts of this case were as follows :—

One Gotting sent a postal money order for Rs. 34 from Mokamah to Balmakund at Allahabad, in part payment of a particular debt. Balmukund signed the usual receipts on the money order form ; and the receipt intended for the remitter was sent in due course by the post office to Gotting and received by him. He thereafter demanded from Balmakund a duly stamped receipt [193] which should mention that the payment was received on account of a certain specified debt. Balmakund refused to give this further receipt. Gotting thereupon complained to the Collector, who sanctioned the prosecution of Balmakund under section 65 of the Stamp Act. The prosecution resulted in a conviction and a sentence of Rs. 50 fine, which were upheld by the Sessions Judge in revision. Balmakund thereupon applied in revision to the High Court.

Munshi *Gulzari Lal*, for the applicant :—

The money order receipt is a good and sufficient receipt, and it was not incumbent upon the applicant to give another receipt. The definition of " receipt " contained in section 2, clause (23) of the Stamp Act, does not make it necessary in a receipt to say on what account the money has been received ; it is enough if it is an acknowledgment of payment. A receipt need not be addressed to any particular person. The money order receipt is an acknowledgment of payment of the sum " specified on the reverse." The name of the payer and the amount are both " specified on the reverse." The receipt is therefore, a complete and sufficient receipt. The question remains whether it is a good receipt ; it is, because by Government notification a money order receipt is exempt from stamp duty. If a stamp of one anna were put on the money order receipt there could be no question that it would be a " duly stamped receipt " within the meaning of section 30 of the Stamp Act, and that no second receipt could be demanded. The stamp was not put on it as the necessity for it was obviated by the Notification. There are other cases of exemption, for example, a receipt for a barrister's fee. If a barrister gives an unstamped receipt for his fee, a second " duly stamped receipt " cannot be demanded from him. Strictly speaking, the money was actually paid by the post office to the applicant, and it was the post office alone who could demand a receipt. As a matter of fact, two receipts were given.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown :—

Mr. Gotting had several accounts with Balmakund. The money which he sent was in respect of one particular account which he

*Criminal Revision No. 388 of 1911 from an order of C. Rustamji, Esq., Sessions Judge of Allahabad, dated the 14th of January, 1911.

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specified in the money order coupon. He was entitled [194] to have the money applied towards that particular account and to obtain a receipt specifying accordingly. The money order receipt is not a good and sufficient receipt as it does not mention the account on which the money is paid. To hold otherwise would lead to great confusion and inconvenience. The money order receipt is not intended to constitute or take the place of a receipt by the payee to the remitter. Its function is merely to discharge the liability of the post office; to satisfy the remitter that the money entrusted by him to the Post Office has been duly paid. The post office acts merely as an agent. Then, the money order receipt cannot be called a "duly stamped" receipt within the meaning of section 30; for it is not "stamped" at all. The object of the Government in exempting money order receipts from stamp duty was only to obviate the necessity of an inquiry in each case by the post office as to whether the payment was without consideration or came under any other exemption or not.

RICHARDS, C. J. and BANERJI, J.—This is an application in revision. The facts are undisputed and very simple. One Mr. Gotting sent a money order for Rs. 34, to the applicant Balmakund. Gotting intended that the Rs. 34 should go in part payment of a certain debt due on a bond. The money was received on the 14th September, 1910, by Balmakund, who, in the usual way, signed in a duplicate receipt and delivered the same to the post office official. One receipt is in the following form :—

ACKNOWLEDGMENT.

"This is a duplicate receipt which will be returned by the post office to the remitter.

"I acknowledge to have received payment of money order No. 3438, for the sum specified on the reverse.

"Date.....1910. Signature (in ink) of payee, or thumb impression of payee if illiterate."

The reverse side is in the following form :

ON POSTAL SERVICE.

"Amount of order (in figures).—Rs. 34-0-0.

"Name of remitter.—Mr. A. W. Gotting.

"Address—Locomotive Department.

"Stamp of the office of issue.—Mokamah, Patna."

The other receipt is in the following form :—

"Received payment of the sum specified on the reverse.

"Dated.....1910. Signature (in ink) of payee or thumb impression if payee is illiterate.

[195] "Paid by me Rs.....As.....

"Signature and designation of official who paid the amount."

On the reverse are the particulars of the amount of the order in words, the name and address of the payee in full. This latter receipt is kept by the post office officials. Mr. Gotting, for reasons of his own, (probably because he was anxious to have a receipt which would show on the face of it an acknowledgment from Balmakund of part payment of the particular debt which he intended in part to discharge) demanded from Balmakund a duly stamped receipt. Balmakund refused contending that the receipt which he had given when he received the money order was sufficient. Later on, on the 30th of October, 1910, however, Balmakund did send a stamped receipt but more or less under protest, still contending that the receipt which he had signed was sufficient compliance

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with the law. Subsequently sanction was obtained for the prosecution of Balmakund under section 65 of the Stamp Act. It was probably due to apprehension of such prosecution that Balmakund signed the stamped receipt to which we have just now referred. The result of the prosecution was that Balmakund was fined Rs. 50. An application was made to the Sessions Judge in revision which application, however, was refused. Hence the present application to this Court.

It is contended on behalf of the applicant that under the circumstances the conviction is illegal. Mr. *Ryves*, on behalf of the prosecution, admits that the punishment is somewhat severe, but contends that the conviction was quite legal, and that an offence was committed under the Stamp Act. The question for us to decide is whether or not the conviction is legal. Section 63 of the Stamp Act provides that any person who, being required under section 30 to give a receipt, refuses or neglects to give the same, shall be liable to a fine which may extend to Rs. 100. Section 30 is as follows:—" Any person receiving any money exceeding Rs. 20 in amount, or any bill of exchange, cheque or promissory note, for an amount exceeding Rs. 20, or receiving in satisfaction of a debt any movable property exceeding Rs. 20 in value, shall, on demand by the person paying or delivering such money, bill, cheque, note or property, give a duly stamped receipt for the same. It is clear that had Mr Gotting made the payment himself or through an agent he would have been entitled to get a receipt [196] for the amount of money which he paid and that such receipt should be duly stamped. It is also clear that under such circumstances Balmakund would have been liable to a conviction if he refused to give such duly stamped receipt. The money, however, was remitted through the post office in the manner to which we have already referred. Section 9 of the Stamp Act provides that the Governor General in Council may by rule or order published in the " Gazette of India" reduce or remit certain duties, including the duty payable upon certain instruments. By Notification No. 735 S. R. dated the 17th of February, 1899, the Governor General in Council, in the exercise of the powers conferred by the aforesaid section, remitted the duties chargeable on certain instruments which are specified at the foot of the order. No 30 is "Receipt endorsed by the payee on a postal money order." It would thus appear that Balmakund gave a receipt in duplicate to the post office authorities, acknowledging the receipt of the money which Mr. Gotting had sent, and that that receipt is expressly exempted from duty by an order of the Governor General in Council duly made in exercise of the powers conferred by the Stamp Act itself. The actual person who made the payment was not Mr. Gotting. It was the post office official. This official got, as he was entitled to get a receipt in duplicate, and the post office regulation provided that the duplicate was to be given by the post office authorities to Mr. Gotting. If it can be said that the money was paid by Gotting at all, it can only be upon the ground that the post office official was the agent of Gotting. It seemed to us most unreasonable that a person who receives money from an agent and gives a valid receipt to such agent, should be required to give another receipt to the principal. Had the money been sent by the hand of an ordinary agent instead of through the post office it could not, we think, be argued for one moment that the agent would be entitled to receive a duly stamped receipt, and that his principal would be entitled to receive a second duly stamped receipt. What reasonable object could be gained by the giving of a second receipt in the present case? Section 30

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33 A. 192=9 A. L. J. 97=13 Cr. L. J. 122=13 I. C. 778.

does not require a person receiving money to specify the particular purpose for which the money was paid. He is only required to give a receipt for the sum paid. Under these circumstances we think [197] that Balmakund ought not to have been convicted under section 66 for having refused to give a second receipt to Gotting. We accordingly allow the application, set aside the conviction and sentence, and direct that the fine, if paid, be refunded.

Conviction set aside.

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34 A. 197 (=9 A. L. J. 124=13 I. C. 284=13 Cr. L. J. 440).

REVISIONAL CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

AJUDHIA PRASAD (*Applicant*) *v.* RAM LAL AND ANOTHER (*Opposite parties*).*

[20th December, 1911.]

Criminal Procedure Code, section 195 (7), *clauses* (*a*), (*b*) *and* (*c*)—*Sanction to prosecute—Sanction refused—Further application—"Case"—"Principal court of original jurisdiction."*

In a suit for arrears of rent exceeding Rs. 100, a decree was passed in favour of the appellant. In course of execution proceedings the respondents made certain statements which, according to the appellant, were false. The appellant applied for sanction to prosecute them under section 195, clause (7) of the Code of Criminal Procedure. The sanction was refused by the Assistant Collector.

Held on application made to the District Judge to grant sanction, that no such application lay. The "case" in connection with which an offence was alleged to have been committed was the proceedings in execution, from which no appeal lay, and the District Judge was not in relation to such proceedings the "principal court of original jurisdiction."

[Diss: 36 I. C. 878=18 Cr. L. J. 46; Fol: 1 Pat. L. J. 206=36 I. C. 320; 2 Pat. L. J. 1; 89 All. 657=42 I. C. 167; Ref: 45 Cal. 836=44 I. C. 177; 1919 Pat. 329=52 I. C. 193=4 P. L. J. 609=20 Cr. L. J. 577.]

THE facts of this case are thus stated in the following order of TUDBALL, J. referring the case to a Bench of two Judges:

"The facts of this case are briefly as follows:—A suit for arrears of rent was brought in the court of an Assistant Collector of the first class, for a sum of over one hundred rupees. It was decreed, and the decree-holder subsequently brought the decree into execution. In the course of the execution proceedings two statements were made by the opposite parties which the present applicant deems to be false. He applied to the court of the Assistant Collector for sanction. That officer refused. Thereupon the present applicant went to the District Judge to have the order refusing sanction set aside. The District Judge held that he had no jurisdiction in the matter and that clause (*c*) of sub-section 7 of section 195 of the Code of Criminal Procedure applied to the matter, as there is no appeal in execution proceedings in the Revenue Court. He held that, as a District Judge, he was not the principal court of original jurisdiction within the meaning of clause (*c*), sub-section 7. The applicant has come here in revision and pleads that the District Judge has refused to exercise jurisdiction which the law has given him. On behalf of the opposite parties it was pleaded that in all cases in which no appeal lies, in order to find out which is the principal court of original jurisdiction within the meaning of this clause, one must look to the nature of the case. If it is a criminal case in which no appeal lies, then the principal court of original [198] jurisdiction will be the principal court of original criminal jurisdiction. If it is a suit in a Revenue Court, where no appeal lies, the principal court of original jurisdiction within the meaning of this clause will be the principal original court of revenue jurisdiction. My attention has been drawn by the applicant to a ruling of this

* Civil Revision No. 37 of 1911.

Court in *Wazir Mahummad* v. *Hub Lal* (1). As I have personally some doubt as to the correctness of that decision, and as the present aspect of the case does not seem to have been placed before that court, I think it would be better to refer this matter to a bench of two Judges. I order accordingly."

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34 A. 197=9 A. L. J. 124 =13 I. C. 284 =13 Cr. L. J. 440.

On the case coming up for hearing before a bench of two Judges,

Mr. *A. H. C. Hamilton*, for the applicant:—

The District Judge was wrong in refusing to exercise jurisdiction. As the suit was one for arrears of rent, an appeal would lie to the District Judge under section 177 of the Tenancy Act, and therefore, under section 195 (7), sub-clause (*b*) of the Code of Criminal Procedure the applicant was right in applying to the District Judge against the order of the Assistant Collector refusing sanction. If the particular proceedings are considered, and if it be held that no appeal would lie from an order passed by a Revenue court in execution proceedings, then the case would be governed by clause (*c*) of section 195 (7), and the District Judge would be the principal court of original jurisdiction. In either case, therefore, whether sub-clause (*b*) or sub-clause (*c*) applied, the District Judge was the proper court which could exercise jurisdiction.

Babu *Piari Lal Benerji* (for Pandit *Uma Shankar Bajpai*), for the opposite party:—

Neither clause (*b*) nor clause (*c*) would give jurisdiction to the District Judge. The words "nature of the case" used in clause (*b*) mean "nature of the case pending" which in the present instance was an "execution case." The word 'case' does not mean 'suit,' and it would not be proper to refer back to the original suit or to consider what its nature was. The proceedings which were pending constituted the 'case,' and it was the nature of these proceedings which had to be looked to. The offence was alleged to have been committed not in connection with the suit, but in connection with the execution case. If in all cases a reference to the nature of the suit were made, various anomalies would [199] result. For example, under section 171 an Assistant Collector of the second class, is empowered to dispose of all execution applications, notwithstanding that the suit might have been decided by an Assistant Collector, of the first class, and all orders passed in execution by the Assistant Collector, of the second class, are appealable under section 176 to the Collector. It would be a grave anomaly to let the Collector hear an appeal from an order in execution proceedings and to let the District Judge hear an appeal from an order granting or refusing sanction in respect of an offence committed in connection with the execution application, and that would be the result if 'nature of the case' meant 'nature of the original suit.' Clause (*c*) deals with cases where no appeals lie. This might mean either (1) where no appeals lie from the decision of the particular tribunal having regard to the constitution of the tribunal, or (2) where no appeals lie from the particular decision having regard to the nature of the particular case. In the present case it is immaterial which of the two meanings is given to the clause. The clause goes on to say that appeal in sanction matters shall be deemed to lie ordinarily to the *principal Court of original jurisdiction*. These words do not always mean *principal* civil *Court of original jurisdiction*. The principal court of original jurisdiction would be the District Judge, the Collector, or the District Magistrate according as the case was a civil, revenue or criminal case. In the present case, as sanction was refused by a Revenue Court,

(1) (1909) I. L. R. 31 All. 313.

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34 A. 197=9 A. L. J. 124 =13 I. C. 284 13 Cr. L. J. 440.

the principal court of original jurisdiction would be the court of the Collector.

Mr. *A. H. C. Hamilton*, was heard in reply.

CHAMIER, J.—A suit for arrears of rent exceeding Rs. 100, was brought in the Court of an Assistant Collector of the first class and was decreed. In the course of execution proceedings in the same court the respondents made statements which, according to the applicant, were false. The applicant then applied to the Assistant Collector for sanction to prosecute the respondents. That officer refused to give sanction, and the applicant then went in appeal to the District Judge, who threw out the appeal on the ground that he had no jurisdiction to hear it. This is an application for revision of the order of the District Judge. On behalf [200] of the applicant it is contended that the case is governed by clause (*b*) of sub-section (7) of section 195 of the Code of Criminal Procedure, and that on a proper construction of that clause the District Judge had jurisdiction. It is contended further that he had jurisdiction even if clause (*c*) of the same sub-section is held to be applicable, and that one or other of these clauses must apply to the case. As regards clause (*b*) the argument for the applicant is that the *case* in connection with which the offence is said to have been committed, was a suit for rent exceeding Rs. 100, against the decree in which an appeal lay to the District Judge, therefore the Assistant Collector, who refused sanction, must be deemed, for the present purpose, to be subordinate to the District Judge, who accordingly ought to have entertained the applicant's appeal. To this the respondents reply that the *case* in connection with which the offence is alleged to have been committed, was the execution proceeding, the order in which was not appealable, therefore clause (*b*) does not apply.

The applicant contends that even if clause (*b*) is held to be inapplicable, clause (*c*) cannot apply, because the opening words of the clause "where no appeal lies" refer only to cases in which no appeal lies against any decisions of the Court, and that the words do not mean as contended by the respondent "when no appeal lies in the case in connection with which the offence is alleged to have been committed." In the alternative the applicant contends that if clause (*c*) applies the Court indicated is the Court of the District Judge. To this the respondents reply that the principal Court of original jurisdiction under the Tenancy Act is the Court of the Collector.

The word "case" has been the subject of many conflicting decisions in connection with section 622 of the Code of Civil Procedure, 1885, and section 115 of the present Code. I do not think that any useful purpose would be served by a reference to those decisions, for the word must be construed with due regard to the context that it appears in, and the purpose for which the section of which forms part was framed. It was this consideration which led the majority of the chartered High Courts to place a narrow meaning upon the word "case" in the section just mentioned. The object of sub-section (7) of section 195 of the Code of [201] Criminal Procedure was to indicate the court to which a court giving or refusing sanction to a prosecution should be deemed to be subordinate within the meaning of sub-section (6) as originally framed. Sub-section (7) provided only that the court giving or *refusing* sanction, should be deemed to be subordinate only to the court to which appeals *ordinarily* lay. This produced a mass of conflicting rulings and clauses (*a*), (*b*) and (*c*) were added with a view to getting rid of the difficulty. Clause (*a*) provides for the

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case of a subordinate court against whose decisions appeals lie to two courts of different grades, and is plain enough. Clause (*b*) provides for the case of a subordinate court against whose decisions appeals lie to two different kinds of courts. Here the test is to what court did an appeal lie in the case in connection with which the offence is alleged to have been committed? The word *case* taken by itself may mean either the original case out of which arose the case or proceeding in which the offence is said to have been committed or the actual proceeding in which the offence is said to have been committed. It must be construed with reference to the context in which it appears. The words are "*nature of the case in connection with which the offence is alleged to have been committed.*" There being a remote connection with an original suit and an immediate connection with an execution proceeding, I am of opinion that the case in connection with which the offence is alleged to have been committed is the execution proceeding. According to the decisions of this Court no appeal lies against an order of an Assistant Collector of the first class passed in execution proceedings under the Tenancy Act. The result is that clause (*b*) does not apply. Does clause (*c*) apply? The opening words of the clause "where no appeal lies" do not appear to me to refer to courts against none of whose decisions an appeal lies, but to refer to particular cases in which no appeal lies. The whole sub-section seems to be confined to courts against whose decisions or some of whose decisions appeals do lie, for the opening words are,—"For the purposes of this section every court shall be deemed to be subordinate only to the court to which *appeals from the former court ordinarily lie*" (the italics are mine). The result of this construction is possibly that the Legislature has made no provision in section 195 for an appeal against [202] an order of a Small Cause Court giving or refusing sanction, and it may be that the only court which can interfere with such an order is the High Court. This result may not have been contemplated, but the construction advocated by the applicant seems to me to be clearly inadmissible. It would have been another matter if clause (*c*) had formed a separate sub-section. I hold that clause (*c*) applies to the present case, and therefore the applicant should have appealed to "*the principal court of original jurisdiction.*" I can discover no justification for reading these words as if they were "*principal court of original civil jurisdiction.*" The clause applies to all classes of cases, and it is impossible to suppose that the Legislature intended the principal court of original civil jurisdiction to revise the orders of Criminal and Revenue Courts with which it has no concern as a Civil Court. The circumstance that District Judges in this province generally have the powers of Sessions Judges and hear appeals in Revenue cases, seems to be wholly irrelevant. The principal court of original jurisdiction under the Tenancy Act is clearly not the court of the District Judge.

For the above reasons I am of opinion that the District Judge was right in declining to entertain the applicant's appeal, and I would dismiss this application with costs.

KARAMAT HUSAIN, J.—I am of opinion that the word "case" in clause (*b*), sub-section (7), of section 195 of the Code of Criminal Procedure (Act No. V of 1898), means the actual proceedings in which the offence is said to have been committed and not the original case out of which those proceedings arose. I am also of opinion that the opening words of clause (*c*), sub-section (7), of section 195 of the Code "where no

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appeal lies " refer to cases in which no appeal lies and not to courts against the decisions of which there is no appeal. It was so held by me in *Wazir Muhammad* v. *Hub Lal* (1). In that ruling it was assumed that the court of District Judge was the principal court of original jurisdiction. That, however, is not the case, and the nature of the proceedings in which sanction is given or refused is to determine the principal court of original jurisdiction. [203] For the above reasons I agree with my learned brother in dismissing the application.

BY THE COURT. – Order of the Court is that the application be dismissed with costs.

Application dismissed.

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34 A. 203 (=9 A. L. J. 108=13 I. C. 958).

MATRIMONIAL.

Before Mr. Justice Chamier.

ESTHER MARIE JACKSON (*Petitioner*) *v.* FREDERICK ORMOND LAYLAND JACKSON (*Opposite party*).*

[22nd December, 1911.]

Act No. IV of 1869 (*Indian Divorce Act*), *section* 57—*Marriage—Remarriage of petitioner in divorce proceedings within six months of the decree becoming absolute.*

Where the successful petitioner in a suit for dissolution of marriage entered into a second marriage within six months of the decree for dissolution of marriage becoming absolute, it was *held* that the second marriage was void. *Warter* v. *Warter* (2) followed.

[Fol : 38 Mad. 452.]

THIS was a suit by Esther Marie Jackson for a declaration that her marriage with Frederick Ormond Layland Jackson is null and void. The parties, who are Christians, were married in Allahabad, on the 12th of January, 1910. The respondent, who had been married to another woman, had obtained in the Calcutta High Court a decree *nisi* for dissolution of that marriage, and the decree had been made absolute on the 6th of December, 1909. He believed that on the decree being made absolute, he was free to marry again, and he assured the present petitioner that all the necessary formalities had been complied with. The respondent's former wife was alive when the parties were married. On the above facts the petitioner claimed to be entitled to a declaration that her marriage with the respondent is null and void.

Mr. *R. K. Sorabji*, for the petitioner.

The opposite party was present in person.

CHAMIER, J.—This is a suit by Esther Marie Jackson for a declaration that her marriage with Frederick Ormond Layland Jackson is null and void.

The parties, who are Christians, were married in Allahabad, on the 12th of January, 1910. The respondent, who had been married to another woman, had obtained in the Calcutta High [204] Court a decree *nisi* for dissolution of that marriage, and the decree had been made absolute on the 6th of December, 1909. He believed that on the decree being made absolute, he was free to marry again and he assured the present petitioner

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* Matrimonial suit No. 6 of 1911.

(1) (1909) I. L. R 31 All. 318.
(2) (1890) L. R. 15 P. D. 152; 59 L. J. P. and M. 87.

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34 A. 203=9 A. L. J. 108=13 I. C. 958.

that all the necessary formalities had been complied with. I find it proved that respondent's former wife was alive when the parties were married.

On the above facts the petitioner claims to be entitled to a declaration that her marriage with the respondent is null and void.

Section 19 of the Indian Divorce Act provides that such a declaration may be made at the instance of a wife on the ground that the former wife of the husband was living at the time of the marriage, and the marriage with such former wife was then in force. Section 57 of the Act provides that when six months after the date of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction or when any such appeal has been dismissed, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death. Provided that no appeal to His Majesty in Council has been presented against any such decree. There is no appeal to His Majesty in Council against a decree *nisi* for dissolution of a marriage (see section 56), therefore there can be no doubt that the "decree of a High Court dissolving a marriage" referred to in section 57 is the decree absolute not the decree *nisi*. The section was construed in this way by SIR JAMES HANNEN in the case of *Warter* v. *Warter* (1), where one Taylor had obtained in the Calcutta High Court a decree absolute for dissolution of his marriage on the 27th of November, 1879, and the divorced wife was married to Colonel Warter on the 3rd of February, 1880. Three days later Colonel Warter made a will in favour of his wife. In April, 1881, on the advice of a solicitor, Colonel and Mrs. Warter were re-married at a registry office. Colonel Warter having died without re-executing his will or making another the question arose whether the marriage of April, 1881, revoked the will. It was held that the marriage of February, 1880, was null and void, and therefore the marriage of April, 1881, was valid and revoked the will. SIR JAMES HANNEN [206] said:—"The Indian law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. This is an integral part of the proceedings by which alone both the parties to the marriage can be released from their incapacity to contract a fresh one." Following this decision I hold that the respondent's marriage with his former wife was still in force when he went through the form of a marriage with the petitioner.

I find on the issues that the petitioner professes the Christian religion, and that the marriage between her and the respondent is null and void.

I make a declaration accordingly. The respondent will pay the petitioner's costs.

Suit decreed.

34 A 205 (=9 A. L. J. 95=13 I. C. 384).

REVISIONAL CIVIL.

Before Mr. Justice Chamier.

MUTASADDI LAL (*Applicant*) *v.* MULE MAL (*Opposite party*).*

[3rd January, 1912.]

Act No. XII of 1887 (*Bengal, N. W.-P. and Assam Civil Courts Act*), *sections* 8 (2), 21 (3)—*Assignment to Additional Judge of cases coming from a particular district—Jurisdiction.*

* Civil Revision No. 75 of 1911.

(1) (1890) L. R. 15 P. D. 152 ; 59 L. J. P. and M. 87.

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REVISIONAL CIVIL.

34 A. 205=9 A. L. J. 95 =13 I. C. 384.

A District Judge has power not merely to make over appeals to an Additional Judge for hearing, but to direct that all appeals and other cases coming from a particular area within the judicial division shall be filed in his Court.

[Ref: 61 I. C. 513=19 A. L. J. 192=43 All. 409.]

THE facts of this case were as follows:—

An application was made under section 193 of the Code of Criminal Procedure for sanction to prosecute the applicant before the Subordinate Judge of Muzaffarnagar, but it was dismissed by him. An appea was addressed to and filed in the court of the Additional District Judge of Meerut, who allowed it and granted the sanction asked for. The applicant came up in revision to the High Court. The case was heard by CHAMIER, J., on the 24th of November, 1911, when he called on the Additional Judge to show how he came to exercise jurisdiction in the case. The Additional Judge submitted that the District Judge of Meerut had, by an order passed in 1907, directed that all appeals from the Muzaffarnagar district should be filed in his court.

[206] Mr. *C. Ross Alston* (with him Mr. *A. H. C. Hamilton*), for the applicant:—

Under section 21, sub-section (3) of Act No. XII of 1887, the District Judge has no power to assign cases in this manner. It may be done by the Local Government by some general order. The word 'assign' in the sub-section does not mean assigned by the District Judge. Ordinarily no appeals would lie in the court of the Additional Judge from an order of the Subordinate Judge. They may be transferred to him for hearing, but they cannot be filed in his court. There is no section empowering the District Judge to pass such an order.

Dr. *Tej Bahadur Sapru*, for the opposite side, referred to section 8, clause (2), of Act No. XII of 1887. Section 8, clause (2), would apply if the functions of the Judge can be said to include the receiving as well as the hearing of the appeals.

CHAMIER, J.—On November, the 24th, I called upon the Additional Judge to explain how he came to exercise jurisdiction in this case and to forward to this Court, copies of any general or special orders bearing upon the question. The report now made by the Additional Judge and the copies of orders submitted by him show that in 1907 the District Judge of Meerut assigned to the Additional Judge all appeals, applications and miscellaneous cases coming from the Muzaffarnagar district, and it is in pursuance of those orders that the present Additional Judge entertained the appeal in the present case. It is contended that the District Judge had no power to make over the work of the Muzaffarnagar district to the Additional Judge and that the word *assign* in section 21, sub-section (3), of the Civil Courts Act does not refer to action to be taken by the District Judge but to action to be taken by the Local Government. There is no section in the Act which empowers the Local Government to *assign* to an Additional Judge work which in the ordinary course would come before a District Judge, but there is a provision in section 8, sub-section (2), to the effect that an Additional Judge shall discharge any of the functions of the District Judge which the District Judge may *assign* to him. It is quite clear to me that the District Judge had power to *assign* appeals and other cases coming from the Muzaffarnagar district to the Additional Judge. **[207]** Therefore the Additional Judge had jurisdiction to hear the appeal in the present case. The application for revision fails and is dismissed with costs.

Application dismissed.

34 A. 207 (=9 A. L. J. 159=13 I. C. 632.)

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APPELLATE CIVIL.

34 A. 207=9 A. L. J. 159 =13 I. C. 632.

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

RAJA DEI (*Defendant*) *v* UMED SINGH (*Plaintiff*).*

[8th January, 1912.]

Hindu law—Hindu widow—Suit by remote reversioner to set aside alienation by widow —Immediate reversioner a female having a life estate only—Acceleration of estate.

N died leaving a widow W, a daughter R. D. and a daughter's son K. S W, during the life-time of R D, made a gift of the property to K. S. *Held*, on suit by other reversioners more remote than K S for declaration that the gift was not binding on them, that the suit would lie. The question of the acceleration of K S's estate would not arise because at the date of the gift the donee was not the next reversioner. *Balgobind* v. *Ram Kumar* (1), *Hanuman Pandit* v. *Jota Kunwar* (2) and *Abinash Chandra Mazumdar* v. *Harinath Shaha* (3) followed. *Madari* v *Malki* (4) and *Ishwar Narain* v. *Janki* (5) dissented from. *Rani Anand Koer* v. *The Court of Wards* (6) referred to.

[Foll: 40 All 518=46 I. C. 186 : 51 I. C 357=4 Pat. L. J 734=1920 Pat. 33 ; Ref: 68 I. C. 795=35 C. L. J. 66; Fol: 71 I. C. 755.]

THE facts of this case were as follows :—

One Nagina died, leaving a widow, Musammat Waziri and a daughter, Raja Dei. During the life-time of the daughter, Musammat Waziri made a gift of the property to the daughter's son, Kan Singh. The plaintiffs, who were the next male reversioners, brought the present suit to set aside the alienation. The defendant pleaded that they had no right to sue, and that the gift merely accelerated the succession of Kan Singh.

Both courts held that there could be no question of acceleration, as the gift was made not to the daughter but to the daughter's son. They also held that the plaintiffs, in spite of being remote reversioners, were entitled to sue. The defendant appealed.

[208] Babu *Lalit Mohan Banerji*, for the appellant, cited *Bhupal Ram* v. *Lachma Kuar* (7), *Tulsha* v. *Baru* (8), *Hansraj Morarji* v. *Bai Moghibai* (9), *Abinash Chandra Mazumdar* v. *Hari Nath Shaha* (3), *Bepin Bihari Kundu* v. *Durga Charan Banerji* (10), *Madari* v. *Malki* (4), *Balgobind* v. *Ramkumar* (1), *Ishwar Narain* v. *Janki* (5).

Mr. *Nihal Chand*, for the respondents, was not called upon.

CHAMIER, J.—Nagina Singh died many years ago, leaving a widow, Musammat Waziri, a daughter, Musammat Raja Dei, and a daughter's son, Kan Singh. In June, 1909, Musammat Waziri, who was in possession of the estate of her husband, made a gift of it to Kan Singh. The plaintiffs at once brought this suit for a declaration that the gift was not binding upon them. The plaintiffs other than the present respondent, Umed Singh, are more distantly related to Nagina Singh than Umed Singh is. The Courts below have agreed in making a declaration as prayed in favour of Umed Singh. Kan Singh died while the suit was pending in the court

* Second Appeal No. 402 of 1911 from a decree of C. E. Guiterman, Additional Judge of Saharanpur, dated the 9th of March, 1911, confirming a decree of Pramatha Nath Banerji, Subordinate Judge of Saharanpur, dated the 22nd of March, 1910.

(1) (1884) I. L. R. 6 All. 431.
(2) Weekly Notes, 1908, p. 207.
(3) (1904) I. L. R. 32 Cal. 62.
(4) (1884) I. L. R. 6 All. 428.
(5) (1893) I. L. R. 15 All. 132.
(6) (1880) L. R. 8 I. A. 14 ; I. L. R. 6 Cal. 764.
(7) (1888) I. L. R. 11 All. 259.
(8) (1908) 4 A. L. J. 677.
(9) (1905) 7 Bom. L. R. 622.
(10) (1908) I. L. R. 35 Cal. 1086.

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APPELLATE CIVIL.

34, A. 207=9 A. L. J. 188 =13 I. C. 632

of first instance. The appeal to the lower appellate court was filed by Musammat Raja Dei, and it is she who has filed this second appeal. In this Court it is contended that at the date of the institution of this suit, Umed Singh was not the nearest reversionary heir of Nagina Singh, and therefore the suit was not maintainable. Indeed, it is contended that even Kan Singh, supposing he had not been the donee of the property, could not have maintained a suit for a declaration inasmuch as the next reversioner was his mother, Raja Dei.

There is, of course, no doubt that the nearest reversioner, who is the presumptive heir, though he may have only a contingent interest, may sue for a declaration that a transfer by a female heir in possession of the property of the last full owner does not bind the estate. Upon the question whether a remote reversioner may maintain such a suit when the immediate reversioner is or rather will be the holder of a life-estate only, as where the immediate reversioner is a Hindu female, there is some conflict of [209] authority in this Court. In *Madari* v. *Malki* (1) STRAIGHT and BROHDURST, JJ., held that such a suit could not be maintained unless the immediate reversioner was shown to be in collusion with the heir in possession. but in *Balgobind* v. *Ram Kumar* (2) OLDFIELD and MAHMOOD, JJ., held that such a suit could be maintained.

In *Ishwar Narain* v. *Janki* (3) TYRRELL and BLAIR, JJ., refused to follow the decision in the latter case and adopted the view taken in the former case. In the case of *Hanuman Pandit* v. *Jota Kunwar* (4), my learned colleague, after referring to several decisions of this and other courts, said that he preferred the decision in *Balgobind* v. *Ram Kumar*, and the same view was taken in *Dirghiai Singh* v. *Jagannath Singh* (5), which is the latest case in this Court. The balance of authority in the Calcutta High Court is clearly in favour of the view taken in *Balgobind* v *Ram Kumar*, and the Madras High Court have held in several cases that such a suit can be maintained by a remote reversioner when the immediate reversioner is a female entitled to a life-estate only. I have myself in several cases in Oudh followed the view taken by OLDFIELD, and MAHMOOD JJ., in *Balgobind* v. *Ram Kumar*, by the Madras High Court and by many Judges in the Calcutta High Court, and I am content to adopt the arguments contained in the judgment of MAHMOOD, J., and in the judgment of BRETT and MOOKERJEE, JJ., in the latest case in the Calcutta High Court. *Abinash Chandra Mazumdar* v. *Harinath Shaha* (6) I am of opinion that a remote reversioner presumptively entitled to the full ownership of the property can maintain such a suit as this, where the immediate reversioner is a female who will take, if anything, a limited or life-estate only. The existence of Raja Dei, then, in my opinion, offers no bar to the maintenance of the present suit Nor in my opinion is the maintenance of the suit barred by the fact that Kan Singh was at the date of the institution of the suit the next reversioner presumptively entitled to the full ownership of the [210] property. In *Rani Anund Koer* v. *Court of Wards* (7) their Lordships of the Privy Council said :—

" If the nearest reversionary heir refuses without sufficient cause to institute proceedings or if he has precluded himself by his own act or

(1) (1884) I. L. R. 6 All. 428.
(2) (1884) I. L. R. 6 All. 431.
(3) (1893) I. L. R. 15 All. 182
(4) Weekly Notes, 1908, p. 207.
(5) F. A. No. 310 of 1910.
(6) (1904) I. L. R 32 Cal. 62.
(7) (1880) L. R. 8 I. A. 14 ; I. L. R. 6 Cal. 764.

conduct from suing or has colludedwith the widow or concurred in the Act alleged to be wrongful, the next presumptive reversioners would be entitled to sue."

These remarks clearly cover the present case where the nearest reversionary heir was a female who supports the alienation in question, and the nearest reversionary heir presumptively entitled to the full ownership of the property was the person in whose favour the transfer complained of was made. In my opinion the courts below were right in holding that the respondent, Umed Singh, was competent to maintain this suit. It has not been suggested that they did not exercise a wise discretion in making a declaration in his favour. I would observe in conclusion that no question of acceleration of estates arises here, for Khan Singh, the donee, was not the next reversioner. I would dismiss the appeal with costs.

KARAMAT HUSAIN, J.—I agree with my learned colleague in the order proposed by him.

BY THE COURT.— Order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

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34 A. 210 (=13 Cr. L. J. 141=9 A. L. J. 162=13 I. C. 829.)

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* BANSI AND OTHERS.*

[10th January, 1912.]

Act No. XLV of 1860 (*Indian Penal Code section* 426—*Act No. VIII of* 1873 (*Northern India Canal and Drainage Act, sections* 7, 70—*Cutting walls of canal—Mischief—Penal provisions of the Canal Act not exclusive of the Indian Penal Code.*

Held that section 70 of the Northern India Canal and Drainage Act, 1873, does not bar the prosecution of an accused person under any other law, for any offence punishable under the Canal Act : *held* also that it is an act of wilful mischief punishable under the Indian Penal Code for any person to make a breach in the wall of a canal.

[211] IN this case the applicants were convicted of having cut a canal bank for the purpose of irrigating their fields. They were charged under section 430 of the Indian Penal Code and sentenced to one year's imprisonment by the Magistrate which was reduced by the Sessions Judge to three months. The applicants applied to the High Court in revision.

Mr. *C. Dillon*, for the applicants :—

There is no evidence of a diminution in the supply of water. The case comes properly under section 70 of the Canals Act, (VIII of 1873), and not under section 430 of the Indian Penal Code. It is not proved what class of canal was cut. It was a time of general scarcity. The offence is very trivial. He cited *Emperor* v. *Tajuddin* (1).

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown :—

There is no necessity to prove diminution of water supply ; the mere cutting of the embankment is an offence by itself.

TUDBALL, J.—The applicants have been convicted by the Magistrate of an offence under section 430 of the Indian Penal Code. They were

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* Criminal Revision No. 634 of 1911, from an order of E. C. Allen, Sessions Judge of Mainpuri, dated the 28th of October, 1911.

(1) Weekly Notes, 1908, p. 55.

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sentenced to one year's rigorous imprisonment each. On appeal the Sessions Judge reduced the sentence to three months' rigorous imprisonment. In revision it is urged on their behalf that the convictions should be really under section 70 of Act VIII of 1873, in the absence of evidence to show that any diminution of the supply of water for agricultural purposes was caused or likely to be caused by the act done by the applicants. The object of this application is really to secure a reduction of sentence. I have examined the record, and there is nothing in the evidence to show of what class the canal was, the bank of which was cut; that whether it was the bank of a main canal or of a distributary. It is impossible in the absence of evidence on the point to hold that the act done was one which caused or was likely to cause a diminution of the supply of water for agricultural purposes. It appears that the applicants wanted water for the purpose of sowing their field. As they were unable to obtain it in a lawful manner, they proceeded to steal it. As the records stands, it is impossible to uphold the conviction under [212] section 430 of the Indian Penal Code. In any case mischief was committed. It is an act of wilful mischief for any person to make a breach in the wall of a canal. It is an act which causes such a change in property as destroys or diminishes its value or utility or affects it injuriously. There is nothing on the record to show the extent of damage done. The conviction must, therefore, be held under section 426 of the Penal Code. It is true that the act is also covered by section 70 of the Canal and Drainage Act. But the offence committed is far from trivial. Section 7 shows clearly that section 70 does not bar the prosecution under any other law of any offence punishable under the Canal Act. The maximum sentence under section 425 is three months' rigorous imprisonment. The sentence upheld by the lower appellate court is, therefore, not in excess of the maximum allowed by law. The offence is a serious one and the act done might have resulted in very great loss, not only to the accused but to other persons as well. In the circumstances of the case I see no object in interfering with the sentence as maintained by the lower court. I alter the conviction to one under section 426 of the Indian Penal Code and uphold the sentence. The applicants, if on bail, will surrender.

Conviction altered.

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[213] PRIVY COUNCIL.

MATA DIN (*Defendant*) *v.* AHMED ALI (*Plaintiff*). *

[2nd November, 1911 and 16th January, 1912.]

[*On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.*]

Muhammadan law—Guardian—Construction of will—Alienation of property of minor by his brothers acting as executors of will and guardians of minor—Sale not binding on minor—Right of suit to redeem mortgage—Act No. XV of 1877 (Indian Limitation Act), schedule II, articles 44 and 144.

A Muhammadan testator by his will left all his property to his four grandsons (brothers), but did not expressly appoint any executors of his will or

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* *Present*:—Lord MACNAGHTEN, Lord ROBSON, Sir JOHN EDGE and Mr. AMEER ALI.

guardians of such of his grandchildren as might be minors at his death, nor was there in the will any intention to entrust the administration of the property to any particular individuals. The testator died in 1887; and on the 15th of June 1889 the three elder grandsons on their own behalf, and purporting to act also as the guardians of the fourth grandson, the respondent (plaintiff) then a minor, sold some of the property to the appellant (defendant). The appellant was a mortgagee of two villages on the estate under two mortgages executed by the testator on the 2nd of December 1885, and the 7th of August 1886 for ten years and seven years respectively; and the effect of the sale had been to pay off the later mortgage on the smaller village, and other debts, by selling the larger village to the mortgagee. The respondent attained his majority in 1892 or 1893, and treating the sale of the 15th of June 1889 as a nullity, and the mortgage as still subsisting, he tendered to the appellant the amount of mortgage money necessary to redeem the larger village, and on the appellant refusing to accept it, brought a suit for redemption on the 14th of September 1905.

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Held that the elder brothers were not authorized either by the will or by the Muhammadan law to act as guardians of the minor, and that he was entitled on attaining his majority to treat the transaction of the 15th of June 1889 as being void as against him.

Held also that the possession of the appellant did not become adverse to the respondent until the expiry of the term of the mortgage of 1885, namely the 2nd of December 1895, and therefore the suit was not barred by the 12 years period provided by article 144 of schedule II of the Limitation Act (XV of 1877). Article 44, schedule II, of the same Act was not applicable, as the sale was made not by a guardian but by an unauthorized person.

[**Ref**: 12 M. L. T. 147=23 M. L. J. 244=1912 M. W. N. 889=15 I. C. 576=37 Mad. 514; 21 I. C. 128; 14 M. L. T. 414; 29 I. C. 439=25 M. L. J. 733; **Fol**: 19 M. L. T. 346=35 I.C. 243; 1 Pat. L. J. 188=31 I.C. 85; **Dist**: (1916) 2 M. W. N. 341=37 I.C. 728 **Ref**: 52 I.C. 871; 6 I.C. 51; 62 I.C. 428; 82 I.C. 369; 68 I.C. 731; 71 I.C 491; 78 I.C. 946; **Fol**: 77 I. C. 705; (unauthorised guardian—alienation). **Ref**: 26 I.C. 179=38 Mad. 1125=27 M.L.J. 285; 50 I.C. 935=17 A.L. J. 765=41 All. 492; 59 I.C. 559=32 C. L. J. 48=24 C.W.N. 1016; 61 I. C. 384; 44 Bom. 742=58 I.C. 257; **Fol**: 83 I.C. 1040=394 C.L.J. 394;]

APPEAL from a judgment and decree (7th August 1907) of the Court of the Judicial Commissioner of Oudh, which varied the decree (9th March 1907) of the District Judge of Lucknow, the latter decree having affirmed the decree (28th May 1906) of the Subordinate Judge of Lucknow.

The suit out of which this appeal arose was brought by the respondent for the redemption of a one-fourth share of a [214] mortgage of a village called Kabirpur, dated the 2nd of December 1885. The appellant (the defendant) was in possession of the mortgaged property under a deed of sale, dated the 15th of June 1889, at which date the plaintiff was a minor.

The main question for decision on this appeal was whether the plaintiff was or was not bound by the deed of sale. All three Courts in India held that he was not so bound and consequently was entitled to succeed in his suit.

The facts giving rise to the litigation were that one Amir Haidar, a Muhammadan possessed of considerable property, including the village of Kabirpur, died on the 12th of August 1887 leaving a will, dated the 7th of December 1886, the provisions of which, so far as they are material for the purpose of this report, were as follows :—

"In respect of taluqa Gauria the following conditions will be observed—My four grandsons, i.e Majid Husain, Ashraf Husain, Muhammad Ali and Ahmad Ali, will be the owners and possessors of the taluqa in equal shares after me and will manage it in union. The *sanad* of the taluqa shall be in the name of my eldest grandson, Majid Husain. After him in the name of every eldest in order of succession and the same order will continue in the family. After deducting the *lambardari* dues and proper and necessary expenses (which will be incurred in consultation of the four grandsons) the total profits and other entire incomes of *mal* and *sewae* will be divided equally,

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If the other grandsons make a request to the holder of the *sanad* for the partition, then it will be incumbent on him to divide (the property) in equal shares in spite of the *sanad*."

After devising the village of Dhakwa, an incumbrance on which was to be discharged by the four grandsons, to the testator's daughter, the will proceeded in paragraph 3:—

"Besides the property specified and detailed above, my four grandsons will be owners, in equal shares, of the property which is mine or which I may or will acquire.

Then after making provision for future expenses to be borne by the property the will concluded (paragraphs 8 and 9):—

"8. My four grandsons will divide equally among themselves, with the exception of the aforesaid village Dhakwa, all the single villages and detached plots of lands, which I took under mortgage and purchase in the fictitious names of my grandsons, and all the houses.

"9. The burden of the whole debt which may be found due from me after my death will be on my entire property moveable and immoveable, excepting the village Dhakwa, and my four grandsons will be responsible for its liquidation."

At the testator's death he left property of about the value of Rs. 7,000. a year and debts amounting to about Rs. 30,000 [215] and the sale of Kabirpur to the defendant was for purpose of liquidating these debts.

The grandsons named in the will were the children of a son who predeceased the testator, and the present respondent Ahmad Ali, the youngest of them, was about 12 years old when the testator died. They formed one household, and enjoyed and managed the property jointly, the lands being registered in their joint names on their grandfather's death. No guardian was appointed for the minor brother.

The appellant was one of the creditors of the estate in whose favour the testator had executed the mortgage of fifteen-sixteenths of the village of Kabirpur on the 2nd of December 1885 for Rs. 13,000 and another mortgage of one-fourth of a village called Karora for Rs. 3,000 on the 7th of August 1886. The terms of these two mortgages were ten and seven years respectively. There was also due to the appellant on another account a sum which on the 7th of January 1889 amounted to Rs. 2,000. By a deed executed on that date by the grandsons who had attained majority of whom one Ashraf Husain signed it for the respondent as well as for himself, the Rs. 2,000 balance was made a further charge on the property comprised in the mortgage of the 2nd of December 1885. On the village Karora arrears of revenue to the extent of Rs. 412 accrued and was paid by the appellant. Under the circumstances it appeared to be preferable to sell a portion of the property and pay off the mortgages rather than keep them up. Accordingly an agreement was made with the appellant that he should buy Kabirpur in consideration of the debts secured thereon and on Karora together with the sum of Rs. 412 and a small sum in cash altogether amounting to Rs. 18,500. This transaction was carried out by the deed of the 15th of June 1889, which was executed in the same manner as that of the 7th of January. The three mortgage deeds were returned and the appellant thereupon became possessed of the village of Kabirpur as owner.

The plaintiff (respondent) came of age in 1893, but it was not until September 1905 that, treating the mortgage of 1885 as still existing to the extent of his one-fourth share, he offered the appellant the sum of Rs 4,500 for the redemption of his share, [216] and on the appellant refusing to accept it, the suit out of which the present appeal arose was instituted on

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the 14th of September 1905, the plaintiff claiming to redeem the mortgage on Kabirpur to the extent of his one-fourth share.

The defence appears from the issues, which were (1) Is the plaintiff bound by the sale-deed, dated the 15th of June 1889? (2) Is the claim for redemption barred by limitation? (3) Is the plaintiff bound by the sale-deed, dated the 15th of June, 1889? (4) Is the plaintiff estopped from questioning the acts of Ashraf Husain relating to the property in suit? (5) Did the plaintiff make a legal tender on 11th September, 1905?

The Subordinate Judge decided the first, third and fourth issues in favour of the plaintiff, and on the second issue he found that sum payable by the plaintiff on redemption was Rs. 2,795.

On appeal by the defendant the District Judge affirmed the decision of the Subordinate Judge. He was of opinion that the grandsons were not appointed by the will either executors or guardians, and that assuming the adult grandsons could be considered executors it would still be incumbent on the defendant to show that the sale of the minor's share was made for his interest and for necessity. On this point he found, in accordance with the opinion of the Subordinate Judge, that although the brothers may have acted in perfect good faith it was not shown that the sale was inevitable or that the course adopted was the best and most beneficial. The District Judge further held that apart from the will the plaintiff could not be bound by his brothers' acts and that the deed of sale being a nullity as far as his interest was concerned no question of ratification or acquiescence arose. Finally he was of opinion that the suit was not barred by limitation.

The defendant then appealed to the Court of the Judicial Commissioner and the appeal was heard by MR. E. CHAMIER, Judicial Commissioner, and MR. R. GREEVEN, 2nd Additional Judicial Commissioner, who held that the fact of the brothers living in commensality like the members of a joint Hindu family was immaterial; that a *de facto* guardian of a Muhammadan minor cannot sell the minor's interest; and that under the [217] will the adult grandsons were not appointed executors or testamentary guardians. They were further of opinion that the transaction did not admit of being ratified; and on the question of limitation that the suit was not barred.

The judgment of the Court of the Judicial Commissioner will be found in the report of the case before that Court in (1908) 11 Oudh Cases, 1.

On this appeal:—

Kenworthy Brown and *A. P. Sen* for the appellant referring to the certificate of appeal granted by the Judicial Commissioner's Court on the ground that a question of law of public importance was raised namely, "whether the transfer of a Muhammadan minor's property by a person who was not his natural guardian but who was *de facto* his guardian should be upheld if made to discharge a debt payable by the minor," contended that in the circumstances of the case the executants of the deed of 15th June, 1889, had power both under the will and under the Muhammadan law to sell the village Kabirpur including the respondent's interest therein. The respondent's brothers were, it was submitted, executors under the will, and were thereby appointed to be his guardians, and were his natural guardians and his guardians *de facto*. As to the powers of persons in that position the will showed that the estate was to be administered by the adult brothers: see Probate and Administration

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Act (V of 1881), sections 3 and 7, and *In the goods of Russell* (1); and as to the power of an executor reference was made to *In the goods of Indra Chandra Singh, Sarasati Dasi* v. *Administrator General of Bengal* (2), and the Probate and Administration Act (V of 1881, as amended by Act VI of 1889), section 90. As to the Muhammadan law on the powers of guardians reference was made to Ameer Ali's Muhammadan law (Ed. 1894) Vol. I, page 556; Baillie's Muhammadan law, page 632; Shama Charan Sarkar's Muhammadan law, page 90. [Lord MACNAGHTEN. What is a *de facto* guardian?] A person who is in the position of a guardian, whether or not he is legally so: in this case a person who has care of the property of a minor though without any special authority: See *Hari Saran Moitra* v. [218] *Bhubaneswari Debi* (3) as to the power of a Hindu widow as natural guardian of her adopted son though not appointed guardian, and unauthorized by the Court to act on his behalf. As to the Muhammadan law the recent Calcutta and Allahabad cases were in favour of the appellant's contention. Reference was made to *Mafazzal Hosain* v. *Basid Sheikh* (4): *Ram Charan Sanyal* v. *Anukul Chandra Acharjya* (5); *Majidan* v. *Ram Narain* (6); *Hasan Ali* v. *Mehdi Husain* (7); and Ameer Ali's Muhammadan law (Ed. 1884), Vol. II, p. 496; *Hamir Singh* v. *Zakia* (8) which is against the appellant; *Harbai* v. *Hiraji Byramji Shanja* (9); the appellant contends here that the sale was for the respondent's benefit [Lord MACNAGHTEN referred to *Baba* v. *Shivappa* (10) and *Sita Ram* v. *Amir Begam* (11)]. It was submitted that the respondent's brothers having taken the property under the will had power to sell and pay creditors, as Sargent, C. J., said the mother in the case of *Baba* v. *Shivappa* might have done: as executors they can under Muhammadan law take care of the interests of a minor: *Abdul Khader* v. *Chidambaram Chettiyar* (12).

As to limitation, Ahmad Ali attained his majority in 1892, and the suit was not brought until September 1905. The suit was barred therefore both under article 44 and article 144 of the Limitation Act (XV of 1877).

DeGruyther, K. C. and *B. Dube* for the respondent contended that by the Muhammadan law the sale of the 15th of June 1889 was *ab initio* void so far as the respondent's interest was concerned, and conveyed no title to the appellant. Reference was made to *Bukshan* v. *Maldai Kooeri* (13), where it was held that sale of a minor's property was only permissible in urgent cases, and with clear advantage to the minor; and that an elder brother was not in the position of a guardian, and had no power as such over the property of the minor members of the family: *Moyna* [219] *Bibi* v. *Banku Behari* (14); *Bhutnath Dey* v. *Ahmed Hossain* (15); *Nizam-ud-din Shah* v. *Ananda Prasad* (16); *Mafazzal Hosain* v. *Basid Sheikh* (17). The general effect of the cases was that a person who assumes authority is held to have no power to deal with the property of a

(1) (1892) L. R. P. D. 380.
(2) (1896) I. L. R. 23 Cal. 580.
(3) (1888) I. L. R. 16 Cal. 10 (55); L. R. 15 I. A. 195 (202).
(4) (1906) I. L. R. 34 Cal. 86.
(5) (1906) I.L.R. 34 Cal. 65 (67 bottom of page).
(6) (1903) I. L. R. 26 All. 22.
(7) (1877) I. L. R. 1 All. 533.
(8) (1875) I. L. R. 1 All. 57.
(9) (1895) I. L. R. 20 Bom. 116.
(10) (1895) I. L. R. 20 Bom. 199.
(11) (1886) I. L. R. 8 All. 324 (338).
(12) (1908) I. L. R. 32 Mad. 276.
(13) (1869) 3 B. L. R. A. C. 428.
(14) (1902) I. L. R. 29 Cal. 473.
(15) (1885) I. L. R. 11 Cal. 417.
(16) (1896) I. L. R. 18 All. 373.
(17) (1906) I. L. R. 34 Cal. 36 (40).

minor, but in cases where he has acted for the benefit of the minor the transaction has been allowed to stand. In the present case the sale was not for the benefit of the minor. *Ruttun* v. *Dhoomee Khan* (1); *Majidan* v. *Ram Narain* (2) where former Allahabad cases are referred to and distinguished ; *Pathummabi* v. *Vittil Ummachabi* (3); *Durgazi Row* v. *Fakeer Sahib* (4); *Baba* v. *Shivappa* (5) and *Amba Shankar* v. *Ganga Singh* (6). If the sale cannot be justified under the Muhammadan law, it cannot be justified on the ground of necessity. It was altogether void.

As to limitation, the mortgage could not have been redeemed until 1895, and the suit having been brought within 12 years from that date was not barred.

Kenworthy Brown replied distinguishing the cases of *Nizam-ud-din Shah* v. *Ananda Prasad* (7) and *Pathummabi* v. *Vittil Ummachabi* (3).

1912, *January* 16*th*:—The judgment of their Lordships was delivered by Lord ROBSON:—

In this case the appellant has been unsuccessful, first, before the Subordinate Judge at Lucknow, next before the District Judge of Lucknow, and lastly before the Court of the Judicial Commissioner of Oudh. The Court of the Judicial Commissioner granted a certificate for an appeal to their Lordships' Board on the ground that the case raised a question of law as to whether the transfer of a Muhammadan minor's property by a person who was not his natural guardian should be upheld, if made to discharge a debt payable by the minor.

The facts of the case are these :—

Sheikh Ahmad Ali, the respondent, was the grandson of Amir Haidar, who, in his life-time, was possessed of two villages, [220] Kabirpur and Karora. Amir Haidar mortgaged a 15 anna share in Kabirpur to the defendant appellant on the 2nd December 1885, and on the 7th of August 1886 he executed another mortgage in favour of the same creditor of a 4 anna share in Karora. The mortgages provided that the mortgagee should take, (and he duly took), immediate possession of the mortgaged property for the purpose of realizing the agreed interest out of the annual profits, making over the surplus, if any, to the mortgagor. The terms of the said mortgages were for ten and seven years respectively.

Amir Haidar died on the 12th of August 1887, leaving a will, dated the 7th of December 1886, by which he bequeathed his entire estate to his four grandsons equally. The plaintiff was about 12 years old when his grandfather died. Afterwards, on the 15th of June, 1889, the three elder grandsons, on their own behalf, and one of them, Ashraf Husain, purporting to act also as the guardian of the plaintiff, sold the village at Kabirpur to the appellant in consideration of the discharge by him of the debts secured thereon and on Karora, together with certain other smaller sums, making up a total of Rs. 18,500. The effect of this sale, if held good was that the plaintiff lost his interest altogether in the village of Kabirpur, which was the larger and more important property, while the smaller village Karora was thenceforth free of the mortgage.

The plaintiff on attaining his majority in 1892 or 1893 made no attempt to impeach this transaction, though he knew of it, but in September

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(1) (1863) 3 Agra, 21.
(2) (1896) I. L. R. 26 All. 22.
(3) (1902) I. L. R. 26 Mad. 734.
(4) (1906) I. L. R. 30 Mad. 197.
(5) (1895) I. L. R. 20 Bom. 199.
(6) (1905) 9 Oudh Cases, 97 (99).
(7) (1896) I. L. R. 18 All. 373.

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338=11 M.
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N. 183=9 A.
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=39 I. A. 49
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1905 he tendered to the defendant the amount of mortgage money necessary to redeem his share of the mortgage property, and on the defendant refusing to accept it, he brought this action for redemption.

He contends that the sale deed of the 15th of June 1889 is void, as against him, on the ground that his brothers had no authority under the grandfather's will to act as executors or to sell his share, and that Ashraf Husain, who purported to represent him in that transaction as his guardian was not entitled so to act. The appellant contends that the four grandsons were entitled to act as executors under Amir Haidar's will, but their Lordships [221] agree with the Courts below in finding that there is nothing in the will justifying that view.

The testator left the whole of his property (with certain unimportant exceptions) to his four grandsons in equal shares, and subject to equal obligations in respect of his debts and expenses, but he did not expressly appoint any executors of his will or guardians of his minor grandchildren. It was argued that an express appointment was not necessary if the testator had clearly shown by his will an intention to entrust its administration to particular individuals, but on a fair construction of this will no such intention can be gathered from it. He left his property to his grandsons so that each share thereof vested at once in the devisee, subject to the obligations attaching thereto, and there appears to be no necessity for any act of an executor to complete the operations of the will. No doubt the testator contemplated a partition by the grandsons themselves of the property devised to them, and in that case it would be necessary for his grandson, if still an infant, to have a guardian, but there is nothing whatever to show that he intended all or any one of the brothers to act in that capacity. So far as his intention is concerned, it may well have been that if, and when, the necessity for a guardian arose, the selection should be made by the Courts.

The family were Muhammadans and were governed by the Muhammadan law relating to guardianship. According to that law, in the absence of duly appointed testamentary guardians the care of Ahmad Ali's property would devolve first on the father and his executor, next on the paternal grandfather and his executor, and failing these, the right of nomination of a guardian would "rest in the ruling power and its administration." (Macnaghten's "Principles of Muhammadan Law," 5th Ed., page 304.) The brothers had, therefore, no right whatever to act except under the authority of an appointment by the Court. Both they and the appellant seem to have had that fact in their minds when they executed the deed of the 15th June 1889 effecting the sale of Ahmad Ali's share in the land, for they stipulated that if Ahmad Ali at any time brought a claim on the ground of minority, and any dispute thereby arose in respect of Mata Din's [222] possession, the three elder brothers should be answerable for the same together with costs.

It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a "*de facto*" guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it.

There has been much argument in this case in the Courts below, and before their Lordships, as to whether, according to Muhammadan law, a

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sale by a *de facto* guardian, if made of necessity, or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable. It is not necessary to decide that question in this case. To begin with, the appellant has not succeeeded in showing that the disputed sale of 1889, although made for the payment of an ancestral debt, was made of necessity, or was beneficial to the minor. On the contrary, the Courts below have all found on the evidence that it was unnecessary and cannot be said to have been beneficial so far as Ahmad Ali was concerned.

It is next found as a fact (and their Lordships see no sufficient reason to find otherwise), that the plaintiff on coming of age never acquiesced in the transaction which he now seeks to impeach, and that there was nothing in his conduct on which the defendant's plea of estoppel could be justified against him. Unless, therefore, the plaintiff's remedy is barred by the Indian Limitation Act, XV of 1877, he is now entitled to the relief prayed for, as modified by the judgment of the Court of the Judicial Commissioner.

As to the plea of limitation, the appellant defendant, placed reliance on articles 44 and 144 of the Indian Limitation Act, 1877.

Article 44 prescribes a period of three years within which a ward, who has attained majority, may set aside a sale made by his [223] guardian, the time running from the date of the ward's majority. This provision has no application to the present case, for the sale here was effected, not by a guardian, but by a wholly unauthorized person.

Article 144 deals with immovable property not otherwise specially provided for by the Act, and prescribes a period of 12 years from the time when the possession of the defendant becomes adverse to the plaintiff. In this case, the appellant was entitled under his mortgage to full possession of Kabirpur and receipt of its rents and profits for 10 years from the 2nd of December 1885. The respondent came of age on some date in 1892 or 1893. He was then certainly entitled to treat, (and by his subsequent tender of the mortgage money it is shown that he has in fact treated), the mortgage as subsisting, so far as he was concerned. Under these circumstances, the possession by Mata Din of Kabirpur did not become adverse to the respondent until the 2nd of December 1895, and as this action was begun in 1905, it was well within the period of limitation.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant :—*T. L. Wilson & Co.*
Solicitors for the respondent :—*Barrow, Rogers & Nevill.*

34 A. 223 (=15 I. C. 177=11 M. L. T. 193=1912 M. W. N. 311=14 Bom. L. R. 212=16 C. W. N. 433=15 C. L. J. 327=9 A. L. J. 401=22 M. L. J. 457).

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RAGHO PRASAD AND OTHERS (*Defendants*) *v.* MEWA LAL AND ANOTHER (*Plaintiffs*). *

[*On appeal from the High Court at Allahabad.*]

[22nd November, 1911, and 23rd January, 1912.]

Civil Procedure Code (1882), *section* 411—*Suit for dower* in forma pauperis *by wife against her husband and his mortgagees—Suit pending execution of decree for sale upon mortgage—Decree dismissing suit against mortgagees and making husband solely liable—Execution of decree to recover court fees due to Government—Effect of sale of mortgaged property.*

The respondents obtained a decree for sale on their mortgage on the 17th of December 1895. Pending execution the wife of the mortgagor brought a suit *in forma pauperis* against her husband and his mortgagees for dower, alleging that it was a charge on the mortgaged property in priority to the mortgage lien. It was found that the dower debt was not charged on the property, and on the 11th of May 1897 her suit was dismissed as against the mortgagees, and a money decree [224] passed against her husband alone; and under section 411 of the Civil Procedure Code (XIV of 1882) the amount of the court fees due to Government was made a first charge on the amount decreed. Notwithstanding that the decree expressly dismissed the suit as against the mortgaged property, the Collector, in order to recover the court fees in the pauper suit brought it to sale, on the 22nd of July 1899, in execution of the decree of the 11th of May 1897 and recovered just enough to satisfy them. On the application of the respondents the Civil Court directed that the property should be again put up for sale in execution of the respondent's decree of the 17th of December 1895, and on the 20th of September 1902 it was purchased at that sale by the respondents who got formal possession. The purchaser under the decree of the 11th of May 1897, now represented by the appellants, had, however, then obtained possession, and there was a contest for mutation of names which resulted in the revenue courts upholding the right of priority of the Government for the court fees and the possession of the appellants.

Held in a suit in the civil court by the respondents to enforce their priority and for possession, that they were entitled to succeed. The decree of the 11th of May 1897 did not create, nor purport to create any charge on the mortgaged property; and the sale under it of the 22nd of July 1899, being a sale of the property of the defendants in the suit for dower to satisfy a debt of the plaintiff in that suit, was without jurisdiction, and passed no title to the purchaser.

APPEAL from a judgment and decree (2nd December 1908) of the High Court at Allahabad, which affirmed a judgment and decree (19th September 1906) of the Judge of the Court of Small Causes at Allahabad exercising the powers of a Subordinate Judge.

The suit out of which this appeal arose was brought by the respondents against one Mahabir Prasad Narain Singh, since deceased and now represented by the appellants (his son, grandsons, and great grandsons) for possession of certain villages, and for declaration of their proprietary title in certain other villages, with mesne profits and interest thereon.

The original owner of the property in suit, one Tufail Ali Khan, executed between 1891 and 1894 four mortgages of it in favour of the plaintiffs for sums amounting in all to Rs. 15,000. Tufail Ali Khan making default in payment, the plaintiffs on the 17th of December 1895 obtained a decree for sale of the mortgaged property; but before the decree was executed Abbasi Begam, the wife of the mortgagor, instituted on the 19th of December 1896 a suit *in forma pauperis* against her hus-

Present :—Lord MACNAGHTEN, Lord ROBSON, Sir JOHN EDGE and MR. AMEER ALI.

band and the plaintiffs for sale of the property in dispute under a kabinama (deed of dower), dated the 20th of November [225] 1862, whereby her husband contracted to pay her a prompt dower of Rs. 1,00,000 and one gold mohur, and charged the amount on the property in dispute. The Court found that the deed was unstamped and unregistered and therefore created no charge on the property, and dismissed the suit against the mortgagees, giving a simple money decree against Tufail Ali Khan alone. In respect of the Court fees payable on the plaint the decree of the Court, which was dated the 11th of May 1897, contained an order made under section 411 of the Code of Civil Procedure (XIV of 1882) as follows : —" It is further ordered that Rs. 1,450-8-0, the amount of Court fee due to the Government, shall be the first charge on the amount decreed and shall also be recoverable from the defendant Tufail Ali Khan." On appeal to the High Court this decree was affirmed.

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On the 11th of December, 1897, the Collector of Allahabad on behalf of the Government applied for execution of the decree of the 11th of May 1897 to recover the Court fees due to the Government under it. In this application Tufail Ali Khan was named as the person against whom the decree was to be enforced, and the property sought to be attached and sold comprised the villages mortgaged to the plaintiffs. The property being ancestral, execution of the decree was transferred to the Collector under the provisions of section 320 of the Code of Civil Procedure, 1882. The property was sold on 22nd July 1899, and was purchased by Mahabir Prasad Narain Singh for Rs. 1,525. Tufail Ali Khan thereupon applied to the Collector to set aside the sale on the ground of irregularity and inadequacy of price. Though the plaintiffs were not made parties to the application the Collector gave them notice to appear at the hearing which they did. The application was rejected on the 20th of August 1899, the Collector holding that there had been no irregularity in the conduct of the sale. The sale was accordingly confirmed and a certificate of sale was issued to Mahabir Prasad Narain Singh on the 19th of September 1899. Tufail Ali Khan appealed from the Collector's order of the 20th of August 1899, to the Commissioner who confirmed the sale on the 25th of October 1899.

On the 25th of November 1899, the plaintiffs applied for sale of the same property in execution of their decree the 17th of [226] December 1895. Mahabir Prasad Narain Singh objected, but his objection was disallowed on the ground that it could not be entertained under section 278 of the Civil Procedure Code. The execution proceedings were transferred to the Collector under section 320 of the Code.

The sale in execution was held on the 20th of September 1902, and the property was purchased by the plaintiffs, the decree-holders for Rs. 18,365. The sale was duly confirmed by the Collector on the 22nd of October 1902, a certificate of sale was granted to the purchasers on the 29th of October 1902. Under the previous sale, however, of the 22nd of July 1899, Mahabir Prasad Narain Singh had obtained possession of the property in dispute and his name had been entered in the revenue papers as owner. The plaintiffs applied to the Assistant Collector to expunge his name and enter theirs in its stead; but the application was rejected on the 23rd of November 1903, and his order was affirmed on appeal by the Collector on the 11th of February 1904, and on revision by the Commissioner on the 30th of May 1904. An application to the Commissioner to reconsider his order was rejected on the 14th of September 1904 ; and on the 8th of May 1906 the plaintiffs instituted the present suit on the ground,

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as stated in paragraph 8 of their plaint, that "by virtue of purchase made at an auction sale held on the 22nd of July, 1899, the defendant had only acquired the equity of redemption of Tufail Ali Khan, but it was extinguished on the said property being resold and purchased by the plaintiffs. The defendant is in unlawful possession of the villages specified in schedule A, and as regards the village specified in schedule B, he denies the plaintiffs' right to it."

The defence was (*inter alia*) that Mahabir Prasad Narain Singh having purchased the property at a sale held to satisfy a debt of the Crown, purchased it free of all incumbrances; that the whole property having thus passed to Mahabir Prasad Narain Singh on the 22nd of July 1899, the plaintiffs purchased nothing at the subsequent sale of the 20th of September 1902; and that in any case the suit was barred by the provisions of sections 13 and 244 of the Code of Civil Procedure, 1882.

[227] Issues were settled, of which the following only were material on this appeal. (1) How does the plaintiffs' omission to object at the time of the sale in satisfaction of the claim of the Government for court fees and their allowing the property to be sold without offering to pay the same affect this claim? (2) Does the claim for court fees in which the property was sold take priority over the plaintiff's mortgage? (3) How does the judgment of the Commissioner, dated the 25th of October 1899, to the effect that the sale having taken place in satisfaction of a Crown debt, it took effect against the plaintiffs' mortgage and of the said sale having been duly confirmed affect this claim? (4) How does the plaintiffs' omission to implead the defendant in their execution proceedings affect their right to have the property claimed? (5) Is the suit barred by sections 13 and 244 of the Civil Procedure Code? (8) Did the defendant purchase the property with notice of the plaintiffs' mortgage?

On issues (1) and (2) the Judge of the first court summed up his conclusions thus:—

"The whole question here is, what was the subject of Abbasi Begam's suit, and as I have shown, it was not the property mortgaged to Mewa Lal and Lachmi Narain, but the one lakh and one *asharfi* decreed to Abbasi Begam against Tufail Ali Khan. The latter was also liable, which means any property that he possessed was liable and that property was the equity of redemption in the villages sold. I therefore hold that the sale to the defendant did not extinguish the plaintiff's prior mortgages; that all that he purchased was Tufail Ali Khan's equity of redemption, and that having failed to redeem the property and allowed it to be sold, he could not now claim to keep it as against the plaintiffs who were purchasers in a prior mortgage, and that even if a claim of Government for court fee be held to be a Crown debt, it did not affect the existing incumbrances upon the debtors' land. I therefore find on the first two issues for the plaintiffs. This decides the third issue also."

The Judge also held that the suit was not barred by either section 13 or 244 of the Civil Procedure Code; and on issue (8) that "the plaintiffs' mortgages were notified at the sale, and the defendant purchased the property with notice thereof."

He accordingly decreed the suit.

On appeal by the defendants the High Court (SIR JOHN STANLEY, C. J., and BANERJI J.) agreed with the lower court that the suit was not barred by sections 13 or 244 of the Civil Procedure Code and as to issues (1) and (2) they said:

[228] The main contention, which has been raised before us by the learned vakil for the appellants, is that the defendants appellants having purchased the property at a sale for the realization of court fees acquired absolute title to it, discharged of any right which the plaintiffs (mortgagees) had under their mortgages or under the sale in execution of the decree obtained by them. It appears to us that there is no

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substance in this contention. The appellants purchased *pendente lite* and in effect purchased nothing, as the mortgagor's equity of redemption passed to the plaintiffs under the sale made to them by the court. The appeal is in fact concluded by the decision of a Full Bench of this court in the case of *Dost Muhammad Khan* v. *Mani Ram* (1). The facts of that case are on all fours with those of the present. It was there held that a sale subject to a mortgage of property belonging to the defendant in a suit brought *in forma pauperis* for the purpose of realizing the court fee payable to Government by the plaintiff, does not preclude the mortgagee from bringing to sale the same property in execution of a decree for sale on his mortgage In that case, as here, the existence of the mortgage was notified at the sale to the defendants appellants The learned Subordinate Judge in his judgment states that the plaintiffs mortgages were all notified at the sale and the defendants purchased the property with notice thereof. This is not disputed. There is in addition to this the fact, as we have stated, that a decree for sale had already been passed and that the defendant purchased *pendente lite*."

The High Court therefore dismissed the appeal.

On this appeal—

Ross and *Kenworthy Brown* for the appellants contended that the claim of the Government for the court fees took priority over all other claims, and the appellants having purchased at a sale for realization of the court fees took an absolute title to the property discharged of all rights which the respondents (mortgagees) had prior to the sale of the 22nd of July 1899. The fact that the respondents' mortgages were notified at the sale, or that proceedings in execution of the respondent's decree were pending when the sale was held, did not in any way affect the nature of the sale or the rights which passed thereunder. Reference was made to the Civil Procedure Code (Act XIV of 1882), section 411 ; and *Collector of Moradabad* v. *Muhammad Daim Khan* (2), which was the law until 1907, when it was overruled by *Dost Muhammad Khan* v. *Mani Ram* (1). To say, as the High Court says, that the appellants took nothing under their purchase was not correct. Reference was made to the Transfer of Property Act (IV of 1882) section 52 (relating to *lis pendens*) and **[229]** sections 86 and 89; and *Fayaz Hossain Khan* v. *Prag Narain* (3). There was an outstanding interest in the property, against which the Collector was justified in pressing the claim of the Government to the court fees. The appellants took that interest which was a right to redeem. Section 86 of the Transfer of Property Act was not applicable. Section 89 of the Act applied and under that section the equity of redemption the appellants had taken was not lost until the confirmation of the sale to the respondents in October 1902. The appellants obtained the charge of the Crown, and section 89 took away nothing that they obtained. If the decree of the respondents affected the appellants they ought to have been brought on the record, and as that was not done the decree did not bind them. There was no one on the record who represented the legal estate. Reference was made to section 372 of the Civil Procedure Code, 1882. Where the right of the Crown and the right of the subject collide the right of the latter must give way : *Commissioners of Taxation for State of New South Wales* v. *Palmer* (4); *Attorney General of New South Wales* v. *Curator of Intestate Estates* (5); *Attorney General* v. *Leonard* (6) per CHITTY, J.

It was also contended that the respondents having taken no steps to set aside the Collector's order of the 20th of August 1899, confirming the

(1) (1902) I. L. R. 29 All., 537.
(2) (1879) I. L. R. 2 All. 196.
(3) (1907) I. L. R. 29 All. 339; L. R. 34 I. A., 102.
(4) (1907) L. R. A. C. 179.
(5) (1907) L. R. A. C. 519 (523)
(6) (1886) L. R. 28 Ch. D. 622 (626).

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sale by appeal or otherwise were bound by it, and had no right to maintain the present suit. Reference was made to *Malkarjun* v. *Narhari* (1) and Civil Procedure Code, 1882, section 311. The Collector in rejecting on the 20th of August 1899 the application by Tufail Ali Khan to set aside the sale said that "the respondents must take what steps they can to assert their rights." They took no steps.

DeGruyther, K. C. and *A. P. Sen* for the respondents were not called upon.

1912, *January* 23*rd*:—The judgment of their Lordships was delivered by Lord MACNAGHTEN.

[230] This is an appeal from a decree of the High Court at Allahabad, which affirmed a decree of the Court of Small Causes there exercising the powers of a Subordinate Judge.

The suit was brought by the respondents Mewa Lal and Lachmi Narain to recover property of which they had been deprived through the intervention of a Government official who attached it and got it sold in order to satisfy a debt due to Government from somebody else.

The facts are undisputed.

On the 17th of December 1895, the respondents, who were mortgagees of shares in seven villages belonging to their mortgagor one Tufail Ali Khan, obtained the usual decree for sale. The 17th of April 1896 was the date fixed for payment of principal, interest and costs, which amounted in all to Rs. 19,290-9-6. The mortgagor made default. On the 23rd of April 1896, the mortgagees applied for an order absolute. The order was drawn up on the 16th of May following. On the 24th of March 1897 an application was made for execution of the decree by sale of the mortgaged property and on the 26th of April 1897 the execution case was transferred to the Collector's Court as the property was ancestral. The decree came into the hands of the Sale Officer on the 8th of July 1897.

In the meantime, the wife of the mortgagor brought a suit *in forma pauperis* against her husband, Tufail Ali Khan, and the respondents, claiming from her husband a lakh of rupees under a contract of dower, and alleging that that sum was charged on the mortgaged property in priority to the mortgages, the subject of the decree of the 17th of December 1895. On the 11th May 1897 the suit was decreed with costs against Tufail Ali Khan, but dismissed with costs as against his mortgagees, and it was ordered that the amount of court fees which would have been paid by the plaintiff had she not been allowed to sue as pauper should be the first charge on the amount decreed to the plaintiff, and should also be recoverable from the defendant Tufail Ali Khan.

The order as regards the court fees payable to Government was in accordance with the directions of section 411 of the Civil [231] Procedure Code, 1882, as to pauper suits. That section is in the following terms:—

"411. If the plaintiff succeed in the suit, the court shall calculate the amount of the court fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; and such amount shall be a first charge on the subject-matter of the suit, and shall also be recoverable by the Government from any party ordered by the decree to pay the same, in the same manner as costs of suit are recoverable under this Code."

There was an appeal to the High Court but it was dismissed with costs.

So the respondents succeeded in preserving the priority of their incumbrances and in maintaining the decree of the 17th of December 1895.

(1) (1900) I. L. R. 25 Bom. 337; L. R. 27 I. A. 216.

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With this success all their troubles began. The Collector on behalf of Government applied for and obtained execution of the decree of the 11th of May 1897, not against Tufail Ali Khan, against whom the suit was decreed, but against the mortgaged property, in regard to which the suit failed. That execution case was also sent to the Collector's Court. It was received by the Sale Officer on the 18th of February 1898, more than six months after the receipt of the decree of the 17th of December 1895. However, the Sale Officer fixed one and the same day, the 22nd of July 1899, for sale in both cases. And when the day of sale came he put the property up for sale under the decree of the 11th of May 1897, and it was sold to Rai Bahadur, the father of the appellants, for Rs. 1,529, an amount just sufficient to satisfy the claim of the Government.

The mortgagees' decree was returned to the Civil Court with a statement that no property was left for sale in connection with that decree. In taking this course the Sale Officer, according to the opinion of the Collector, acted legally. Possibly, said the Collector, he might have put the property up for sale under the mortgagees' decree, "proclaiming at the same time the debt due to Government as an incumbrance to be satisfied by the purchaser," but there was no material irregularity. In the Collector's opinion the authorities clearly affirmed "the principle that the Government takes precedence of all other creditors, whether or not they have a lien on the property."

At the instance of the mortgagees the Civil Court directed that the property should be put up for sale again under the [232] decree of the 17th of December 1895. Ultimately the mortgagees bought it for Rs. 18,365. They obtained formal possession. But it seems that Rai Bahadur had already obtained possession under his sale certificate. Both parties then exerted themselves to collect rents. Then followed a struggle for mutation of names. The Assistant Collector dismissed an application for that purpose by the mortgagees, blaming them for trying to avoid payment of the Government dues "instead of quietly paying off" the court fees and getting the property sold in satisfaction of their large debt. After a learned argument he held that the wording of section 411, Civil Procedure Code, was clear that the Government dues were the first charge on the property, and that Rai Bahadur had consequently a preferential claim. Then the mortgagees appealed to the Collector. He took the same view, after argument, though he confessed that he "had not hitherto realised that the position of the Crown in such matters was so strong." Lastly, the mortgagees applied to the Commissioner on second appeal. He, too, rejected their application in the first instance on reading the record, and then on an application for revision after hearing the parties at considerable length, who "argued as to the equity and legal rights of the case." As to the merits he pronounced no opinion. He thought it essentially a case for the Civil Court. But he added that until the question was determined by a competent court he did "not think that any fairer decision could be come to than that at which the Collector arrived."

So at last the mortgagees betook them to the Civil Court, to which they ought to have applied long before in a regular suit. The Judge of first instance ordered that the respondents should be put in possession of the property, and declared that thay were the absolute owners. An appeal to the High Court was dismissed with costs. But the learned Judges, after argument, came to the conclusion that there was a substantial question of law involved and gave leave to appeal to His Majesty in Council.

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Their Lordships are at a loss to discover what question of law is involved in this case. So far as can be gathered from the judgments in the Collector's Court the validity of the sale to Rai Bahadur was rested on two grounds (1) on the terms of [233] section 411 of the Civil Procedure Code, and the decree of the 11th of May 1897, and (2) on the prerogative of the Crown. As to the first point, the claim put forward on behalf of the Government is absurd. The decree of the 11th of May 1897 did not create any charge on the mortgaged property in favour of the Government. The Government had no right to attach the property and sell it in execution under that decree, though, of course, such interest, if any, as remained in the mortgagor from whom the court fees were declared to be recoverable, might have been reached by a proper proceeding. The order for the first sale was, therefore, without jurisdiction. The sale passed no property to the person declared purchaser. On the second point the claim advanced by the Collector on behalf of the Government is a preposterous claim. It is only when claims of the Crown and claims of "common persons" (to use an old expression) "concur" or come into competition that the Crown is preferred. The Crown has no more right than a "common person" to seize A's property and apply it in or towards the discharge of a debt due from B. That is not a question of law. It is a matter of common justice, and it may be added, of common honesty.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant:—*Douglas Grant.*
Solicitors for the respondents:—*Barrow, Rogers and Nevil.*

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34 A. 234 (=39 I. A. 121=14 I. C. 1000=9 A. L. J. 263=11 M. L. T. 217=16 C. W. N. 409=1912 M. W. N. 324=22 M. L. J. 462).

[234] PRIVY COUNCIL.

DEBI MANGAL PRASAD SINGH (*Plaintiff*) *v.* MAHADEO PRASAD SINGH (*Defendant*).

[*On appeal from the High Court at Allahabad.*]

[10th and 14th November, 1911 and 2nd February, 1912.]

Hindu law—Inheritance—Mitakshara law—Joint Hindu family—Mother's share on partition of joint family property between her and her sons after father's death—Stridhan—Maintenance.

According to the Mitakshara there is no substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition.

Held therefore (reversing the decision of the courts in India) that the share which the mother in a joint Hindu family obtains after the death of the father on partition of the joint family property between the mother and the sons is not her *stridhan*, but is given for her maintenance, and on her death it devolves upon the heirs of her husband and not upon her own heirs.

Debi Mangal Prasad Singh v. *Mahadeo Prasad Singh* (1) and *Chhiddu* v. *Naubat* (2) overruled.

[Fol: 26 I. C 785=16 M. L. T. 587=1915 M. W. N. 48=39 Mad. 298; Dist. 29 I. C. 184=28 M. L J. 495; Ref. 53 I. C. 426; 60 I. C. 929; 66 I. C. 986; 71 I C. 833; Fol. 74 I. C. 81; Ref 82 I. C. 10]

Present:—Lord MACNAGHTEN, Lord ROBSON, Sir JOHN EDGE and Mr. AMEER ALI.

(1) (1909) I. L. R. 32 All. 258. (2) (1901) I. L R. 24 All. 67.

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APPEAL from a judgment and decree (20th December 1909) of the High Court at Allahabad, which affirmed a judgment and decree (14th December 1907) of the Subordinate Judge of Gorakhpur dismissing the appellant's suit.

The main question for decision on this appeal was whether property to which a Hindu mother in a joint family governed by the Mitakshara law becomes entitled on partition is her *stridhan* or not.

GAYA PRASAD SINGA = Dulhan Sahibzad Kunwari (widow).

- Sheo Partap Singh (dead).
  - Debi Mangal Prasad Singh (Plaintiff).
    - Jagar Nath Singh (Defendant No. 3).
    - Durga Prasad Singh (Defendant No. 4).
    - Mathura Singh (Defendant No. 5).
    - Lallu Singh (Defendant No. 6).
- Mahadeo Prasad Singh (Defendant No. 1).
- Sitla Bakhsh Singh (Defendant No. 2).
  - Balbhaddar Singh (Defendant No. 7).

The above pedigree shows the relationship of the parties. Debi Mangal Prasad Singh, the appellant (plaintiff), was the grandson, and the respondents, Mahadeo Prasad Singh (defendant No. 1) and Sitla Bakhsh Singh (defendant No. 2), were the sons of Gaya Prasad Singh, who died leaving a widow, Dulhan Sahibzad Kunwari.

[235] On the 4th of January 1893, the appellant being then a minor, his mother Dulhan Dharamraj Kunwari brought a suit for partition of shares in the ancestral property against the present respondents Mahadeo Prasad Singh and Sitla Bakhsh Singh. To that suit Dulhan Sahibzad Kunwari was made a party defendant on her own application. The First Court decreed to each of the parties to the suit a one-fourth share in the property, and that decree was affirmed by the High Court. Dulhan Sahibzad Kunwari thus obtained a one-fourth share on partition. She died on the 19th of November 1900, and the appellant brought, on the 1st of June 1907, the suit out of which the present appeal arose to recover possession of a one-third share of the property obtained by Dulhan Sahibzad Kunwari on partition on the allegation that on her death the defendants had wrongly taken possession of the whole of the property, although they were only entitled to a two-thirds share in it.

The defence was that the property in suit was the *stridhan* of Dulhan Sahibzad Kunwari and that the plaintiff therefore had no right of inheritance in it.

Two issues were settled, namely :—(1) Whether the property Dulhan Sahibzad Kunwari got under the partition decree was her own *stridhan* or she had only a life interest in it? (2) Is the plaintiff the legal heir of Dulhan Sahibzad Kunwari and has he any interest in the property left by her as against the defendants Nos. 1 and 2?

The Subordinate Judge decided both issues against the plaintiff on the ground that the share allotted to Dulhan Sahibzad Kunwari on partition was her *stridhan* to which the plaintiff was not entitled under the Hindu law.

On appeal the High Court (Sir JOHN STANLEY, C. J., and BANERJI, J.) affirmed that decision.

The judgment of the High Court will be found in I. L. R. 32 All. 253.

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On this appeal—

Sir *Erle Richards*, *K.C.* and *B. Dube* for the appellant contended that the share allotted on partition to Dulhan Sahibzad Kunwari was for her maintenance only, and was not her *stridhan*: it therefore passed on her death to her husband's heirs and not to [236] her own heirs under the Mitakshara law. Reference was made to Mayne's Hindu Law, 7th ed., page 882, para 658; for the definition "Stridhan," see "Mitakshara, chap. II, section 11, paras. 2 and 30 (Stoke's Hindu Law Books, page 458); Mayne's Hindu Law, pages 820, 822, para. 610; *Thakoor Deyhee* v. *Rai Baluk Ram* (1); Macnaghten's Hindu law, Vol. I, page 30, and *Bhugwandeen Doobey* v. *Myna Baee* (2). A distinction has been drawn between property voluntarily given or inherited and that taken on partition: *Chotay Lall* v. *Chunnoo Lall* (3); *Muttu Vaduganadha Tevar* v. *Dorasinga Tevar* (4); *Sheo Shankar Lal* v. *Debi Sahai* (5); *Sheo Pratab Bahadur Singh* v. *Allahabad Bank* (6); Mayne's Hindu Law, page 837, para. 621; *Cossinaut Bysack* v. *Hurrosoondry Dossee* (7). A widow would not get a larger share on partition than if she inherited as it is only for her maintenance; Guru Das Banerjee's Hindu Law, "Marriage and Stridhan" (2nd ed.), page 305: *Sorolah Dossee* v. *Bhuban Mohun Neoghy* (8) decided by Sir Arthur Wilson; Mayne's Hindu Law, page 703, para. 518. There is an absence of authority in India on the point in the present case. In Bengal the general law is that the wife's share reverts to her husband's heirs on her death as in the case decided by Sir Arthur Wilson; *Beni Parshad* v. *Puran Chand* (9); *Chhiddu* v. *Naubat* (10); Mitakshara, chap. I, section 6 (Stoke's Hindu Law Books 394), section 3, para. 8; chap. II, section 1, para. 30 et seqq.: Guru Das Banerjee's "Marriage and Stridhan" (2nd ed.), 330, 331; *Sri Lal Rai* v. *Surajbali* (11); Mitakshara, chap. I, section 1 (Stoke's Hindu Law Books, 371); *Buldeo Singh* v. *Mahabeer Singh* (12); *Sheodyal Tewaree* v. *Judoonath Tewaree* (13) and *Laljeet Singh* v. *Rajcoomar Singh* (14). In any event the appellant was entitled to succeed to the property together with the respondents 1 and 2.

[237] *D. Gruyther*, *K.C*, *Ross* and *A. P. Sen*, for the respondents contended that the share which was allotted to Dulhan Sahibzad Kunwari on partition was her *stridhan* to which the appellant had no right of inheritance. The Mitakshara was the sole authority in this case, and what the Mitakshara laid down was that the mother does not take the share she is entitled to, as maintenance, but in precisely the same manner as the other sharers take their shares, Mitakshara, chap. II, section 1, paras. 31, 32, 33. The case supposed in the Mitakshara is a case of partition in the father's lifetime; see chapter I, section 7, paras. 1 and 2 chap II, section 11, paras. 1, 2 and 12. *Chotay Lal* v. *Chunno Lall* (15); *Sheo Dayal Tewaree* v. *Judoonath Tewaree* (16) was irrelevant as no partition had taken place; *Mohabeer Pershad* v. *Ramyad Singh* (17) gave no conclu-

(1) (1866) 11 Moo. I. A. 139, (155, 174).
(2) (1867) 11 Moo. I. A. 487, (504—506).
(3) (1878) I. L. R. 4 Cal. 744 (753, 754); L. R. 6 I. A. 15 (30).
(4) (1881) I. L. R. 3 Mad. 290; L. R. 8 I. A. 99 (108).
(5) (1903) I. L. R. 25 All. 468 (472); L. R. 8 I. A. 202 (205)
(6) (1903) I. L. R. 25 All. 476 (491); L. R. 30 I. A. 201 (217).
(7) (1820) 2 Morley's Dig. 198.
(8) (1888) I. L. R. 15 Cal. 292.
(9) (1896) I. L. R. 23 Cal. 263 (279).
(10) (1901) I. L. R. 24 All. (67, 74, 76).
(11) (1901) I. L. R. 24 All. 82.
(12) (1866) 1 Agra H. C. 155 (157).
(13) (1868) 9 W. R. 61 (68).
(14) (1873) 20 W. R. 336 (340).
(15) (1878) I. L. R. 4 Cal. 744: L. R. 6 I. A. 15.
(16) 1868) 9 W. R. 61 (62).
(17) (1873) 12 B. L. R. 90: 20 W. R. 192 (195).

sive decision; *Beni Parshad* v. *Puran Chand* (1); *Lalljeet Singh* v. *Raj Coomar Singh* (2); *Doorga Koonwar* v. *Tejoo Koonwar* (3); *Nellakumaru Chetti* v. *Marakathammal* (4); *Bhagirthibai* v. *Kahnujirav* (5) *per* WEST J.; Guru Das Banerjee's Hindu Law "Marriage and Stridhan" (2nd ed.), 314, 320; *Thakoor Deyhee* v. *Rai Baluk Ram* (6); *Bhugwandeen Dubey* v. *Myna Baee* (7); *Lal Sheo Partab Bahadur Singh* v. *Allahabad Bank* (8); *Subramanian Chetti* v. *Arunachellam Chetti* (9). The Bengal cases are useless here,—as they are decided on the Dayabhaga law. *Sorolah Dossee* v. *Bhubun Mohun Neoghy*, (10) did not decide the point in the present case. Mayne's Hindu Law omits consideration of the other sections of the Mitakshara referred to. *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (11). The respondents, therefore, it was submitted, rightly obtained possession of the share of Dulhan Sahibzad Kunwari as her sons and heirs on her death, to the exclusion of the appellant.

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[238] Sir *Erle Richards*, *K.C.*, replied, referring to Mitakshara, chap. I section 6, para. 2; section 3, para. 8 and chap. II, section I, para. 33.

1912, *February 2nd.*—The judgment of their Lordships was delivered by Lord ROBSON:—

The question to be determined in this case is whether immoveable property, obtained by a Hindu widow on partition of the joint family property under the Mitakshara law, is part of her *stridhan* in the narrow sense of that word, indicating her separate property or peculium which passes on her death to her own heirs; or is merely part of her *stridhan* in the wider sense in which the word is sometimes used, as indicating any property in which she may have some right of proprietorship.

The property in question originally belonged to one Gaya Prasad, who with his three sons, formed a Hindu joint family governed by the Mitakshara law. He died leaving three sons, and a widow, Dulhan Sahibzad Kunwari. One of his sons, Sheo Partap Singh, died in 1889, leaving a widow and his son, the plaintiff appellant. In 1894 a partition of the joint family property took place, at the suit of the plaintiff under the guardianship of his mother, and in that suit the court apportioned one-fourth share of the property to Dulhan Sahibzad Kunwari, who remained in possession thereof until her death on the 19th of November 1900.

The plaintiff claims possession of one-third of the property thus held by her, on the ground that it passed, under the Mitakshara law, to the heirs of her husband, of whom he is one.

The first two defendants respondents are the two surviving sons of Dulhan Sahibzad Kunwari, and their contention is that the property acquired by their mother on the said partition was her *stridhan* or *peculium* so as to descend to her heirs.

This raised the further question as to whether the plaintiff, whose father had predeceased Dulhan Sahibzad Kunwari, was one of her heirs or was excluded from her inheritance by her surviving sons. The Subordinate Judge decided both these issues in favour of the defendants, and that judgment was affirmed by the High Court at Allahabad.

(1) (1896) I. L. R. 23 Cal. 263 (278).
(2) (1873) 20 W. R. 336 (339, 340).
(3) (1866) 5 W. R. Misc. 53.
(4) (1876) I. L. R. 1 Mad. 166.
(5) (1886) I. L. R. 11 Bom. 285.
(6) (1886) 11 Moo. I. A. 139 (155, 174).
(7) (1867) 11 Moo. I. A. 487 (504, 506).
(8) (1903) I. L. R. 25 All. 476 (491); L. R. 30 I. A. 209 (217).
(9) (1904) I L. R. 28 Mad. 1.
(10) (1888) I. L. R. 15 Cal. 192.
(11) (1889) I. L. R. 16 Cal. 758.

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[239] The sections of the Mitakshara dealing with the property of a woman have given rise to much controversy and some conflict of decisions. In chap. II, section 11, para. 1 of that treatise, Vijnanesvara sets forth Yajnyawalcya's classification or description of woman's property as follows :—

"What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other [separate acquisition] is denominated a woman's property.

In para. 2 of the same section, Vijnanesvara repeats in substance the six-fold classification given in para. 11, and then in place of the general words "as also any other" he substitutes a further enumeration as follows:—

"And also property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by Manu and the rest, 'woman's property.'"

This reference to Manu is not borne out by the quotation from that authority given in para. 4 (section 1). Manu is there cited as making the same classification of the different kinds of "woman's property" as that above given by Yajnyawalcya, and saying that they "are denominated the six-fold property of a woman."

The six-fold enumeration of the sources of a "woman's property," as given by Yajnyawalcya and Manu, corresponds with the technical or narrow signification of *stridhan* indicating property which is under her absolute control during life on her death is descendible to her heirs. Do the same characteristics attach to a woman's property derived from the additional sources specified by Vijnanesvara, *viz.*, inheritance, partition, &c.? The words "any other" with which Yajnyawalcya concluded his enumeration are a translation of the word "adi" or "adya," which, according to Mr. Mayne (Hindu Law, 7th ed., page 823) means "and the like." In that view, Yajnyawalcya meant to limit his description of "woman's property," or *stridhan*, to property acquired in any of the six modes he had just specified, or in any other manner *ejusdem generis* with those modes. Vijnanesvara's additional enumeration goes beyond that. When read with Yajnyawalcya's description, it constitutes a practically complete statement of the means by which a woman can acquire property rights. Dealing with this extended signification of the [240] term "woman's property" Vijnanesvara says in paragraph 3 of the same section that it "conforms in its import with its etymology and is not technical." In paragraphs 2, 3 and 4, therefore, he is speaking of *stridhan* in the wider sense. In paragraphs 5, 6 and 7, Vijnanesvara cites the description of "woman's property" given by Katyayana, which does not expressly profess to be exhaustive, but which closely approximates in character to that given by Yajnyawalcya and Manu, and does not include any of the heads (inheritance, partition, &c.) added to the list by Vijnanesvara in paragraph 2. Then comes paragraph 8, which gives rise to the difficulty. It runs thus :—"A woman's property has been thus described. The author next propounds the distribution of it. 'Her kinsmen take it if she die without issue.'"

The rule of devolution prescribed by the author (Yajnyawalcya) to whom Vijnanesvara refers, was, so far as that author himself was concerned, no doubt intended to apply only to *stridhan* in the narrow signification defined in paragraph 1, and not to the enumeration as expanded by

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the commentator in the concluding words of paragraph 2. It is, indeed, possible to read paragraph 3 as applying only to the more limited enumeration of Yajnyawalcya. When Vijnanesvara says "a woman's property has been thus described," he may have been referring to the description given by his author and by Katyayana, and have intended to confine Yajnyawalcya's rule of devolution to Yajnyawalcya's classification. His language, however, in paragraph 8, when read with what he says in paragraphs 2, 3 and 4, is open to the meaning that a woman's property, of whatsoever kind, descends always to her own heirs. It is difficult to adopt the latter construction in view of the undoubted fact that, as Sir Arthur Wilson said in delivering the judgment of their Lordships' Board in *Sheo Shankar Lal* v. *Debi Sahai* (1), "most of the old commentators recognize, with regard to the property of a woman, whether called *stridhan* or by any other name, that there may be room for differences in its line of descent according to the mode of its acquisition."

So far as woman's acquisition of property by inheritance is concerned the matter is now clearly concluded by authority, and [241] consideration of the cases decided with regard to that item in Vijnanesvara's additional enumeration will facilitate the task of dealing with the item of "partition" in the same enumeration.

In the case of *Thakoor Deyhee* v. *Rai Baluk Ram* (2) it was contended that, in the provinces governed by the Mitakshara, the widow's estate in her husband's property was absolute, and that she had full power to dispose of it. In support of that argument reliance was placed on the concluding words of the second paragraph of section 11, chap. 2, of the Mitakshara above dealt with, viz., "also property which she may have acquired by inheritance." Their Lordships, however, rejected the view that those words included such property as part of a woman's *stridhan* so as to make it descendible to her heirs. They quoted, with approval, the proposition laid down by Sir William Macnaghten in his "Principles and Precedents of Hindu Law," vol. 1, page 38, where he says :—

> "In the Mitakshara, whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding, is denominated woman's property, but it does not constitute her *peculium*."

It was therefore held that a widow has no power of alienating any immovable property which she has inherited from her husband, and that, on her death, such property will pass to the next heirs of her deceased husband. Similarly, in *Bhugwandeen Doobey* v. *Myna Baee* (3) it was held that, by the Hindu law prevailing in Benares (the Western School), no part of the husband's estate, movable or immovable, forms portion of his widow's *stridhan*, and she has no power to alienate the estate inherited from her husband, to the prejudice of his heirs, which, at her death, devolves on them. Sir JAMES COLVILLE, in delivering the judgment of their Lordships' Board, says :—"Both the Vivada Chintamani and the Mayukha confine *stridhan* within the definitions of Manu and Katyayana. They exclude property inherited, and the other acquisitions which are comprehended in the last clause of the paragraph in the Mitakshara, but are excluded by Sir William Macnaghten."

This observation puts partition on the same footing as inheritance, so far as the rights of a widow are concerned.

(1) (1903) I. L. R. 25 All. 468 (472) : L. R. 30 I. A. 202 (206).

(2) (1866) 11 Moo. I. A. 139.

(3) (1867) 11 Moo. I. A. 487.

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[242] In *Chotay Lall* v. *Chunnoo Lall* (1) it was held that, under the law of Mitakshara, a daughter's estate inherited from the father is a limited and restricted estate only and not *stridhan*, so that upon her death the next heirs of the father succeed thereto.

The cases on the question of a woman's inherited property came under review by their Lordships' Board in *Sheo Shankar Lal* v. *Debi Sahai* (2) before referred to and *Lal Sheo Partab Bahadur Singh* v. *Allahabad Bank* (3). The construction of the Mitakshara was again considered, and it was held that under the Hindu law of the Benares school, property which a woman has taken by inheritance from a female is not her *stridhan* in such sense that on her death it passes to her *stridhan*-heirs in the female line to the exclusion of males.

Each of these authorities is inconsistent with the wide scope which the respondents, on their construction of the Mitakshara, seek to give to the definition of *stridhan*.

The question now arises whether there is any substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition. It is a question attended with some difficulties, especially in the construction of the Mitakshara, whatever view of it may be taken. While a family remains joint a woman has no right under the Mitakshara for a specific share of the family estate. She is only entitled to maintenance, or in due course to her customary inheritance, and if a partition takes place a mother gets a share equal to that of a son. If the share given to a widow on partition is given to her as a substitute for that to which she would be entitled upon inheritance, then, according to the foregoing authorities, it would seem reasonable that it should follow the same rule of descent and revert on her death to her husband's heirs. If, on the other hand, it is given to her by way of provision for her maintenance, it seems equally reasonable that when the necessity for her maintenance has ceased the property should revert to the estate from which it was taken. Of course, the members of a joint family effecting a partition may agree that a portion of the property shall be transferred to the widow by way of absolute gift, [243] as part of her *stridhan*, so as to constitute a provision for her *stridhan* heirs; but, in the absence of any such intention, their Lordships do not feel justified in putting property acquired by a widow, on a partition of the joint estate, upon a footing different from that on which property coming to her by way of inheritance has been placed. The contrary view was taken by the High Court at Allahabad in *Chhiddu* v. *Naubat* (4). The learned Judges in that case laid great stress upon chap. I, section 6, para. 2 of the Mitakshara. Vijnanesvara there deals with the rights of a son born after the partition, and says that on the demise of his parents he obtains both their portions,—

"His mother's portion, however, only if there be no daughter, for it is declared that "Daughters share the residue of their mother's property after payment of her debts."

Again chap. I, section 3, para. 8, runs as follows:—

"It has been declared that sons may part the effects after the death of their father and mother. The author states an exception in regard to the mother's separate property: 'The daughters share the residue of their mother's property, after payment of her debts."

(1) (1878) I. L. R. 4 Cal. 744: L. R. 6 I. A. 15.
(2) ((1903) I. L. R. 25 All. 468: L. R. 30 I. A. 202.
(3) (1908) I. L. R. 25 All. 476: L. R. 30 I. A. 209.
(4) (1901) I. L. R. 24 All. 67 (74, 76).

This paragraph refers only to the mother's separate property or *peculium* whatever that may be. But it is by no means certain either in that paragraph or in section 6, paragraph 2, the property coming to her by way of partition is necessarily included in that *peculium*.

That there is a distinction in the rules of descent between different kinds of a woman's property according to the mode in which it has been acquired, is beyond question, but the Mitakshara does not always discriminate between these different kinds of property, and in the doubt that arises as to its precise intent and construction in reference to this point, the principle upon which the cases relating to inheritance have been decided appears to be safe guide in dealing also with cases of partition.

In this view, it is unnecessary to discuss the second question as to whether the plaintiff was entitled to share in his grandmother's estate as one of her heirs equally with his uncles.

Their Lordships will therefore humbly advise his Majesty that this appeal should be allowed; the decrees of the Courts below set aside with costs; and in lieu thereof a decree made in [244] favour of the appellant for the one-third of the share with mesne profits which came to Dulhan Sahibzad Kunwari on partition and was held by her.

The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant :—*Barrow, Rogers and Nevill.*

Solicitors for the respondents :—*T. L. Wilson & Co.*

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34 A. 244 (=14 I. C. 657=9 A. L. J. 260=13 Cr. L. J. 273).

REVISIONAL CRIMINAL.

Before The Hon'ble Mr. H. G. Richards, Chief Justice.

EMPEROR v. LAL SINGH.*

[29th November, 1911.]

Criminal Procedure Code, section 407—Sanction to Prosecute—Application to Magistrate of the first Class—Appeal to District Magistrate—Transfer—Jurisdiction.

Section 407 of the Criminal Procedure Code does not entitle a District Magistrate to send appeals under section 195 of that Code to a Magistrate of the first class subordinate to him. That section deals with appeals from convictions. *Sadhu Lall* v. *Ram Churn Pasi* (1) followed.

THIS was an application in revision arising out of an application for sanction to prosecute. The original application was made more than three months after the decision of the case from which it arose. The Magistrate, who originally heard the case, had been transferred in the mean time. The successor of the Magistrate granted sanction. The opposite party appealed under section 195 of the Code of Criminal Procedure to the District Magistrate, who transferred the appeal to a Magistrate of the first class subordinate to him.

The appeal was dismissed and thereupon the opposite party applied in revision to the High Court.

Mr. *C. Dillon* (with him Babu *Balram Chandra Mukerji*), for the applicant, contended that the application for sanction was made more

* Criminal Revision No. 614 of 1911, from an order of Kasim Beg Chagtai Magistrate, first class, of Budan dated the 11th of October, 1911.

(1) (1903) I. L. R. 30 Cal. 394.

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than three months after the case was over. The other party waited till the officer who decided the case went away on leave. Under such circumstances sanction should not have been granted.

[245] The Collector had no jurisdiction to transfer the appeal to another Magistrate. He referred to *Sadhu Lal* v. *Ram Churn Pasi* (1).

The Hon'ble Pandit *Moti Lal Nehru*, for opposite party, was heard in reply.

RICHARDS, C. J.—This is an application to set aside the orders of two Magistrates of the first class, granting sanction to prosecute under sections 193 and 211 of the Indian Penal Code. The application for sanction was not made before the same Magistrate as had originally tried the case, but it was made to his successor, who granted sanction. There was an appeal to the District Magistrate, who apparently directed that the appeal should be heard by another Magistrate of the first class subordinate to him. The learned District Magistrate was evidently exercising what he considered to be the power vested in him under section 407. In my opinion this section does not entitle the District Magistrate to send appeals under section 195 of the Criminal Procedure Code to a Magistrate of the first class subordinate to him. The section deals with appeals from convictions. This view of the section was taken in the case of *Sadhu Lall* v. *Ram Charun Pasi* (1). I therefore allow the application, set aside the order of Mr. Kasim Beg Chagtai, and send back the case to the District Magistrate with directions that he should hear the appeal himself. I expressly abstain from stating any view upon the merits.

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34 A. 246 (= 9 A. L. J. 297=14 I. C. 505).

[246] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

LACHMI NARAIN (*Defendant*), *v.* TURAB-UN-NISSA (*Plaintiff*).*

[16th December, 1911.]

Act No. IX of 1908 (*Indian Limitation Act*), *schedule I, articles* 116, 120, 131, 132—*Suit to recover arrears of annuity charged on immovable property—Claim for personal decree only—Limitation.*

Held that article 132 of the first schedule to the Indian Limitation Act is applicable only to sums in which the plaintiff claims to recover money charged upon immovable property to raise it out of that property, and not to a claim in which merely personal decree is asked for. *Ramdin* v. *Kalka Prasad* (2) followed.

Held also that the words of article 131 'to establish a periodically recurring right' are altogether inapplicable to a suit to recover arrears of payments due under a registered contract. *Dost Muhammad Khan* v. *Sohan Singh* (3) followed. A suit of such a nature is governed by either article 116 or article 120 of the first schedule to the Indian Limitation Act.

[Cited. 38 Mad. 916=23 I. C. 806.]

THE facts out of which this appeal arose were as follows.

In February, 1866, one Maujud Ali Shah executed a document, whereby, after reciting that a large sum of money was due to his wife on

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*Second Appeal No. 1309 of 1910, from a decree of Mohammad Ishaq Khan, District Judge of Farrukhabad, dated the 12th of September, 1910, confirming a decree of Daya Nath, Subordinate Judge of Farrukhabad, dated the 16th of December, 1909.

(1) (1903) I. L. R. 30 Cal. 394.
(2) (1885) I. L. R. 7 All. 502.
(3) Punj Rec. 1906, p. 303.

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account of dower, he undertook to pay her Rs. 12 per mensem during her life, and agreed she should receive that amount out of the income of certain immovable property. In 1870, he mortgaged that and other immovable property to Lachman Singh and Madho Singh for Rs. 22,700, by a deed which provided that the mortgagees should pay annually out of the profits of the property for the illumination of the *dargah* of which he was *sajjada-nashin*, and that, of this sum, Rs. 12 a month should be paid to his wife, Abadi Begam, and the remaining Rs. 13 a month were to be paid to him. In August, 1874, the mortgagees sub-mortgaged their rights to Asa Ram, the father of the defendant to the present suit. The original mortgagees and after them Asa Ram continued to pay the money to Abadi Begam and Maujud Ali Shah and their heirs until 1898 or 1899, when Asa Ram stopped payment. In the present suit, instituted in 1909, the plaintiff respondent claimed arrears of the sums of Rs. 12 and Rs. 13 per mensem, from 1899 to the date of suit, and [247] interest thereon at the rate of 6 per cent. per annum. The court of first instance decreed the claim, and this decree was affirmed in appeal by the District Judge. The defendant appealed to the High Court.

Mr. *W. K. Porter* (for Mr. *B. E. O'Conor*) and Munshi *Gulzari Lal*, for the appellant.

Dr. *Tej Bahadur Sapru* (with him Dr. *Satish Chandra Banerji*) for the respondent.

KARAMAT HUSAIN and CHAMIER, JJ.—In February, 1866, one Maujud Ali Shah executed a document whereby, after reciting that a large sum of money was due to his wife on account of dower, he undertook to pay her Rs. 12 per mensem during her life, and agreed that she should receive that amount out of the income of certain immovable property. In 1870, he mortgaged that and other immovable property to Lachman Singh and Madho Singh for Rs. 22,700, by a deed which provided that the mortgagees should pay annually out of the profits of the property for the illumination of the *dargah* of which he was *sajjada-nashin*, and that, of this sum, Rs. 12 a month should be paid to his wife, Abadi Begam, and the remaining Rs. 13 a month were to be paid to him. In August, 1874, the mortgagees sub-mortgaged their rights to Asa Ram, the father of the defendant to the present suit. The original mortgagees and after them Asa Ram continued to pay the money to Abadi Begam and Maujud Ali Shah and their heirs until 1898 or 1899, when Asa Ram stopped payment. In the present suit, instituted in 1909, the plaintiff respondent claims arrears of the sums of Rs. 12 and Rs. 13 per mensem, from 1899 to the date of suit, and interest thereon, at the rate of 6 per cent. per annum. The courts below have decreed the claim. The questions for decision in this appeal are, whether the suit is within time, and whether the plaintiff has established her title to recover the amount claimed. On the question of limitation the courts below have held that the claim is governed by article 132 of the first schedule of the Limitation Act. But that article, as held by their Lordships of the Privy Council in *Ram Din* v. *Kalka Prasad* (1), is applicable only to suits in which the plaintiff claims to recover money charged upon immovable property to [248] raise it out of that property. In the present case the plaintiff claims only a personal decree against the defendant. She does not seek to recover the money out of the property. In this Court it has been contended that if article 132 does not apply, then the proper article to apply is article 131, and

(1) (1885) I. L. R. 7 All. 402.

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two cases decided by the Madras High Court (1) have been referred to in which it has been held that the words "to establish" in article 131 are not confined to a declaration of title but include the recovery of arrears due to the plaintiff in respect of a periodically recurring right. The Punjab Chief Court, on the other hand, in *Dost Muhammad Khan* v. *Sohan Singh* (2), have held that the words "to establish" in article 131 do not extend and cannot be extended to cases in which the plaintiff seeks to recover specific sums of money due to him in respect of a recurring right. We prefer the view taken by the Punjab Chief Court. It seems to us that the language of article 131 "to establish a periodically recurring right is altogether inapplicable to a suit to recover arrears of payment due under a registered contract such as we have in the present case. We are of opinion that the suit is governed either by article 116 or article 120, and that in either case no more than six years' arrears or a sum equivalent thereto can be recovered. There remains the question whether the plaintiff has established a right to recover any sum under the deed. The defendant pleaded that the plaintiff was not entitled to sue as she could not be appointed *Muttawalli* of the shrine, and that only a lawfully appointed *Muttawalli* could recover it, and that the money payable under the deed had nothing to do with the inheritance. It is quite clear that the income of the mortgaged property could not be constituted *waqf* and there is no indication whatever that the *corpus* of the property has been constituted *waqf*. It seems to us that it is no answer to the plaintiff's claim to say that she is not a *sajjada-nashin* or *Muttawalli* of the property. She is entitled to recover on the deed, if she can show that she is the heir of Maqsud Ali Shah who died in 1899. The plaintiff propounded a pedigree according to which she is clearly the next heir of Maqsud Ali Shah. The defendant pleaded that [249] the pedigree was incomplete and he gave in his written statement a pedigree in which Fazal Ali Khan is shown to have a daughter, Dargahi Begam, in addition to the two sons and daughter shown in the plaintiff's pedigree. If Dargahi Begam was alive at the death of Maqsud Ali Shah, she was entitled to the property in preference to the plaintiff. It has been contended on behalf of the plaintiff that if the defendant had intended to plead that Dargahi Begam was entitled to succeed in preference to the plaintiff, this would have been put forward specifically in the court below. There is a good deal to be said for this argument. But at the same time the defendant distinctly pleaded that Fazal Ali Shah had a daughter, Dargahi Begam, and it was the business of the plaintiff to prove either that Dargahi Begam was not the daughter of Fazal Ali Shah, or that she died in the life-time of Maqsud Ali Shah, or to show that, although Dargahi Begam was entitled to succeed Maqsud Ali Shah in 1899, she, the plaintiff, was entitled to the property at the date of the suit. The point seems to have been overlooked, and we think that the proper course is to order further inquiry on the subject. We, therefore, remit to the lower appellate court for trial the question whether the plaintiff is entitled to the *malikana*. Both parties may adduce further evidence. On return of the findings ten days will be allowed for objections.

Issue remitted.

(1) *Ramnad Zamindar* v. *Drasami* (1884) I. L. R. 7 Mad. 341, 348, and *Ratnamasari* v. *Akilandammal*, (1905) I. L. R. 26 Mad. 291, 314.
(2) Punj. Rec. 1906, p. 303.

34 A. 250 (=9 A. L. J. 152=13 I. C. 975).

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APPELLATE CIVIL.

34 A. 250=9 A. L. J. 152 =13 I. C. 975.

[250] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

MUHAMMAD AHMAD SAID KHAN (*Plaintiff*) *v.* MUHAMMAD MASIH-ULLAH KHAN (*Defendant*).*

[6th January, 1912.]

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *sections* 166, 201—*Lessee continuing to be recorded as such after expiry of the lease—Suit for profits—Presumption.*

The lessee of a mortgage of zamindari property was recorded as entitled to the profits of the share, and remained so recorded even after the mortgage had been redeemed. *Held*, in a suit for profits that the lessee was entitled to recover so long as he was recorded. *Durga Prasad* v. *Hazari Singh* (1), followed.

[Ref. 63 I. C. 187; 66 I. C. 2; Rel. 75 I. C. 663.]

THE facts of this case are, briefly, as follows :—

Rafat Khan and Musammat Majid-un-nissa owned a six-anna share in the village of Dhobra. They mortgaged their share to one Haji Yusuf Khan, who sub-mortgaged it to his wife, Musammat Zohra Begam, who was herself the proprietor of a two-anna share in the aforesaid village. This sub-mortgage was usufructuary. Zohra Begam executed a lease in respect of the whole eight-anna share in favour of the plaintiff appellant, Ahmad Said Khan. The latter was recorded as a co-sharer, and he brought the present suit against the defendant lambardar for his share of the profits for the years 1313-15 Fasli. Before the expiry of the lease, however, Rafat Khan and Majid-un-nissa redeemed their property in 1314, and mutation was made in their favour. But the plaintiff still continued to be recorded as lessee in respect of the whole share.

The defence raised was that the plaintiff was only a lessee, and that the property had been redeemed subsequently. The court of first instance, however, decreed the suit on the basis of the entry in the revenue records. The lower appellate court modified this decree. The plaintiff appealed.

Maulvi *Muhammad Ishaq* (with him Dr. *Satish Chandra Banerji*), for the appellant.

The suit should have been decreed *in toto*. Plaintiff was a recorded co-sharer during the whole period, and section 201 of Act II of 1901, applies. Sections 33 and 142 of Act III of 1901, may [251] be read to illustrate the meaning of the word ' proprietor '. The word has been used in an extended sense in section 201 of Act II, as appears from section 166, and plaintiff was entitled to bring his suit.

Maulvi *Muhammad Rahmat-ullah* (or Malulvi *Ghalam Mujtaba*, for the respondent :—

According to section 4, clause (5) of Act II of 1901, a *thekadar* has only the status of a tenant. The mere fact of his being recorded cannot invest him with a proprietary title. The original lessee may also be recorded in respect of the same share. He cannot be said to be the legal representative of a co-sharer as the word ' legal representative ' is defined in the Code of Civil Procedure. He may not have authority under the lease to exercise such powers. Mutation in his favour will not confer such a right. Reference was made to *Durga Prasad* v. *Hazari Singh* (1).

* Second Appeal No 468 of 1911, from a decree of A. Sabonadiere, District Judge of Aligarh, dated the 29th March, 1911, modifying a decree of Kewal Krishna, Assistant Collector, first class, of Etah, dated the 4th of November, 1910.

(1) (1911) I. L. R. 33 All. 799.

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34 A. 250 =9 A. L. J. 152 =13 I. C. 975.

KARAMAT HUSAIN and CHAMIER, JJ.:—This appeal arises out of a suit brought by the appellant for an eight anna share of the profits of a mahal of which the defendant respondent is the lambardar. The owner of a six-anna share mortgaged it to one Muhammad Yusuf Khan, who sub-mortgaged it to Zohra Begam, who was herself the owner of a two anna share in the mahal. Zohra Begam gave the lease of the whole eight-anna share to the appellant, and it is on the strength of that lease that the appellant, and it ison the strength of that lease that the appellant in the present case has claimed a share of profits as against the lambardar. One of the defences to the suit was that the lease was not in force during two of the three years in question. It appears that the mortgage was redeemed in August, 1906, that is to say, at the end of 1313 Fasli. It is contended that the lease must have come to an end when the mortgage was redeemed. The lower appellate Court accepted that argument and gave the appellant a decree for only a two anna share of the profits for the years 1314 and 1315 Fasli. In second appeal it is contended that this decision is erroneous, and that the case is governed by section 201 of the Tenancy Act. It has been found by the lower appellate Court that, notwithstanding the redemption of the mortgage, the appellant continued to be recordad as lessee of the whole eight anna share. The suit is brought under chapter XI [252] of the Tenancy Act. The appellant is a co-share within the meaning of that chapter, for it is provided by section 166 of the Act that the word "co-sharer" includes the heirs, legal representatives, executors, administrators, and assigns of a co-sharer. It is as assignee of a co-sharer that the appellant has brough this suit. For the time being he is to be treated as proprietor of a share as between himself and other sharers for the purpose of the settlement of profits. It seems to me that he is a person who, within the meaning of section 201 of the Act, is recorded as having a proprietary right entitling him to institute this suit. Under sub-section (3) of that section the court is bound to presume that the appellant has a right entitling him to institute this suit. It was so held by the Full Bench of this Court in *Durga Prasad* v. *Hazari Singh* (1). The appellant is entitled to an eight anna share of the profits for the years 1314 and 1315 Fasli, and it is not now disputed that he is entitled to an eight anna share of the profits for the year 1313 Fasli.

The next point taken by the appellant is that the lower appellate court ought to have allowed him interest on the profits up to the date of the suit, at the rate of twelve per cent. per annum and not at the rate of the ten per cent. as it did. In the circumstances of the case we think that the appellant has no ground for complaint in respect of the rate of interest allowed to him.

The third and last point taken by the appellant is that the lower appellate court is wrong in calculating the profits on 90 per cent. of the recorded rental in the years 1313 and 1314 Faslis and is wrong in calculating profits for 1315 Fasli on the actual collections. The learned District Judge has given his reasons for declining to calculate profits on more than 90 per cent. of the recorded rental for the years 1313 and 1314 Faslis, and we need only say that we see no reason to differ from him. The year 1315 Fasli was a very bad year. The collections were Rs. 2,077, out of the recorded rental oi Rs. 3,305. It is clear that in such a year as that, the whole of the rental could not have been recovered, and we are

(1) (1911) I. L. R. 33 All. 799.

not prepared to say that the learned Judge was wrong in calculating the profits on the actual collections.

[283] The result is, that we allow the appeal, modifying the decrees of the courts below, give the appellant a decree for Rs. 2,664-13-8, with interest, from the date of the institution of the suit to that of realization, at the rate of six per cent. per annum. The parties will pay and receive proportionate costs in all three courts. Interest will not be calculated upon costs.

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34 A. 260=9 A. L. J. 152 =13 I. C. 975.

Appeal decreed.

34 A. 253 (= 13 I. C. 531=9 A. L. J. 188).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice and Mr. Justice Banerji.

RAM CHANDRA DAS (*Plaintiff*) v. FARZAND ALI KHAN AND OTHERS (*Defendants*).*

[10th January, 1912.]

Act No. III of 1877 (*Indian Registration Act*), *sections* 32, 60, 75—*Registration—Presentation—Endorsement of registering officer—Presumption—Evidence—Act No. I of* 1872 (*Indian Evidence Act*), *section* 114.

A document was presented to a Sub-Registrar for registration by a *karinda* of the person in whose favour it was executed. It was received for registration. Simultaneously with the presentation an application was made to summon the executants. They failed to appear, and the Sub-Registrar, considering that execution was not admitted, refused to register the document. The matter came up before the District Registrar by means of an application under section 73 of the Registration Act, and the presence of the executants having been secured, the District Registrar ordered that the document should be registered. The document was apparently then sent by the Registrar to the Sub-Registrar, by whom it was registered.

Held that in the absence of evidence to the contrary it must be presumed that the *karinda* who presented the document was duly authorized in that behalf, and further that, even if the Registrar had in fact sent the document direct to the Sub-Registrar, instead of returning it to the person who had presented it for registration, this fact alone was not sufficient to invalidate the registration. *Mohamed Ewaz* v. *Birj Lall* (1) referred to. *Mujib-un-nissa* v. *Abdur Rahim* (2) and *Ishri Prasad* v. *Baij Nath* (3) distinguished.

[Dist. 34 All. 331.]

THE facts of this case were as follows:—

One Farzand Ali executed a mortgage bond on the 5th of February, 1888. The name of his mother also appeared on the bond as an executant, but she did not execute it. The property admittedly belonged to Farzand Ali. The bond was taken for registration by Jasondhi Rai, a *karinda* of Bansi Rai, in whose favour the bond was executed. There was nothing to show if the [254] *karinda* held a power of attorney executed in his favour. The executant was summoned but failed to appear. The Sub-Registrar issued a warrant, but Farzand Ali again failed to put in any appearance. Taking this to mean a denial of execution, the Sub-Registrar refused registration of the bond on 6th December, 1888. An application under section 73 of the Registration Act, III of 1877, was made to the District Registrar, who ordered registration of the bond, Farzand Ali having

* Frist Appeal No. 244 of 1910, from a decree of Muhammad Shafi, Subordinate Judge of Saharanpur, dated the 29th of June, 1910.

(1) (1897) L. R. 4 I. A. 166.
(2) (1901) I. L. R. 23 All. 233.
(3) (1906) I. L. R. 28 All. 707.

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34 A. 253=13 I. C. 531=9 A. L. J. 188.

appeared before him and admitted execution. The District Registrar however, instead of returning the bond to the applicant to get it registered, sent it direct to the Sub-Registrar, who registered it. Upon these facts the Subordinate Judge held that the document not having been properly presented was not registered according to law and was inadmissible in evidence. He accordingly dismissed the suit. The plaintiff appealed.

The Hon'ble Pandit *Moti Lal Nehru* with him Dr. *Satish Chandra Banerji*), for the appellant, contended that there was no defect in the matter of presentation. The question of presentation would have arisen if the document had been returned to the appellant by the District Registrar. If it is not properly presented it is not entitled to registration. The law cast a duty on the officer of satisfying himself that all that should be done has been done.

The Privy Council in *Mujib-un-nissa* v. *Abdur Rahim* (1) only held that where the agent duly authorized to present the document did so after the death of the principal he could not do so. The death of the principal revoked the authority The irregularity was apparent there on the face of the certificate. No irregularity appeared here.

[The Hon'ble Pandit *Sundar Lal*, for the respondent referred to F. A. 79 of 1910, decided on 12th February 1911, (unreported) and *Ishri Prasad* v. *Baij Nath* (2)]

In 28 All. also the registration proceedings clearly showed that the person presenting it had no authority to do so. There is a presumption in favour of everything having been rightly done—section 87 of the Registration Act and 114 of the Evidence Act. A presentation to the registering officer is quite [255] sufficient if he accepts it. He must satisfy himself that it was (1) duly executed and (2) duly presented—section 74 of the Registration Act. *Shah Makhun Lal Pandey* v. *Shah Kundan Lal* (3) and *Mohammed Ewaz* v. *Birj Lall* (4) were also cited.

The Hon'ble Pandit *Sundar Lal* (with him Babu *Jogindro Nath Chaudhri*), for the respondent :—

There is no presumption that a registered instrument was presented by a person duly authorized to do so. The party relying on it is bound to prove this fact. That is what the Privy Council lay down in 23 All. A court may presume so under circumstances. The production of the certificate is evidence of the particular fact. A special kind of power of attorney in writing properly executed and registered in the presence of the registering officer, has to be shown by the person presenting it for registration. The point is whether such a power can be presumed. Even if the first presentation was correct, it has yet to be shown that the presentation required after the order of the District Registrar was made. Besides, section 73 only speaks of an application for registration to the District Registrar and not a presentation for registration. Under the case in 23 Allahabad, presentation by a proper person was essential. Section 87 would not cure a defect in that respect. When a person wishes the executant to be summoned, as here, then the application can be made by any person, and there is no presumption that a person on applying is duly authorized under section 32. Any presumption in favour of the plaintiff is rebutted by the fact that no power of attorney is produced. The registration officer had to satisfy himself on two points, due registering and presentation in time. There was no inquiry here as to the second point,

(1) (1901) I. L. R. 23 All. 233.
(2) (1906) I. L. R. 28 All. 707.
(3) (1875) L. R. 2 I. A. 210.
(4) (1877) L. R. 4 I. A. 166.

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and the presentation had to be within 30 days of the order of the District Registrar. The person relying on the document must prove how and when it came before the Sub-Registrar for the second time. In 28 All., the document was presented by a pleader who had full authority and the executant admitted it, and yet it was held that presentation by a "proper" person must be proved. Presentation was not a question of [256] procedure, as laid down by the Privy Council. The original presentation could not relate back to the second presentation. If section 75 did not exist, it might be argued that it did.

RICHARDS, C. J. and BANERJI, J.:—This appeal arises out of a suit brought by the plaintiff against the defendants to realize the amount of a mortgage bond, dated the 5th February, 1888. The bond was originally made in favour of Bansi Lal, the father of the plaintiff Seth Ram Chandra Das. The bond was apparently executed by the defendant, Rao Farzand Ali Khan, on behalf of himself and also on behalf of his mother. The merits of the case have not been gone into by the court below and the question involved in this appeal is the question whether or not the learned Subordinate Judge was right in holding that the bond in suit had not been duly registered, and accordingly could not be given in evidence by the plaintiff. The bond was, in fact, registered to this extent at least, that it was received in the Registration office and a certificate of registration is endorsed thereon, or rather certain endorsements appear upon the bond. From these endorsements it would appear that the bond was presented for registration in the office of the Sub-Registrar on Monday, the 4th of June, 1888. Assuming for a moment that the bond was duly presented, within the meaning of section 32 of the Registration Act of 1877, the presentation was made in time. Simultaneously with the presentation of the bond an application was made under section 36 of the same Act to summon the executants. They did not appear. The Sub-Registrar considered that execution was not admitted and he therefore refused registration. The matter then came before the District Registrar under an application made on behalf of Bansi Lal under section 73 of the Act. The presence of Farzand Ali was procured and he admitted the execution of the bond. The District Registrar made an order in the following terms:—"The document be registered as admitted to have been executed by Farzand Ali Khan". Some way or another the bond found its way back to the Sub-Registrar's office and was registered. Exactly how the bond found its way back to the Sub-Registrar's office is not very clear. The plaintiff, who is the son of Bansi Lal, in his evidence says:—"The document was not returned [257] to me by the Judge. It was sent to the Roorki Tahsil and it was registered there." Except this statement there is nothing to show how the bond got back to the Sub-Registrar's office, and the witness was speaking of matters which happened more than twenty years before he made his deposition and when he was a boy of about fifteen years of age. The learned Subordinate Judge held that the bond had not been duly registered and that accordingly it was not admissible in evidence. He accordingly dismissed the plaintiff's suit. Hence the present appeal.

It is argued on behalf of the defendants, first, that the bond was not in fact duly presented for registration, on the ground that the person who presented it was not authorized to make the presentation in the manner prescribed by the Registration Act; and, secondly, that, even if it be presumed that the first presentation was in accordance with law, it

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=9 A. L. J. 183.

was necessary that there should be a second presentation by a person duly authorized after the Registrar had made his ruling on the application to him under section 73, to which we have already referred. Section 32 of the Registration Act enumerates the persons who are entitled to present a document for registration; it may be presented by some person executing or claiming under the same, or by a representative or assign of such person, or by the agent of such person, representative or assign duly authorized by power of attorney executed and authenticated in the manner prescribed by the Act. From a document issued by the Registration office, which will be found at page 16 of the appellant's book, it would appear that the document in question was presented by one Dasondhi Rai, *karinda* of Bansi Lal. Section 36 provides means for procuring the attendance before the Registrar of any person whose presence or testimony is necessary for the purpose of registration. Section 60 provides for the endorsements by the Registering Officer of a certificate of registration and further provides that such certificate shall be admissible for the purpose of proving that the document has been duly registered in the manner provided by the Act, and that the facts mentioned in the endorsements referred to have occurred as certified. In our opinion the production of the bond with the certificate of due registration endorsed thereon raised a strong presumption in favour of the *due* registration of the bond; [258] and that in the absence of clear proof that the requirements of law were not complied with, the court was bound to admit the document in evidence. Section 114 of the Evidence Act coupled with section 60 of the Registration Act seems to us to be abundant justification for this proposition.

The defendants strongly rely on the case of *Mujib-un-nissa* v. *Abdul Rahim* (1). In that case the person who had executed the deed and on whose behalf the application for registration purported to have been made was dead at the time of the presentation of the document for registration. Their Lordships of the Privy Council held that the authorization ceased upon the death of the donor of the power of attorney, and that consequently the presentation was made by a volunteer, that is to say, by a person who had no authority whatever to "present" the document. They held also that the presentation of the document was not a mere matter of procedure. The distinction between the facts in this case, and in the case before us is, we think, quite obvious. In the case before their Lordships it was proved by conclusive evidence, and admitted by the parties, that the person presenting the document purported to do so on behalf of the dead person. In the present case (to deal with the two questions separately) it is not at all admitted that the document was presented for registration by an unauthorized person. It is contended that the document to which we have already referred shows that the bond was presented by the *karinda*. It does not at all follow that the *karinda* may not have been duly authorized in the manner prescribed by the Act.

* * We have already pointed out that in our view the production, of the bond with the registration certificate endorsed thereon raised a strong presumption in favour of due registration. We think that this was the view taken by their Lordships of the Privy Council in the case of *Mohammed Ewaz* v. *Birj Lall* (2). At page 175 their Lordships say:—

"But there is another part of the judgment of the High Court which their Lordships think required consideration. The High Court say:—'It has been held by this

(1) (1901) I. L. R. 23 All. 233.

(2) (1877) L. R. 4 I. A. 166.

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34 A. 253=13
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Court more than once, that unless a deed be registered in accordance with the substantial provisions of the law it must be regarded as unregistered, though it may, in fact, have been improperly admitted to [255] registration. Their Lordships think this is too broadly stated, if the High Court is to be understood to mean that in all cases where a registered deed is produced, it is open to the party objecting to the deed, to contend that there was an improper registration,—that the terms of the Registration Act in some substantial respects have not been complied with. Undoubtedly it would be a most inconvenient rule if it were to be laid down generally, that all courts, upon the production of a deed which has the Registrar's endorsement of due registration, should be called on to inquire, before receiving it in evidence, whether the Registrar had properly performed his duty. Their Lordships think that this rule ought not to be thus broadly laid down. The registration is mainly required for the purpose of giving notoriety to the deed, and it is required under the penalty that the deed shall not be given in evidence unless it be registered. If it be registered, the party who has presented it for registration is then under the Act in a position which *prima facie* at least entitles him to give the deed in evidence. If the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely upon, or when they would be safe.'

In our opinion, there is nothing in the judgment of their Lordships in the case of *Mujib-un-nissa* v. *Abdul Rahim* which is inconsistent with these observations.

The case of *Ishri Prasad* v. *Baij Nath* (1) is also relied upon by the defendants. In that case the document was presented for registration by a pleader who was not duly authorized in compliance with provisions of the Registration Act, and this fact was admitted by the parties. In our judgment this case is no authority for holding that the *onus* lay in the present case upon the plaintiff of showing that the requirements of the Act were duly complied with. In the case mentioned above, as also in the case of *Mujib-un-nissa* v. *Abdul Rahim*, the presumption in favour of due registration was rebutted by evidence and by the admission of the parties. In the case before us there is no such evidence and no such admission. We are, therefore, unable to hold that the initial presentation of the bond was defective.

We now deal with the second point. Section 75 of the Registration Act provides as follows :—

"If the Registrar finds that the document has been executed and that the said requirements have been complied with, he shall order the document to be registered. And if the document has been duly presented for registration within 30 days after the making of such order, the registering officer shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in sections 58, 59 and 60. Such registration shall take effect as if the document had been registered when it was first duly presented for registration."

[260] The defendants contended that the provisions of this section render it necessary that there should be a second presentation within 30 days, and that second presentation must be in all respects similar to the initial presentation made under section 32. In the first place we may point out that, but for the evidence of the plaintiff, to which we have already referred, in which he says that bond was not returned to him, but that it was sent to the Roorki Tahsil and was registered there, there is nothing to prove that the document was not in fact duly presented a second time by a duly authorized agent. The evidence of the plaintiff on this particular point is very vague. As we have already pointed out, he is speaking of a very ancient matter, and he does not even say who it was who brought the document for registration, and it is only an inference which may be drawn from his evidence that it was the judge, that is the Registrar, who directed the document to be sent back to the Sub-Registrar

(1) (1906) I. L. R. 28 All. 707.

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34 A. 255=13 I. C. 531=9 A. L. J. 188.

for registration. In our opinion, it would be hardly reasonable to bind the plaintiff by this vague statement and to hold that it is sufficient to rebut the strong presumption in favour of everything required by the Act having been duly performed. However, even if we assume in favour of the defendants that the bond after it had been adjudicated upon by the Registrar was not returned by the Registrar to Bansi Lal or his attorney but was forwarded direct to the Sub-Registrar, we think the matter ought to be dealt with as a defect in procedure. Section 87 provides that:—

"Nothing done in good faith pursuant to this Act, or any Act hereby repealed, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure."

If it was irregular of the Registrar to send the bond himself to the Sub-Registrar instead of handing it back to the applicant, the irregularity was the irregularity of the Registrar not of the applicant. It is, no doubt, true that their Lordships of the Privy Council say in this case of *Mujib-un-nissa* v. *Abdur Rahim*, in dealing with the acceptance by the Registrar of the document from the attorney of a deceased person:—

"It has been suggested, however, that the error of a Registrar was a defect in his procedure only, and accordingly under section 87, does not invalidate the act of registration. To their Lordships the error appears to be of a more radical nature. When the terms of section 32 are considered with due regard to the nature of registration of deeds, it is clear that the power and jurisdiction of the [261] Registrar only come into play when he is invoked by some person having a direct relation to the deed."

Their Lordships were here dealing with the initial presentation for registration and that presentation was made by a mere volunteer. For the purposes of the point we are now dealing with, it must be presumed that the bond was originally presented by a person duly authorized and that the error, if any, which was committed was the sending of the bond by the Judge to the Sub-Registrar instead of handing it back to the party to be presented. In our opinion the second point which has been argued in support of the decision of the learned Subordinate Judge also fails.

We, therefore, hold that the appeal should be allowed. We accordingly allow the appeal, set aside the decree of the learned Subordinate Judge and remand the case to his court under order XLI, rule 23 of the Code of Civil Procedure, to be heard and determined according to law. The appellant will have his costs in this Court. Other costs will abide the result.

Appeal allowed.

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34 A 261 (=13 I. C. 963=9 A. L. J. 131).

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

HABIB-ULLAH AND OTHERS (*Defendants*) *v.* ABDUL HAMID AND OTHERS (*Plaintiffs*) AND NABI BAKHSH AND OTHERS (*Defendants*).*

[11th January, 1912.]

Bengal Regulation XV of 1793—*Mortgage—Redemption—Limitation—Act No. XIV of* 1859 (*Limitation Act*), *section I* (12)—*Accounts.*

A usufructuary mortgage was executed in the year 1852, in a place to which the provisions of Bengal Regulation XV of 1793 applied. It provided that the

* Second Appeal No. 607 of 1910, from a decree of Ram Autar Pande, District Judge of Azamgarh, dated the 2nd of February, 1910, confirming a decree of Ram Chandra Chaudhri, Subordinate Judge of Azamgarh, dated the 30th of June, 1909.

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mortgagees should enter into possession and collect the rent and pay the Government revenue and defray collection charges &c. therefrom and retain the balance in lieu of interest. There was to be no accounting on either side and the mortgagor was to be entitled to redeem on payment of the principal sum of Rs. 252.

Held, on suit by the representative of the mortgagor to redeem, brought within 60 years from the date of the mortgage, that the suit was within time: that the mortgage could not be considered as redeemed in the strict sense of the term from the moment when the profits received by the mortgagees became equal to the amount due to them for principal and interest, and that the mortgagor was, notwithstanding anything contained in the deed, entitled to an account [262] of the profits received by the mortgagees. *Sudarshan Das Shastri* v. *Ram Prasad* (1) followed. *Shafi-un-nissa* v. *Fazl Rab* (2) and *Badri Prasad* v. *Murlidhar* (3) distinguished.

[Fol : 33 I. C.740.]

THE facts of this case were as follows :—

On the 12th of February 1852, one Muslima Bibi made a mortgage by way of a *zar-i-peshgi* lease of an eight anna share of a village Patua for the period of six years in consideration of Rs. 215 in favour of Akbar Ali and Yar Muhammad, the predecessors in title of defendants Nos. 1 to 50. The deed provided that Rs. 12 per annum would be paid as profits in lieu of interest. The plaintiffs, who had acquired the property from the successors of the mortgagor, brought the present suit for redemption on the 27th of June, 1908. They also claimed Rs. 2,175-13-11 as mesne profits, as well as interest at the rate of 12 per cent. per annum, alleging that it could be awarded under Bengal Regulation XXXIV of 1803. Defendants contended that the suit was barred by limitation, and that they were not liable for any mesne profits or interest.

The court of first instance held that the suit was governed by article 148, schedule II. of the Limitation Act, and was within time. It also held that the plaintiffs were entitled to mesne profits and interest, and decreed the suit. The lower appellate court confirmed this judgment. The plaintiffs appealed.

Dr. *Tej Bahadur Sapru* (with him Maulvi *Muhammad Ishaq*), for the appellants :—

The mortgage, being made in 1852, was governed by Bengal Regulation XV of 1793. Section 10 of that Regulation provides as follows :— "All such mortgages are to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum with simple interest due upon it shall have been realized from the usufruct of the mortgaged property, &c." The plaintiffs sue for redemption on the ground that the mortgage debt has long ago been satisfied by the usufruct, and they claim the surplus as mesne profits. If the mortgage was satisfied by the usufruct, it must be considered under section 10 of Regulation XV of 1793, to have been cancelled and redeemed at once. No period of limitation was necessary under the Regulation, as [263] the relation of mortgagee and mortgagor ceased to exist, and the plaintiff's remedy was by an ordinary suit for recovery of possession for which an ordinary period of limitation was provided. The fact of redemption was under the Regulation completed by the satisfaction of the mortgage from the usufruct, and did not require a decree of court to establish it as it does now. The Regulation was repealed by section 1 of Act XXVIII of 1855, but section 10 was not affected. The Preamble of Act XXVIII refers only to the repeal of the

(1) (1910) I. L. R. 32 All. 97.
(2) (1910) 7 A. L. J. 787.
(3) (1879) I. L. R. 2 All. 593.

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Usury Laws, and section 7 of that Act also enacts a saving. He also cited *Samar Ali* v. *Karam-ullah* (1).

[Mr. *Abdul Raoof*, for the respondents, here referred to. *Sudarshan Das Shastri* v. *Ram Prasad* (2).]

With all due respect to the learned Judges responsible for that ruling it does not contain a correct interpretation of this Regulation. The word, ' redeem ' is used in section 10 in its fullest sense. From the very day the mortgage is *cancelled and redeemed*, the possession of the mortgagee become adverse to the mortgagor. His position becomes no better than that of a trespasser. It is true that this is not the law now, but it was so under the old Regulation. The interpretation in 7 A. L. J. R., 963, reads words into section 10 which are not there. The section clearly says *cancelled and redeemed*. As to *Pokhpal Singh* v. *Bishan Singh* (3), the case cited by the lower appellate court, the mortgage in that case was not governed by the provisions of Regulation XV of 1793. As to the fact that when a mortgage is satisfied out of the usufruct, it becomes extinct, and the parties are relegated to the position in which they were before the mortgage, see *Gobardhan* v. *Suraj* (4). Regulation XV was extended to Azamgarh by Regulation XVII of 1806. Section 10 of Regulation XV had not been modified till it was repealed by the Transfer of Property Act. He also cited *Fakir Baksh* v. *Sadat Ali* (5). The plaintiffs have no right to any account. Even if any surplus be held to be due, no interest should be awarded. He cited *Badri* [264] *Prasad* v. *Murlidhar* (6), *Shafi-un-nissa* v. *Fazl Rab* (7) and *Bechoo Singh* v. *Rai Sheo Sahoy* (8).

Mr. *Abdul Raoof*, for the respondents, was heard only on the question of interest.

The mortgagee was awarded 12 per cent. under Regulation XXXIV of 1803. The mortgagor should also be awarded the same rate. As to an account and mesne profits, that is provided for by section 11 of Regulation XV of 1793.

KARAMAT HUSAIN and CHAMIER, JJ.—This appeal arises out of a suit by respondents 1, 2 and 3, for redemption of a mortgage made in the form of a *zar-i-peshgi* lease on February 12th, 1852, by one Muslima Bibi, in favour of the appellants and respondents 4 to 48 or their predecessors in title. The deed provided that the mortgagees should enter into possession and collect the rents and pay the Government revenue and defray collection charges &c., therefrom and retain the balance in lieu of interest. There was to be no accounting on either side and the mortgagors were to be entitled to redeem on payment of the principal sum Rs. 252. The case of the plaintiff's respondents was that the mortgage was subject to the provisions of Bengal Regulation XV of 1793; therefore, the mortgagees were not entitled to more than 12 per cent. per annum on the principal sum, notwithstanding the provisions of the deed, and that if an account were taken of profits received by the mortgagees, it would be found that the principal sum and interest had been satisfied many years ago, and that a large sum was due to the plaintiffs respondents. The Subordinate Judge gave them a decree for possession of the property and for Rs. 3,305-8-9 on account of surplus profits and interest thereon up to the date of the suit and directed an inquiry as to the profits during the suit and up to the

(1) (1886) I. L. R. 8 All 402.
(2) (1910) I. L. R. 33 All. 97.
(3) (1897) I. L. R. 20 All. 115.
(4) (1894) I. L. R. 16 All. 254, at 255.
(5) (1881) I. L. R. 7 All. 876.
(6) (1879) I. L. R. 2 All. 693.
(7) (1910) 7 A. L. J. 787.
(8) (1869) N. W. P. H. C. Rep. 111.

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delivery of possession. The decree was confirmed on appeal by the District Judge. In second appeal it is contended in the first place that the suit is barred by limitation. Dr. *Tej Bahadur* argues that if Regulation XV of 1793 applies, as the plaintiff's respondents say, the mortgagees were not entitled to more than 12 per cent. per annum on the principal sum notwithstanding the [265] terms of the deed, and an account must be taken of what the mortgagees have received and the mortgage must be considered to have been in the words of section 10 of the Regulation " virtually and in effect cancelled and redeemed " as soon as the principal sum with simple interest at 12 per cent. per annum had been realized from the usufruct of the property, and thereafter the mortgagee's possession must be deemed to have been adverse; consequently the mortgagor's right to recover the property was barred under section I (12) of the Limitation Act XIV of 1859, on the expiry of 12 years from the date on which the principal and interest were satisfied out of the usufruct. There can be no doubt that the mortgage was originally subject to Regulation XV of 1793, which was made applicable to the Azamgarh district by Regulation XVIII of 1806, and that, as held in *Samar Ali* v. *Karimullah* (1), it remained subject to the former Regulation notwithstanding the passing of the Usury Laws Repeal Act XXVIII of 1855. Therefore the plaintiffs were entitled to an account of the profits received by the mortgagees. But we cannot accept the argument that the right of the mortgagors to recover the property became barred by limitation upon the lapse of twelve years from the date on which the principal and interest were satisfied out of the usufruct. Prior to the passing of Act XIV of 1859, there was no limitation for a suit for redemption of a mortgage. Section I (15) of that Act provided that the period of limitation applicable to a suit against a mortgagee for the recovery of immoveable property mortgaged should be sixty years from the date of the mortgage, and there are similar provisions in the Limitation Acts of 1871, 1877 and 1908. The possession of a mortgagee does not become adverse to the mortgagor merely because the mortgagee remains in possession after the mortgage money has been satisfied out of the usufruct or has been otherwise paid off. Much more is required to set time running against the mortgagor. We agree with the *Sudarshan Das Shastri* v. *Ram Prasad* (2) that the provision in section 10 of the Regulation of 1793, that a mortgage shall be deemed to be cancelled and redeemed, does not mean redeemed in the full sense of the word. It appears to us that on the [266] passing of Act XIV of 1859 the mortgagor's right to redeem became subject to section I (15) of that Act and a suit for redemption could be brought at any time within sixty years of the mortgage. In our opinion the suit is not barred by limitation.

The next point taken is that the plaintiffs respondents are not entitled to an account of the profits received by the mortgagees. As already stated, we are of opinion that the mortgage has all along been subject to the provisions of Regulation XV of 1793, therefore the plaintiffs respondents are entitled to an account of the profits. Dr. *Tej Bahadur* relied upon the decision in *Shafi-un-nissa* v. *Fazal Rab* (3), but the mortgage in that case was made in January, 1866, and therefore was never subject to the Regulation of 1793. He relied also on the case of

(1) (1886) I. L. R. 8 All. 402.
(2) (1910) I. L. R. 33 All. 97.
(3) (1910) 7 A. L. J. 787.

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Badri Prasad v. *Murlidhar* (1), but that case is clearly distinguishable from the present case. The sum to be received by the mortgagee was a fixed sum, not as here a fluctuating amount, and their Lordships were careful to point out that they did not decide that, if the amounts received by the mortgagee had been fluctuating, it would not have been necessary to take an account against him.

The third and last point taken is, that the courts below were wrong in allowing the plaintiffs respondents interest at 12 per cent. per annum on the annual surplus profits. In allowing interest at the above rate the courts below relied upon the judgment of this Court in *Bechoo Singh* v. *Rai Sheo Sahoy* (2), in which it was said that it was an established practice in cases of this kind to allow the mortgagor, interest on the surplus profits at the rate allowed to the mortgagee on the mortgage-debt. It is not contended that no interest should have been allowed and in the circumstances, we think that 12 per cent. is a fair rate.

The appeal fails and is dismissed with costs.

Appeal dismissed.

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34 A. 267 (=9 A. L. J. 231 =13 I. C. 829= 13 Cr. L. J. 141).

[267] REVISIONAL CRIMINAL.

Before Mr. Justice Karamat Husain.

ABDUL GHAFUR AND ANOTHER *v.* RAZA HUSAIN.*

[17th January, 1912.]

Criminal Procedure Code, section 476—Preliminary inquiry—Revision.

When a Magistrate takes action under section 476 of the Code of Criminal Procedure, it is not necessary to the validity of his order that he could hold a preliminary inquiry, nor, if he does hold preliminary inquiry, is it necessary that he should give the person against whom such inquiry is being held an opportunity of cross-examining the witnesses: *Queen-Empress* v. *Matabadal* (3) followed.

[Fol. 38 Mad. 1044 =23 I. C. 479.]

Maulvi *Muhammad Rahmat-ullah*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*) (with whom Babu *Durga Charan Singh*) for the opposite party.

In this case an Assistant Collector of the first class acting under section 476 of the Code of Criminal Procedure directed certain persons to be prosecuted under section 193 of the Indian Penal Code. The persons against whom this order was made appealed to the District Judge, who rejected their appeal. They then applied to the High Court on the criminal side for revision, but this was held to be barred. They then prayed that their application might be considered as one on the civil side and contended that the Assistant Collector was wrong in that he had not allowed the applicants an opportunity of cross-examining the witnesses examined before him in the inquiry under section 476 of the Code of Criminal Procedure.

KARAMAT HUSAIN, J. :—In this case an Assistant Collector of first class acting under section 476, Criminal Procedure Code, directed the applicants to be prosecuted under section 193 of the Indian Penal Code. The

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* Criminal Revision No. 658 of 1911, from an order of Muhammad Ali, District Judge of Banda, dated the 31st of July 1911.

(1) (1873) I. L. R. 2 All. 593; L. R. 7 I. A., 5.

(2) N. W. P. H. C. Rep. 1869, p. 111.

(3) (1893) I. L. R. 15 All. 392.

applicants appealed to the learned District Judge of Banda, for revoking the sanction. The application was rejected by the learned District Judge and the order of the Assistant Collector was confirmed. The applicants came to this court in revision on the criminal side. The learned vakil for the opposite party, relying on the Full Bench ruling of this Court in *In the matter of the petition of Bhup Kunwar* (1), contends that the High Court has no jurisdiction, in the [268] exercise of its revisional powers on the criminal side under section 439 of the Code of Criminal Procedure to interfere with such orders. The Full Bench ruling in the case referred to is binding upon me. The learned vakil for the applicants prays that permission may be given to him to alter the application into a civil revision, inasmuch as the order passed by the Assistant Collector of the first class is based on the statements of the witnesses who were not allowed to be cross-examined by the applicants. In *Chota Sadoo Peadah* v. *Bhoobun Chuckerbutty* (2) it was laid down that the preliminary inquiry need not be held in the presence of the accused, and in *Queen-Empress* v. *Matabadal* (3), it was ruled that when a Magistrate takes action under section 476 of the Code of Criminal Procedure, it is not necessary to the validity of his order that he should hold a preliminary inquiry. I am, therefore, of opinion that the Magistrate in refusing to give the applicants an opportunity to cross-examine the witnesses did not act in the exercise of his jurisdiction illegally or with material irregularity. For the above reasons, I reject the application.

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Application rejected.

34 A. 268 (=13 I. C. 619=9 A. L. J. 226).

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

JUGAL KISHORE AND OTHERS (*Defendants*) *v.* RAM NARAIN AND OTHERS (*Plaintiffs*).*

[18th January, 1912.]

Act No. IV of 1882 (*Transfer of Property Act*), *section* 101—*Purchase—Satisfaction of mortgage on property purchased—Intention of purchaser to keep mortgage alive for his benefit—Presumption.*

In considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property, the point of time to be regarded is the date of the acquisition of the property. If an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, the charge cannot be treated as still subsisting simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive. *Liquidation* [269] *Estates Purchase Co.* v. *Willoughby* (4) followed. *Bindeshuri Singh* v. *Pandit Balraj Sahai* (5) and *Mohesh Lal* v. *Bawan Das* (6) referred to.

[Fol: 70 I. C. 912=24 Bom. L. R. 720=46 Bom. 1009.]

THE facts of this case were as follows:—

Adhar Singh and others executed a mortgage for Rs. 405 in favour of Shiva Singh and others, the predecessors of the present plaintiffs, on the

* Second Appeal No. 416 of 1911, from a decree of H. E. L. P. Dupernex, District Judge of Mainpuri, dated the 21st of February, 1911, confirming a decree of Banke Behari Lal, Subordinate Judge of Mainpuri, dated the 29th of June 1910.

(1) (1903) I. L. R. 26 All. 249.
(2) (1868) 9 W. R. C. R. 3.
(3) (1893) I. L. R. 15 All. 392.
(4) [1898] A. C. 321.
(5) (1906) 10 Oudh Cases, 49.
(6) (1883) I. L. R. 9 Cal. 961.

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8th of January, 1884. This deed was registered on the 11th of January, 1884. On the 17th and 18th of January, 1898, the mortgagors executed two sale deeds in respect of the mortgaged property in favour of the mortgagees, part of the consideration being the mortgage of the 8th of January. Subsequently a suit for pre-emption was brought by the defendants respondents, which succeeded. The plaintiffs then brought the present suit on their mortgage of 1884. The defendants pleaded that the mortgage was extinguished by the sale deeds of 1898. The Court of first instance held that, the pre-emptors having obtained possession of the property, the mortgagees had not acquired any right of ownership therein, and were therefore entitled to sue on their mortgage. He decreed the suit. The lower appellate court confirmed this decree. The defendants appealed.

Babu *Jogindro Nath Chaudhri* (with him Mr. *A. P. Dube*), for the appellants :—

The mortgage must be deemed to be extinguished under section 101 of the Transfer of Property Act. The sale was complete, and the pre-emptor merely stepped into the shoes of the mortgagees. There is no evidence that the latter intended to keep the mortgage alive, or that its continuance would be for their benefit. He cited *Mohesh Lal* v. *Mahant Bawan Das* (1), *Ram Kishan Upadhia* v. *Dipa Upadhia* (2), *Baldeo Prasad* v. *Uman Shankar* (3) and *Ahamad Shah* v. *Wali Dad Khan* (4).

[CHAMIER, J., referred to the ruling in 10 Oudh Cases, p. 49.]

Munshi *Gokul Prasad*, for the respondents :—

The case in 9 Calc., 961, merely held when a prior charge merged into a subsequent security. It is a question of intention, and should be decided in the circumstances of each particular case. No general rule can be inferred from this ruling. *See* [270] *Ghosh on Mortgage*, p. 470. The prior security revives when the latter is ineffectual. See 9 Cal., 961 at p. 975. Merger is not necessarily created by the vesting of the proprietary and mortgagee rights in the same person. Even when there may be a merger, a court of equity will hesitate in holding it so ; *Forbes* v. *Moffat*, 18 Ves, 384. Intention may be presumed from the subsequent suit for pre-emption. The continuance of the mortgage would be for the benefit of a mortgagee, whose purchase may be liable to be defeated by the claim of a pre-emptor. In the cases in 10 Oudh cases and the Punjab Record for 1906, the mortgagee desired to enforce his mortgage as well as to remain in possession. This is not the present case. The property has passed out of the possession of the mortgagees. The ruling in 10 Oudh cases refers to an English case which was subsequently upset on appeal.

Babu *Jogindro Nath Chaudhri* was not heard in reply.

CHAMIER. J.—This was a suit for a decree for sale upon a mortgage, dated the 8th of January, 1884, made by Adhar Singh and others, in favour of the respondents. On the 17th and 18th of January, 1898, the mortgagors by two deeds sold the mortgaged property to the respondents for an ostensible consideration of Rs. 1,800, of which Rs. 500 were said to have been retained by the respondents on account of a mortgage of January 11th, 1894. There was no mortgage of that date the intention was to refer to the mortgage of the 8th of January, 1884. The mistake in the day of the month seems to have been due to the fact that the mortgage of the 8th of January, 1884, was registered on the 11th of January, and the mistake in

(1) (1888) I. L. R. 9 Cal. 961.
(2) (1891) I. L. R. 13 All. 581.
(3) (1907) I. L. R. 32 All. 1.
(4) Punj. Rec. 1906, 348.

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34 A. 268=13 I. C. 619=9 A. L. J. 226.

the year seems to have been a purely clerical error. In 1899, the appellants brought a suit for pre-emption saying that there was no such mortgage as the one referred to in the sale deed, and that the statement in the deed that Rs. 500 had been retained on account of a previous mortgage had been made for the purpose of making it appear that the consideration was larger than it really was. The respondents produced two witnesses who swore that there was a previous mortgage of the date given in the sale deed. That evidence was disbelieved and at the last moment the respondents produced a copy of the mortgage of the 8th of January, 1884, [271] and said that a mistake had been made in the sale deed, and the sum of Rs. 500 had been retained on account of that mortgage. That explanation was rejected and a decree was made for pre-emption on payment of Rs. 1,300. The respondents appealed on another point, saying in their grounds of appeal that they would enforce their rights under the previous mortgage by a separate suit. They brought the present suit in July, 1909. The defence of the appellants was, and is, that if there was any mortgage in existence in favour of the respondents when they (the respondents) bought the property in 1598, it must be taken to have then ceased to exist according to the rule contained in section 101 of the Transfer of Property Act. The respondents contend that the mortgage must be deemed to have continued to subsist, as the continuance of it was for their benefit. The rule contained in section 101 of the Transfer of Property Act reproduces a rule well known to English Courts of Equity, with reference to which many cases are to be found in the English and Indian Reports. Upon the authorities it is quite clear that in considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property the point of time to be regarded is the date of the acquisition of the property. One of the latest English cases in which the rule was considered is that of the *Liquidation Estates Purchase Co.* v. *Willoughby* (1). In his judgment in that case the Master of the Rolls said:—"We take it to be clear that if an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, that charge cannot be treated as still subsisting simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive." The decision of the Court of Appeal was reversed by the House of Lords on the facts, but the correctness of the statement of the law contained in the judgment of the Master of the Rolls was not challenged. In fact, at page 339 of the report, Lord Macnaghten quotes the following passage from his judgment with approval:—"The answer to this question depends upon the intention [272] of the parties at the time and that intention must be found from the terms of the deed and the circumstances under which it was executed." It was contended by Mr. *Gokul Prasad* that at the time of the sale deeds it was for the benefit of the purchasers that the mortgage should continue to subsist in view of the probability or possibility of a claim for pre-emption being preferred. But I do not understand how a mortgage on the property could defeat a claim for pre-emption. A pre-emptor must pay the price actually and in good faith paid for the property by the purchaser, however the price may be made up. The mortgage money was overdue, therefore any person obtaining the property by pre-emption

(1) [1898] A. C. 321.

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could pay it off, whether the mortgagees consented or not. There might have been some ground for the argument if the mortgage had been with posession for a long term of years as in *Bindeshuri Singh* v. *Pandit Balraj Sahai* (1), but even in such a case, I think, it should be held that the continuance of the mortgage was not for the benefit of the purchaser. In the present case, in the view which I take of the law, there seems to be no ground whatever for holding that the continuance of the mortgage was for the benefit of the respondents. The fact that it would now be convenient for the respondents to be able to set up the mortgage has no bearing on the question. See *Mohesh Lal* v. *Bawan Das* (2). The respondents have themselves to thank for what has happened. They accepted a deed of sale containing incorrect particulars of a previous mortgage and they followed this up by producing absurd evidence in the pre-emption suit. We were asked to hold that the appellants were estopped by their conduct in the pre-emption suit from denying the continued existence or the mortgage, but it seems to be impossible to do that. The appellants were not parties to either the mortgage or the sale. It is not shown that they knew anything about the mortgage. The respondents set up a mortgage in order to prove that the price was Rs. 1,800 and failed to prove it, with the result that the appellants obtained the property free from incumbrances for Rs. 1,300. That was the fault of the respondents. The mortgage was non-existent at the date of the pre-emption suit, and it [273] cannot be revived in order to remedy the error of the court or a party in the pre-emption suit.

In my opinion, the respondents have no right to sue the appellants upon the mortgage of 1884, and their suit should have been dismissed.

I would allow this appeal and dismiss the respodent's suit with costs in all three courts.

KARAMAT HUSAIN, J.—I agree with my learned colleague in the order proposed by him.

BY THE COURT.—The order of the Court is that the appeal be allowed and the respondents' suit be dismissed with costs in all courts.

Appeal allowed.

34 A. 273 (=9 A. L. J. 198=13 I. C. 573.)

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

RASHIK LAL (*Defendant*) *v.* RAM NARAIN AND OTHERS (*Plaintiffs*).*

[20th January, 1912.]

Act No. IX of 1872 (*Indian Contract Act*), *section* 39—*Contract—Mortgage—Part of consideration unpaid—Effect of such non-payment.*

Where on execution and registration of a mortgage an interest in the mortgaged property has vested in the mortgagee the fact that part of the mortgage money as specified in the deed of mortgage has not been paid neither renders the mortgage invalid nor entitles the mortgagor to rescind it at his option. *Gokal Chand* v. *Rahman* (3) dissented from. *Tatia* v. *Babaji* (4), *Subba Rau* v. *Devu Shetti* (5), *Bajrangi Sahai* v. *Udit Narain Singh* (6) and *Baijnath Singh* v. *Pattu* (7) referred to.

[Ref. 13 A. L. J. 185=27 I. C. 733; Fol. 2 Pat. L. J. 168=38 I. C. 877.]

* Second Appeal No. 355 of 1911 from a decree of H. E. Holme, District Judge of Jhansi, dated the 19th of January, 1911, confirming a decree of Girdhari Lal, Subordinate Judge of Jhansi, dated the 25th of November, 1910.

(1) (1906) 10 Oudh Cases, 49.
(2) (1883) I. L. R. 9 Cal. 961
(3) Punj. Rec. 1907, 274.
(4) (1896) I. L. R. 22 Bom. 176.
(5) (1894) I. L. R. 18 Mad. 126.
(6) (1906) 10 C. W. N. 932.
(7) Weekly Notes, 1908, p. 88.

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34 A. 273=9 A. L. J. 198 =13 I. C. 373.

THE facts of the case were as follows:—

Bachu Lal and Gulzari Lal were the owners of an indigo factory. They executed a usufructuary mortgage of half of it in favour of Cheda Lal, the father of the plaintiff, in August, 1894. Subsequently they sold the whole of it to Rashik Lal in May, 1895, and left Rs. 750 to be paid to Cheda Lal for the usufructuary mortgage. On 29th August, 1898, Rashik Lal, the defendant, executed a mortgage by way of conditional sale of the indigo factory and the zamindari property in favour of Cheda Lal for Rs. 5,000, which consisted of a hundi for Rs. 2,000, Rs. 125 cash paid [274] before execution, Rs. 125 paid on registration, and Rs. 750 on account of the prior usufructuary mortgage. The hundi was, however, stolen by Cheda Lal, and it was not cashed. The defendant served a notice, dated the 28th of September, 1898, on Cheda Lal, threatening to sue him for damages for breach of contract and to prosecute him for fraud and theft; but no such steps were taken. The plaintiffs, who are the sons of Cheda Lal, sue for recovery of Rs. 1,000 and interest thereon, and in default for foreclosure. The defence was fraud, failure of consideration and other like pleas. The court of first instance gave a decree as prayed for; on appeal the learned District Judge confirmed it, but held that the hundi was stolen by Cheda Lal. The defendant appealed to the High Court.

Pandit *Mohan Lal Sandal*, for the appellant, contended that owing to partial failure of consideration, the mortgage deed in suit was invalid and the plaintiffs were not entitled to sue thereon. He relied on *Gokal Chand* v. *Rahman* (1). If the mortgage be held valid, the plaintiffs were entitled to interest up to 28th September, 1898, when notice was served. He relied on section 39 of the Contract Act, and the case of *Subba Rau* v. *Devu Shetti* (2). He distinguished *Bajrangi Sahai* v. *Udit Narain Singh* (3). He referred further to *Ajudhia Prasad* v. *Sidh Gopal* (4) and *Abhai Narain Singh* v. *Padarath Singh* (5).

The Hon'ble Pandit *Sundar Lal*, for the respondents, contended that section 39 of the Contract Act did not apply, inasmuch as a mortgage was a transfer of an interest in the property; it was not a mere contract. As soon as the mortgage deed was executed, the interest in the property passed, and the remedy open to the mortgagor was to sue for recovery of the consideration; but he did not sue. He relied on *Baijnath Singh* v. *Paltu* (6).

Pandit *Mohan Lal Sandal* was heard in reply.

KARAMAT HUSAIN, J.—On the 26th of August, 1898, the defendant, Rashik Lal, executed a conditional sale in favour of Cheda Lal, the predecessor in interest of the plaintiffs, to secure a sum of Rs. 5,000. He stipulated that he would pay the principal [275] and interest on Kuwar Sudi Puno, Sambat 1956 (*i. e.*, 18th October, 1899), and would redeem the zamindari property, and that if he failed, the property should be deemed to have been sold, and the consideration was acknowledged to have been received as follows:—

			Rs.
Deducted	... ...	...	750
Received before execution of mortgage		...	125
Shall receive at registration	...	...	125
Received a hundi drawn by Cheda Lal		...	4,000

(1) Punj. Rec. 1907, 2?4.
(2) (1894) I. L. R 18 Mad. 126.
(3) (1906) 10 C. W. N. 932.
(4) (1887) I. L. R. 9 All. 330.
(5) S. A. No. 1174 of 1910, decided on 11th July 1911 (unreported).
(6) (1908) I. L. R. 30 All. 125.

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34 A. 273=9 A. L. J. 198 =13 I. C. 573.

The plaintiffs brought an action for the recovery of Rs. 1,000 principal and Rs. 1,790-1-3 interest, or for possession of the property sold conditionally. They alleged that the sum of Rs. 4,000 had not been paid.

The pleas in defence were that no consideration for the mortgage was paid by Cheda Lal ; that the mortgage was obtained by fraud ; that compound interest was barred by time and that the plaintiffs were liable to pay damages in consequence of the loss suffered by the defendant on the ground of non-payment of Rs. 4,000. The suit was decreed by the court of first instance. The defendant appealed and contended that the mortgage deed was obtained by fraud; that the sum of Rs. 1,000 sued for was not advanced; that the mortgage contract was rescinded by the defendant ; that the mortgage was unenforceable because of its breach by Cheda Lal ; that compound interest was not to be awarded, and that the defendant was entitled to damages caused by the non-payment of Rs. 4,000.

The lower appellate court found on all the points raised before it against the defendant appellant, and, dismissing the appeal, confirmed the decree of the court of first instance. In second appeal it is urged that as the sum of Rs. 4,000 was not paid, the mortgage was invalid ; that even if it was valid, the defendant, in consequence of the non-payment of Rs. 4,000, rescinded it by his notice, dated the 28th of September, 1898 ; that he was entitled to do so under section 39 of the Indian Contract Act, 1872 (see 18 Madras, 126; Punjab Record for 1907, p. 274; 10 C. W. N. 923), and that the whole of the mortgaged property cannot be foreclosed. There is no force in [276] any of the points taken by the learned vakil for the appellant. There is a fundamental distinction between a contract and a conveyance, *i.e.*, a transfer of an interest in land, and for this reason the rights and duties of the parties to a contract are quite different from the rights and duties of the parties to a conveyance. In the case before us, I am concerned with one of those distinctions which is recognised in section 54 of the Transfer of Property Act.

In a sale, in the absence of any contract to the contrary, the ownership of the property sold passes from the vendor to the vendee as soon as the sale deed is registered. Neither the delivery of possession nor the payment of the price is a condition precedent to the passing of the ownership. The latest case of this Court on the subject is *Baijnath Singh* v. *Paltu* (1).

A mortgage under section 58 of the Transfer of Property Act, is "the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability." The definition shows that a mortgage under the Transfer of Property Act is a transfer of an interest in the land mortgaged and not a mere contract. It therefore follows that no sooner a valid mortgage deed is registered, an interest in the property mortgaged, in the absence of any contract to the contrary, vests in the mortgagee notwithstanding the fact that the mortgage money has not been paid by the mortgagee to the mortgagor. The mere non-payment of the mortgage money cannot have the effect of rendering the mortgage invalid. The remarks of FARRAN, C. J., in *Tatia* v. *Babaji* (2) are worth noticing. He says :—" I am not, however, as at present advised, prepared to assent to the train of thought which puts conveyances of land in the mofussil

(1) Weekly Notes, 1908, p. 38.

(2) (1896) I. L. R. 22 Bom. 176 (183).

perfected by possession or registration where the consideration expressed in the conveyance to have been paid has not in fact been paid in the same category as contracts void for want of consideration. The radical distinction between a perfected conveyance and a contract does not seem [277] to me to have been sufficiently borne in mind throughout the judgment."

Of course, if there is a contract to the contrary in the mortgage deed, no interest in the property mortgaged vests in the mortgagee on the registration of the mortgage deed, but in the mortgage deed of the 29th of August, 1898, there is nothing to that effect. For the above reasons I would hold that the mortgage deed, dated the 29th of August, 1898, was a valid mortgage.

The next point is that the mortgagor by his notice, dated the 28th of September, 1898, rescinded the contract of mortgage on the ground that out of the consideration Rs. 4,000 were not paid by the mortgagee. The operative part of the notice is to the following effect: —"You must return the hundi to us or the money together with the loss suffered by us owing to the non-payment of Rs. 4,000. If you do not do so we shall sue you on the ground of your fraud, dishonesty and breach of contract." There is nothing in the notice, as I read it, to express any intention of rescinding the so-called contract of mortgage. It simply threatens to sue the mortgagee for breach of contract. Supposing that it does convey the meaning contended for, I am of opinion that section 39 of the Indian Contract Act has no application, for the simple reason that it deals with contracts, and a mortgage when registered is not a contract but a transfer. In *Subba Rau* v. *Devu Shetti* (1) MUTTUSAMI AYYAR, J., observed :— "Under section 39 of the Contract Act the mortgagee was entitled to cancel the contract of mortgage on the ground that the mortgagee in contravention of his agreement incapacitated himself for performing it in its entirety."

The terms of the mortgage are not before me, and I am therefore not in a position to say whether there was or was not a specific agreement between the mortgagor and the mortgagee, that no interest in the property mortgaged would pass without the payment of the entire mortgage money. If there was no such stipulation, then, with due respect to the learned Judge, I am unable to hold that section 39 of the Contract Act empowers a mortgagor to rescind a mortgage in which an interest in the property mortgaged has already vested in the mortgagee.

[278] In *Gokul Chand* v. *Rahman* (2) it was held by a Full Bench that, in the absence of a specific contract postponing payment, failure to pay full consideration as agreed upon whether to the mortgagor or to a prior incumbrancer after the said payment has been demanded by the mortgagor avoids the mortgage and destroys the mortgagee's lien and right to possession even on subsequent tender of the unpaid consideration it being immaterial, whether the non-payment has or has not caused inconvenience or loss to the mortgagor." The previous rulings of the Punjab Chief Court were conflicting and the Full Bench put an end to the conflict. No reason whatsoever is given for the rule laid down, and the radical distinction between a contract and a transfer of an interest in land is totally ignored. With due respect, I am unable to accept the view taken by the Full Bench.

(1) (1894) I. L. R. 18 Mad. 126.

(2) 4 Punj. Rec. 1907, 274.

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In *Bajrangi Sahai* v. *Udit Narain Singh* (1) MACLEAN, C. J., said :—"I do not for myself see why the mortgage, which was registered, is not a perfectly good mortgage to the extent of the money actually advanced. It is said that this view is inconsistent with that taken by the Madras High Court in the case of *Subba Rau* v. *Devu Shetti* (2). But when we come to examine that case, I do not think it is an authority for the proposition contended for. There the Court found in effect that the mortgagor had a right to cancel the contract and cancelled the contract, and it was also found that the mortgagee had acquiesced in that cancellation for about eight years. Whether there was any power in that case to cancel the contract is a question which we need not enter into. There is no such suggestion in the present case. There is no suggestion that the mortgagor has cancelled the contract or that he had power to do so." The Calcutta case of *Bajrangi Sahai* is, in my opinion, no authority for the proposition that a mortgagor, when the interest in the land mortgaged passed to the mortgagee, has any power to cancel the mortgage. I may note that the reference to the Madras case is wrong. The correct reference is I. L. R. 18 Mad. 126.

[279] Section 4 of the Transfer of Property Act does not put an end to the vital distinction between a contract and a transfer of an interest in land, for it only enacts that the chapters and sections of the Transfer of Property Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872. But in a mortgage as soon as an interest in the land mortgaged vests in the mortgagee, the transaction ceases to be a contract and becomes a transfer of immoveable property to which section 4 of the Transfer of Property Act does not apply.

The mortgage, dated the 29th of August, 1898, was a single transaction, and the entire property mortgaged was subjected to every pie of the mortgage money advanced. The mortgage of the entire property mortgaged was, in my opinion, therefore, perfectly good to the extent of the sum of Rs. 1,000 (one thousand), which, according to the finding of the lower appellate court, was actually advanced by the mortgagee. The plaintiffs are entitled to recover the sum of Rs. 1,000, with interest at the rate agreed upon. If the defendant fails to pay, they are entitled to foreclose the whole of the property mortgaged. For the above reasons, I would dismiss the appeal with costs. I extend the time for redemption to the 20th of July 1912.

CHAMIER, J.—This was a suit by the respondents upon a mortgage by way of conditional sale made in favour of their father, Cheda Lal, by the appellant, Rashik Lal, on August 29th, 1898. The consideration for the mortgage consisted of a cash advance of Rs. 250, a sum of Rs. 750, due upon a previous mortgage, and a hundi for Rs. 4,000 drawn by Cheda Lal in favour of the appellant upon a firm in Cawnpore. The hundi was stolen from the appellant by a man in the service of Cheda Lal, and the latter failed to make good the amount of the hundi to the appellant. The respondents admit that the greater part of the consideration failed in this way. They have sued for recovery of the sum of Rs. 1,000 and interest thereon in accordance with the deed and for foreclosure in case of non-payment. The suit was resisted upon the ground that as the mortgagee had failed to carry out his part of the contract, his sons were not entitled to enforce the mortgage according to its terms. This defence having been rejected by the courts below, the mortgagor **[280]** has appealed to this

(1) (1906) 10 C. W. N. 932.

(2) (1894) I. L. R. 18 Mad. 126.

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Court. He relies upon the decision of a Full Bench of the Punjab Chief Court in *Gokal Chand* v. *Rahman* (1) and the decision of the Madras High Court in *Subba Rau* v. *Devu Shetti* (2). The respondents rely upon the decision of the Calcutta High Court in *Bajrangi Sahai* v *Udit Narain Singh* (3), a number of decisions of this Court, the last of which is that in *Baijnath Singh* v. *Paltu* (4), and two decisions of the Bombay High Court, cited in the case last mentioned. The cases in this Court and in the Bombay High Court were all cases in which the purchaser of immoveable property had failed to pay part of the purchase money, and it was held that the sale was nevertheless a completed transaction and passed title to the purchaser. In this Court it has been held in many cases of the kind that a purchaser suing for possession of property who has not paid the whole purchase money may be required to pay the balance before he is allowed to execute a decree for possession. The Bombay High Court have held distinctly that a vendor of immoveable property by a registered sale deed is not entitled to rescind the sale on the ground that part of the purchase money has not been paid. There appears to be no distinction in principle between the case of a sale and that of a mortgage. The reasons for holding that where the ownership of immoveable property has been transferred by way of sale, the seller cannot rescind the transaction because the purchaser refuses to pay the price promised, but must sue for the same, seem to apply with equal force to the case where an interest in immoveable property has been transferred by way of mortgage and the mortgagee refuses to advance part of the money agreed to be advanced. I think, therefore, that the decision of this Court and of the Bombay High Court support the contention of the respondents. The Calcutta High Court in the case cited gave a decree for foreclosure to a mortgagee, though he had failed to pay the whole of the mortgage money to the mortgagor. The decision of the Punjab Chief Court, no doubt, goes the whole length of the appellant's contention in the present case, but the learned Judges do not seem to have regarded the mortgage as a transfer of an [281] interest in immoveable property or to have distinguished between a contract to mortgage and a completed mortgage. They seem to have decided as they did upon the broad ground that it is inequitable to allow a mortgagee to sue upon a mortgage where he has failed to advance part of the money agreed to be advanced. The Madras decision rests upon the view that in such a case a mortgagor is entitled to rescind the mortgage, and the court seems to have held that the mortgage, in question in the case had in fact been cancelled by the mortgagor. I am not prepared to say that the court is bound in every case to enforce the mortgage according to the letter where the whole of the mortgage money has not been advanced. For example where the mortgagee sues for possession, he may, I think, be required to pay the balance of the mortgage money before he takes out execution of his decree, and there may be other cases in which he may properly be put upon terms. In the present case there seems to be no reason for not passing a decree as prayed. Under the decree, the appellant mortgagor will be given an opportunity of repaying the amount which he received from the mortgagee. Even if the mortgagor in such a case is entitled to rescind the mortgage, he can do so only upon repaying the amount advanced to him. It was suggested in the course of the argument for the appellant that he had in fact rescinded the mortgage. There is no

(1) Punj. Rec. 1907, 274.
(2) (1894) I. L. R. 18 Mad. 126.
(3) (1906) 10 C. W. N. 932.
(4) Weekly Notes, 1908, p. 38.

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evidence of this. The communication relied upon so far from evincing a desire to rescind shows that he intended to enforce the mortgage. In my opinion, he was not entitled to rescind and never made any attempt to do so. I agree that the appeal should be dismissed, but I would extend the time for redemption to the 20th of July next.

BY THE COURT.—The order of the Court is that the appeal will be dismissed with costs. The defendants will have time to redeem up to the 20th of July, 1912.

Appeal dismissed.

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34 A. 282 (=14 I. C. 572=9 A. L. J. 183.)

[282] APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Sir Harry Griffin.

BRIJBASI LAL AND OTHERS (*Defendants*) *v.* SALIG RAM AND OTHERS (*Plaintiffs*) AND PIYARE LAL (*Defendant*).*

[23rd January, 1912.]

Review of judgment—Effect of order on review—Appeal from original decree.

The effect of the granting of an application for review is to supersede the decree which is the subject of such application. No appeal can, therefore, be maintained against the decree anterior to the review, but only against the subsequent decree. *Kuar Sen* v. *Ganga Ram* (1) and *Kanhaiya Lal* v. *Baldeo Prasad* (2) followed. *Uman Kunwari* v. *Jarbandhan* (3) distinguished.

[Ref: 78 I. C. 525; 78 I. C. 84=36 C L. J. 484.]

IN this case an order absolute for sale under order XXXIV, rule 5 of the Code of Civil Procedure, 1908, was made by the Subordinate Judge of Agra on the 18th of May, 1910. An application for review of this order was made on the 18th of June, 1910, and was granted on the 29th July, 1910, and a fresh order for sale was passed. On the 24th of October, 1910, the defendants presented an appeal to the High Court against the order of the 18th of May, 1910, which appeal was admitted on the 22nd of April, 1910. No appeal was filed against the order of the 29th July, 1910. On the defendant's appeal coming on for hearing the respondents raised a preliminary objection to the effect that, inasmuch as the decree under appeal had been superseded in consequence of the order in review, the appeal could not be maintained, and reliance was placed on *Kuar Sen* v. *Ganga Ram* (1) and *Kanhaiya Lal* v. *Baldeo Prasad* (2). The appellant contended that the court below was in the circumstances not competent to review its order of the 18th May, 1910, and that the order of the 29th July, 1910, must be treated as a nullity. He relied on the Full Bench case of *Uman Kunwari* v. *Jarbandhan* (3).

Babu *Surendra Nath Sen* for the appellant.

The Hon'ble Dr. *Sundar Lal* (with him Pandit *Rama Kant Malaviya*) for the respondents.

KNOX and GRIFFIN, JJ.—This appeal arises out of an order passed by the Subordinate Judge of Agra, on the 18th of May, 1910. The Subordinate Judge had before him an application for an order absolute for sale under order XXXIV, rule 5. He [283] granted the order absolute and

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* First Appeal No. 114 of 1911 from a decree of Sheo Prasad, Subordinate Judge of Agra, dated the 18th of May, 1910.

(1) Weekly Notes, 1890, p. 144.
(2) (1905) I. L. R. 28 All. 240.
(3) (1908) I. L. R. 30 All. 479.

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APPELLATE CIVIL.

34 A. 282=14 I. C. 472=9 A. L. J. 182.

in that order absolute he stated the amount that would be due and payable to the decree-holder on the 2nd of March, 1910, and it is this order which we are asked to set aside on the ground that the Subordinate Judge had no jurisdiction to alter or amend a decree after it had been affirmed by the High Court, because (i) the Subordinate Judge had put a wrong construction upon the decree of this Court, and (ii) the Subordinate Judge had erred in framing a decree for a larger sum than the judgment authorized. We need not mention the other grounds of appeal and we need not consider even those above-mentioned, because the appellants are met by the respondents with an objection which appears to us fatal to this appeal. It appears from the record that after the Subordinate Judge had passed his order on the 18th of May, 1910, he was asked to review the same by an application, dated the 18th of June, 1910. The application was allowed by an order, dated the 29th of July, 1910, and the order of the 18th of May modified. The terms of the order, so far as they refer to the matter before us, run as follows: —"It is, therefore, ordered that the objections (of the judgment-debtors) be disallowed and that an order absolute for sale be prepared under rule 5, order XXXIV." This order is put forward by the respondents as the final decree in the case. No appeal has been instituted from it and no mention of it is made in the appeal which we are now considering. This appeal was presented on the 24th of October, 1910. It was not admitted, for reasons which we need not consider, until the 22nd of April, 1911. The appellants had, therefore, ample opportunity to call in question the order of the court below, dated the 29th of July, 1910. But, as we have already said, they nowhere even alluded to its existence. They have not attempted to explain why they have left that decree unchallenged, and the probability is that they have overlooked its existence. The learned vakil for the appellants addressed to us a very lengthy and elaborate argument in which he contended that the order of the 29th July, 1910, was an order passed without jurisdiction, a mere nullity, which would of itself appear when we pass a decree in the present appeal, and in support of this argument he cited the Full Bench ruling of this Court, *Uman Kunwari* v. *Jarbandhan* (1). We [284] have considered that and the argument addressed to us upon that but we do not think the case to be in point. What was then under consideration was a decree of a Subordinate Judge, who had reversed a decree of a Munsif and passed an order of remand under section 562 of the old Code of Civil Procedure. While that appeal was pending in this Court, the court of first instance had carried out the order of remand and had decreed the plaintiff's claim. Upon this Court proceeding to hear the appeal before it a preliminary objection was raised to the effect that, as the order of remand had been carried out before the appeal was filed, this court could not entertain the appeal. It was held that a decree passed in pursuance of a remand was no bar, and this court proceeded to set aside the order of remand and to restore the order first passed in the case. The learned Judges who decided the case of *Uman Kunwari* v. *Jarbandhan*, pointed out that after the court of first instance had once decided the case, it ceased to have any jurisdiction except on review of judgment. From this it is evident that the learned Judges in no way considered the exact point before us. In *Uman Kunwari* v *Jarbandhan*, the order of remand was found to be erroneous and was set aside, and everything done in pursuance of the order fell to the ground. In the case before us what has really happened is that

(1) (1908) I. L. R. 30 All. 479.

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34 A. 283=, 14 I. C. 472= 9 A. L. J. 183.

the Subordinate Judge, who had jurisdiction to review his judgment, proceeded to review it and in reviewing it passed an order which does not commend itself to the appellants. That order may be right or wrong but there was jurisdiction in the Subordinate Judge. There are two cases which are exactly in point, namely, *Kuar Sen* v. *Ganga Ram* (1) and *Kanhaiya Lal* v. *Baldeo Prasad* (2). We cannot find that these cases have ever been questioned, and we agree with what was held in them that the order for review under such circumstances superseded the original decree. The decree under appeal has ceased to exist and the appeal cannot be heard. We dismiss the appeal with costs.

Appeal dismissed.

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34 A. 285(=9 A. L. J. 233=13 I. C. 643).

[285] FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Karamat Husain and Mr. Justice Chamier.

JAI NATH PATHAK AND ANOTHER (*Plaintiffs*) *v.* KALKA UPADHYA AND OTHERS (*Defendants*).*

[23rd January, 1912.]

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 9—*Fixed rate tenancy—Entry of name of tenant in—"Conclusive proof" revenue records.*

The entry mentioned in section 9 of the Agra Tenancy Act, 1901, is "conclusive proof" only as to the nature of the tenancy as between the zamindar and the tenant and does not apply to questions as to the title to the tenancy as between rival claimants thereto. *Mulai Singh* v. *Rajwant Singh* (3) overruled.

[Ref: 63 I. C. 711=9 A. L. J. 653=43 All. 615; 74 I. C. 647=21 A. L. J. 697.]

THIS was a suit for a declaration of title to certain property including some fixed rate holdings. The facts of the case are stated in the following order recommending that the appeal should be referred to a Full Bench.

KARAMAT HUSAIN and CHAMIER, JJ.—This is the plaintiffs' appeal. Their claim has been dismissed by the lower appellate court on a point of law. The facts must be, for the present assumed to be as follows:—Two brothers, Ishri and Ram Narain, were joint in estate. Ram Narain predeceased his brother who thus became sole owner of the property. Ishri died leaving two daughters, one of whom, Musammat Anjora, is still alive. Possession of the property should have passed to Musammat Anjora, but was taken by Musammat Rupao, widow of Ram Narain. Part of the property consisted of fixed-rate tenancy, and at the last revision of the settlement before the passing of the Agra Tenancy Act, Musammat Rupao was recorded as the fixed rate tenant. In 1908 she transferred the holding to her nephews. The plaintiffs in the present suit, who are the sons of the above-named Musammat Anjora and her sister, Musammat Nidha, claim a declaration that the transfer is not binding upon them. They say that the person now entitled to the holding is Musammat Anjora and that Musammat Rupao took and held possession with her consent; but whether Musammat Rupao took possession with Musammat Anjora's consent; or adversely to her is immaterial, as they, the plaintiffs, will not be entitled to possession until the death of Musammat Anjora.

The first court decreed the claim, but on appeal the Additional Judge held that under section 9 of the Agra Tenancy Act the entry of Musammat Rupao's name as fixed rate tenant was conclusive proof that she was fixed rate tenant of the land, and therefore it was her *stridhan* and the plaintiffs' claim to be reversionary heirs of Ishri in respect of the holding failed. He accordingly dismissed the suit.

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* Second Appeal No. 191 of 1911 from a decree of E. E. P. Rose, Additional Judge of Jaunpur, dated the 10th of December, 1910, reversing a decree of Babu Lal Merh, Munsif of Jaunpur, dated the 22nd of April 1910.

(1) Weekly Notes, 1890, p. 144.
(2) (1906) I. L. R. 28 All. 240.
(3) Weekly Notes, 1906, p. 68.

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34 A. 286=9 A. L J. 238=13 I. C. 643.

[286] The view taken by the lower appellate court receives support from the decision of this Court in *Mulai Singh* v. *Rajwant Singh* (1) which he quotes. As at present advised, we are unable to accept that ruling. If it is correct, it would appear that the entry of the name of a Hindu widow as tenant of a holding at fixed rates at the last revision of the settlement before the passing of the Agra Tenancy Act converts the holding into her *stridhan* and deprives the male collaterals of her husband of their right of inheritance. There must be a large number of cases in which a Hindu fixed rate tenant died before the revision in question, leaving, besides a widow, either male collaterals or daughters or daughter's sons. We do not think that section 9 of the Agra Tenancy Act was intended to deprive all the heirs of a Hindu except his widow of their right in such cases. It seems to us that the words 'conclusive proof' in the section were intended to meet the case of disputes between the landlord on one side and the holder for the time being of the tenancy on the other. The circumstance that the Legislature provided special rules of succession by section 22 of the Act for certain tenancies, but said nothing about the succession to fixed rate tenancies leads to the inference that it did not intend to interfere with the personal law of succession applicable to fixed rate tenants. Nawab *Abdul Majid* contended that the effect of sections 9 and 20 of the Act is that all Hindu females recorded as fixed rate tenants at the last revision of the settlement before the passing of the Act have power to alienate their holdings to whomsoever they please. He even went so far as to say that this is generally understood to be the law. The question is of great importance. As we are not prepared to accept the decision to which we are referred, we direct that the record be laid before the learned Chief Justice with a view to this appeal being laid before a larger Bench.

Munshi *Gokul Prasad* (for Babu *Durga Charan Banerji*) for the appellants.

The name of the widow was only entered after death of Ram Narain. She had only a Hindu widow's estate. The record was only evidence of the nature of the holding as between landlord and tenant. There was no special provision prescribing the devolution of fixed rate tenancies. It followed that the general law applied. Section 22 laid down the law with reference to other kinds of tenancies. The expression 'conclusive proof' in section 9 of the Agra Tenancy Act did not apply to disputes between sharers *inter se*, it is conclusive proof of the nature of a tenancy only.

The first enactment on the point was Act X of 1859. Sections 3 and 4 contemplated suits between zamindar and tenant. Then came Act XII of 1881, sections 4 to 6. Under these Acts the Court had to make inquiries about the nature of tenancies. In 1882-3 there was a revision of permanent settlements in these provinces [287] and the nature of tenancies was inquired into and recorded. The present Act has made the entry conclusive, but only so far as the nature of the tenancy is concerned. Section 9 deals with the rights of tenants as between them and the zamindar, not with their rights *inter se*. The same view was taken by GRIFFIN, J., in an unreported case S. A. 26 of 1906, decided on 31st July, 1907. If the Legislature had intended suits of this kind to be barred, if would have said so, as in section 32 of the Tenancy Act. The Board of Revenue also took the same view in Select Decision No. 2 of 1909 where they differ from the case of *Mulai Singh* v. *Rajwant Singh* (1) and agree with GRIFFIN, J.

The Hon'ble *Nawab Muhammad Abdul Majid*, for the respondents, relied on the case of *Mulai Singh* v. *Rajwant Singh* and the language of the section.

RICHARDS, C. J., and KARAMAT HUSAIN and CHAMIER, JJ.—

The facts which must be assumed for the purposes of this appeal are very clearly set forth in the order of reference of the learned Judges. The short point for our decision is whether or not a person who was recorded in the manner stated must be deemed to have all the estate in the fixed

(1) Weekly Notes, 1906, p. 68.

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34 A. 285=9 A. L. J. 283 =13 I.C. 643.

rate tenancy, vested in him or her alone, irrespective of the rights of all other persons, who under the ordinary law would be entitled to the tenancy, but for the fact that such a person is so recorded. The defendants, who are the transferees of Musammat Rupao, rely on the provisions of section 9 of the Agra Tenancy Act. That section is as follows:—"Every entry at the last revision of records before the commencement of this Act recording a person as a permanent tenure-holder or a fixed rate tenant, or otherwise shall, in the absence of a judicial decision to the contrary, in proceedings instituted before the commencement of this Act, be conclusive proof that such person is a permanent tenure-holder or a fixed rate tenant, or not, as the case may be."

The section is certainly unfortunately worded, and *prima facie* the language of it is in favour of the defendants' contention *viz.*, that Musammat Rupao must be deemed, having regard to the words of the Act, to have had the entire estate in the fixed rate tenancy, and that their title as her transferees is [288] complete. This view met with favour by the learned Judges who decided the case of *Mulai Singh* v. *Rajwant Singh* (1). They say :—"In our opinion the language of the section is clear and imperative."

Prior to the passing of this Act there had been somewhat similar provisions in Act X of 1859, (sections 3, 4 and 7) and Act XII of 1881 (sections 4, 5 and 6). Under those Acts it was the duty of the Court to inquire as to the nature of a tenancy which had been held at fixed rates for certain periods, and certain presumptions in favour of the tenants were provided. Those sections were all intended to meet the case of disputes between the zamindar and his tenant as to the nature of the tenancy. Before the passing of the Agra Tenancy Act of 1901, at the time of revision of records, inquiries were held as to the nature of these tenancies, but these again were inquiries between the zamindar and the tenant and did not touch upon the title to the tenancy itself. It is admitted that fixed rate tenancies, unlike occupancy tenancies, are heritable and transferable. Section 20 expressly so provides. Fixed rate tenancies devolve on the death of the fixed-rate tenant according to the ordinary law. If the contention of the defendants be sound, namely, that by virtue of section 9 the entry is conclusive not only between landlord and tenant but also between all persons claiming the tenancy, then it follows that if the managing member of a joint and undivided family was recorded as the fixed rate tenant, the tenancy on his death would not devolve upon the surviving members of the joint family but would go to the heirs of the member of the family (who happened to be recorded) as if the family were separate. Again, if the widow or a daughter succeeded to a fixed rate tenancy on the death of a fixed rate tenant who was a Hindu, the tenancy on the death of the widow or daughter would go to the heir of the widow or daughter and not to the heirs of the last male holder. It seems to us quite clear that this could not have been intended. A learned Judge of this Court in Second Appeal No. 26 of 1906, held that section 9 did not apply to questions as to the title to the fixed rate tenancy. The same view was taken by the Board of Revenue in *Gajadhar Dusaundhi* v. *Gokul Dusaundhi* (2). In our opinion [289] the decision of the court below was not correct. The entry mentioned in section 9 is conclusive proof only as to the nature of the tenancy. The case, however, was decided on the preliminary point, and the general merits of the case were not

(1) Weekly Notes, 1906, p. 68.

(2) Select Decisions, No. 2 of 1909.

gone into by the lower appellate court. We accordingly allow the appeal, set aside the decree of the lower appellate court and remand the case with directions that the same may be re-admitted, and the learned Judge do proceed to hear and determine the same according to law. Costs in this Court will be costs in the cause.

Appeal decreed—Cause remanded.

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FULL BENCH.

34 A. 285=9 A. L. J. 233= 13 I. C. 643.

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34 A. 289 (=15 I. C. 196=1912 M. W. N. 417=11 M. L. T. 316=9 A. L. J. 450= 15 C. L. J. 468=14 Bom. L. R. 460=23 M. L. J. 11=16 C. W. N. 913).

PRIVY COUNCIL.

PARBATI (*Defendant*) *v.* MUZAFFAR ALI KHAN AND OTHERS (*Plaintiffs*) AND MUZAFFAR ALI KHAN AND OTHERS (*Plaintiffs*) *v.* PARBATI (*Defendant*).

Two appeals consolidated.

[*On appeal from the High Court Allahabad.*]

[31st January, and 1st and 21st February, 1912.]

Mortgage—Suit for redemption of usufructuary mortgage—Defendants setting up title under sales of mortgagor's interest—Title by adverse possession—Separation of member of joint Hindu family and purchase of property with self-acquired means —Possession adverse to mortgagors.

These were cross appeals from the decision of the High Court in *Muzaffar Ali Khan* v *Parbati* (1). The plaintiffs relied on a usufructuary mortgage of 1846 and sued for redemption of the property in suit, two shares in a village called Lohari. The case of the defendants was that they were in possession, not under the mortgage, but under sales of the 27th of May, 1853, and the 20th of March, 1854, respectively by which the equity of redemption in the shares mortgaged in 1846 had passed to those through whom they claimed title, and they pleaded adverse possession. Both the lower courts had upheld the later sale and dismissed the suit as to that share in Lohari. As to the earlier sale the courts below had differed, the first court upholding it, and the High Court deciding in favour of the plaintiffs. On appeals by both parties, it was immaterial, in the view taken by their Lordships of the Judicial Committee of that sale (27th May, 1853) by what title Ashraf un-nissa, one of the widows of the mortgagor, obtained the share she took, and whether or not she had a daughter who survived him. Her share was certainly transferred by the sale to Baldeo Sahai, who, though he was the grandson of one of the mortgagees and the son of the other, with both of whom he had lived as a member of a joint Hindu family, had, according to reliable evidence, separated from them and at the time of the sale was carrying on, with a nucleus of property derived from his grandmother, a money-lending business from the profits of which he was enabled to purchase, with self-acquired funds, [290] the share in Lohari from Ashraf-un-nissa, who purported to sell it to him as a person who was not a mortgagee under the mortgage of 1846; and he was therefore not precluded from setting up a title by adverse possession, which it was conclusive in the evidence he had held for more than 50 years. Their Lordships therefore, while affirming the decision of the courts below as to the later sale, reversed the decision of the High Court as to the earlier sale, and upheld that transaction also.

Two consolidated appeals (30 and 31 of 1910) from a judgment and decree (13th June, 1907) of the High Court at Allahabad, partly affirming and partly reversing a judgment and decree (14th July, 1904) of the Subordinate Judge of Saharanpur who had dismissed the suit.

Present :—Lord SHAW, Lord ROBSON, Sir JOHN EDGE and Mr AMEER ALI.

(1) (1907) I. L. R. 29 All. 640.

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The facts will be found sufficiently stated in the report of the appeal to the High Court (SIR GEORGE KNOX, ACTING C. J. and DILLON, J.) and also in the High Court judgment appealed from which will be found in I. L. R., 29 All. 640.

On these appeals—

Sir *R. Finlay*, *K. C.*, and *B. Dube* for the appellants in appeal 30 and respondents in appeal 31, contended that the plaintiffs were not entitled to recover any portion of the property covered by the mortgage of the 22nd of July 1846; that it had been proved that Ashraf-un-nissa had a daughter living at the time of her husband's death; and that Baldeo Sahai had acquired a good proprietary title to the one-third share of mauza Lohari by virtue of the sale, dated the 23rd of May, 1853, and by adverse possession for more than 50 years.

DeGruyther, *K. C.*, and *Cowell* for the respondents in appeal 30 and the appellants in appeal 31, contended that the mortgage-deed of the 22nd of July, 1846, was admitted and the evidence showed that it was still subsisting; that the defendants had not proved their purchases as alleged of the mortgagors' interest on the 27th of May 1853, and the 20th of March, 1854; and that the defendants as mortgagees could not rely on any possession as being adverse to the mortgagors during the continuance of the mortgage. Reference was made to *Simbhunath Pande* v. *Golap Singh* (1).

Sir *R. Finlay*, *K. C.*, replied.

1912, *February* 21*st*:—The judgment of their Lordships was delivered by SIR JOHN EDGE:—

These are consolidated appeals from a decree of the High Court of Judicature for the North-Western Provinces at Allahabad, [291] dated the 13th of June, 1907, which partly affirmed and partly reversed a decree of the Subordinate Judge of Saharanpur, dated the 14th of July, 1904, by which the suit had been dismissed.

The suit was brought on the 1st of September, 1903, to obtain proprietary possession of 13 biswas, 6 biswansis, 3 tanwansis, 6½ kachwansis and a fraction of the 20 biswas of Mauza Lohari. The plaintiffs' case briefly was that one Mehdi Ali, whose representatives in title they alleged themselves to be, had in 1846 mortgaged the share in Mauza Lohari, possession of which they claimed, to Sita Ram and his son Sheo Lal; that the mortgage debt had been discharged by the usufruct; and that the defendants were the representatives of the mortgagees and still held possession under no other title; and the plaintiffs claimed a decree for proprietary possession and for mesne profits.

The case of the defendants was that they held possession not under the mortgage of 1846, but under a private sale of the 27th of May, 1853, of 10 biswas of Mauza Lohari, and under an auction sale of the 20th of March, 1854, of the remaining 10 biswas of Mauza Lohari, which sales they alleged were made in order to discharge debts which had been contracted by Mehdi Ali. In effect the defendants' case was that by reason of the sales of 1853 and 1854 the equity of redemption in the shares which were mortgaged in 1846 passed to those through whom they claimed title. It was also contended on behalf of the defendants that they were not precluded from setting up a title by adverse possession by the fact that possession of the shares in suit had been originally obtained under the mortgage of 1846.

(1) (1887) I. L. R 14 Cal. 572 (579): L. R. 14 I. A. 77 (88).

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The facts as found by the Board are briefly as follows :—

On the 22nd of July, 1846, Mehdi Ali, who owned the whole 20 biswas of Mauza Lohari, borrowed Rs. 4,000 from Sita Ram and his son Sheo Lal, and executed in their favour a mortgage for the term of two years of the shares which are the subject of this suit. The mortgage was usufructuary and the mortgagees were put in possession under it. Incidentally it may be mentioned that the Subordinate Judge found as a fact that the mortgage debt had been discharged by the usufruct before 1863. If it were necessary in this appeal to decide that issue their Lordships would probably not be prepared to dissent from that finding of the Subordinate Judge.

[292] Mehdi Ali, who was a Shia Muhammadan, died on the 9th of January, 1852, and left surviving him two widows, Ashraf-un-nissa and Umda Begam, and certainly three daughters who had been born to him by Umda Begam. Through one of those daughters, Askari, who subsequently married and left issue, the plaintiffs claim title. It has been contended on behalf of the defendants that Mehdi Ali also left surviving him a daughter born to him by Ashraf-un-nissa. On behalf of the plaintiffs it has been contended that Mehdi Ali left surviving him no daughter by Ashraf-un-nissa, and that Ashraf-un-nissa was a childless widow. In the view which their Lordships take of this case it is immaterial whether Mehdi Ali left, or did not leave, a daughter surviving him by Ashraf-un-nissa. It may, however, be mentioned that after Mehdi Ali's death, for some reason which the evidence does not explain, 10 biswas of Mauza Lohari were treated as the share of Ashraf-un-nissa, and the remaining 10 biswas were treated as the share of Umda Begam and her three daughters.

Mehdi Ali died heavily in debt, and after his death in 1852 suits to recover debts which were due by him were brought by his creditors against Ashraf-un-nissa, Umda Begam, and her three daughters, as the representatives of Mehdi Ali, and money decrees were obtained in those suits. One of those suits was brought by Sheo Lal on the 8th of July, 1852, on a bond payable on demand, to recover with interest Rs. 2,000 which Sheo Lal had lent to Mehdi Ali on the 29th of May, 1849. In that suit Sheo Lal obtained a decree for Rs. 2,786-5-6, principal and interest, against Ashraf-un-nissa, Umda Begam, and the three daughters of Umda Begam, all of whom were sued as the heirs of Mehdi Ali. Under that decree the 20 biswas of Mauza Lohari were attached. On the 5th of May 1853, a sale proclamation was made fixing the 20th of June, 1853, as the date for the auction sale of the 20 biswas in execution of the money decree. On the 19th of May, 1853, Sheo Lal, through his pleader, applied to the Court to remove the attachment in order to enable the defendants in that suit to pay the decree money by a private sale of the estate of Mehdi Ali deceased. On that application the Court removed the attachment. On the 27th of May, 1853, Inayat Husain, acting under a power of attorney, which had been executed for that purpose by Ashraf-un-nissa and had been duly registered, [293] executed on her behalf a sale deed of 10 biswas of Mauza Lohari in favour of Baldeo Sahai, son of Sheo Lal, the consideration being Rs. 7,500. In that sale deed it was stated that two-thirds of three suls of the 20 biswas of Mauza Lohari had been from the 22nd of January, 1846, in the exclusive possession of Sita Ram and Sheo Lal under the mortgage for Rs. 4,000 of 1846 from Mehdi Ali to them, and it was stated

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that Mehdi Ali had died, and had left a considerable amount of debt unpaid, that Ashraf-un-nissa had remained the heir of half the estate of Mehdi Ali in lieu of her dower debt; and in order to satisfy the decrees held by, and the debts due to, Sheo Lal, she made an absolute sale of the 10 biswas share to Baldeo Sahai. It was by the sale deed agreed that Rs. 2,000 of the purchase money should be left with Baldeo Sahai, and that he should have power to pay the Rs. 2,000 to the mortgagees and to redeem the subject of the sale. In the sale deed the 10 biswas were described as Ashraf-un-nissa's share. After that sale the 10 biswas were entered in the revenue papers as Baldeo Sahai's share by private sale. Baldeo Sahai obtained possession of the 10 biswas share and held possession of the share until he died in 1895, when the defendants as his representatives obtained possession.

It has been contended on behalf of the plaintiffs, first, that Ashraf-un-nissa had no title to the 10 biswa share in Mauza Lohari, and, consequently had no title which she was capable of passing by the sale deed, and, secondly, that Baldeo Sahai was a member with his father Sheo Lal of joint Hindu family, and that the family held possession as mortgagees and could not set up a claim of adverse possession against the representatives in title of Mehdi Ali, the mortgagor of 1846.

It has not been suggested that Ashraf-un-nissa had any interest in Mauza Lohari which she could sell other than such interest, if any, in the immovable property of Mehdi Ali as she obtained under the Shia law as his widow. Her right to dower did not confer upon her a saleable estate in Mauza Lohari. If she had not borne to Mehdi Ali a daughter who survived him, Ashraf-un-nissa as his widow took no title to any share in Mauza Lohari. If on the other hand, as the defendants have contended, Ashraf-un-nissa had borne to Mehdi Ali a daughter who survived him for a few months, [294] Ashraf-un-nissa's share as his widow, and the share of his daughter, which on that contention came to her on the daughter's death, did not together amount to a 10 biswas share in the mauza. If Ashraf-un-nissa had any other title in 1853 to the 10 biswas share which she purported to sell to Baldeo Sahai, it has not been shown what it was or how she had obtained it. But it is not necessary to consider what title, if any, Ashraf-un-nissa had to the 10 biswas share as by the sale deed of the 27th May, 1853, Ashraf-un-nissa sold to Baldeo Sahai such interests, if any, as she had in the 10 biswas of Mauza Lohari, and Baldeo Sahai got possession of the 10 biswas, and in course of time obtained a title by adverse possession to the whole 10 biswas or any portion of that share which Ashraf-un-nissa may not have been empowered to sell to him, and that title became indefeasible unless he or the defendants who claim under him were precluded from setting up a title of adverse possession.

The High Court found as a fact that Baldeo Sahai was in 1846, and continued to be, a member of the joint Hindu family of which his father Sheo Lal had been a member, and on that finding of fact decided that Baldeo Sahai's possession and the possession of the defendants as his representative had always been that of mortgagees and consequently that Baldeo Sahai and those who claim under him were precluded from setting up any title of adverse possession to any portion of the share which was mortgaged in 1846 to Sita Ram and Sheo Lal. Their Lordships are unable to agree with the findings of fact of the High Court upon which that decision was based. At the date of the mortgage of 1846 Baldeo

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34 A. 289=16 I. C. 196=1912 M. W. N. 417=11 M. L. T. 316 =9 A. L. J. 450=15 C. L. J. 468=14 Bom. L. R. 460=23 M. L. J. 11=16 C. W. N. 913.

Sahai was undoubtedly a member of the joint Hindu family, of which Sita Ram and Sheo Lal were members, and that family was governed by the law of the Benares School of the Mitakshara. Their Lordships, however, find on evidence which they consider is unimpeachable, that in 1847 or 1848, owing to disputes in the family, Baldeo Sahai ceased to be joint in food and joint in business with Sheo Lal, but no partition of the family property was then made, and thenceforward during their lives Baldeo Sahai and Sheo Lal had been separate in food and in business. Their Lordships also find that when Sheo Lal and Baldeo Sahai ceased to be joint in food and in business Baldeo Sahai received a present of a considerable sum of money from his grandmother, with which he carried on the business [295] of a money lender on his own account, and that out of his separate self-acquired property he found the purchase money of Rs. 7,500 of the sale deed of the 27th of May, 1853. The oral evidence showing a separation is in their Lordships' opinion confirmed by the terms of that deed. Ashraf-un-nissa purported to sell the 10 biswas to Baldeo Sahai as a person who was not a mortgagee under the mortgage of 1846. So far as the 10 biswas which Ashraf-un-nissa purported to sell to Baldeo Sahai on the 27th of May, 1853, their Lordships find that a title at least of adverse possession has been established and that the defendants are not precluded from setting up that defence.

Their Lordships concur with the finding of the Subordinate Judge and the finding of the High Court that the remaining 10 biswas share in Mauza Lohari was sold to Sheo Lal on the 20th of March, 1854, at an auction sale held in execution of a decree for money which had been obtained by a creditor of Mehdi Ali, in a suit brought against Umda Begam and her three daughters as the heirs and representatives of Mehdi Ali, and Sheo Lal obtained possession and held it until he died, when his interest passed to his son Baldeo Sahai as his heir.

The plaintiffs failed to establish any title by way of redemption or otherwise to any interest in Mauza Lohari, and their suit was rightly dismissed by the Subordinate Judge.

Their Lordships will humbly advise His Majesty that the appeal of the representative in title of Baldeo Sahai be allowed with costs and the decree of the High Court be varied by dismissing the appeal to that Court with costs, and that the appeal of Saiyid Muzaffar Ali Khan and other plaintiffs to His Majesty in Council be dismissed with costs.

Appeal 30 *allowed: decree varied.*

Appeal 31 *dismissed.*

Solicitors for the appellant in Appeal 30 and respondent in Appeal 31:—*Barrow, Rogers and Nevill.*

Solicitors for the respondents in Appeal 30 and appellants in Appeal 31:—*Ranken Ford, Ford and Chester.*

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[296] PRIVY COUNCIL.

BALWANT SINGH (*Plaintiff*) *v.* R. CLANCY (*Defendant*) *and* BALWANT SINGH (*Plaintiff*) *v.* MAHARAJA SINGH (*Defendant*).*

[2nd, 6th, 7th, 8th and 28th February, 1912.]

[*On appeal from the High Court at Allahabad.*]

Minor—Mortgage executed by minor—Money borrowed to discharge debts of father—Contract executed by minor—Effect of—

In this appeal, which was one from the decision of the High Court in *Maharaj Singh* v. *Balwant Singh* (1), their Lordships of the Judicial Committee on the evidence upheld that decision on the question whether the defendant Maharaj was a minor at the time he signed the mortgage, and said:—"Having found as a fact that Maharaj Singh was a minor," at that time "it is not necessary for their Lordships to consider any other issue. This suit has been brought on the mortgage deed of the 28th of October, 1892, by the assignee of that mortgage, and as their Lordships have held that the mortgage was not made by Sheoraj Singh as the manager of the family or in any respect as representing Maharaj Singh, and as Maharaj Singh was then a minor, the mortgage deed as against him and his interest in the estate was not merely voidable, it was void and of no effect and must be regarded as a mortgage deed to which he was not even an assenting party, and as a mortgage deed which did not affect him or his interest in the estate.

[**Ref:** 41 Mad. 650=45 I. C. 867; 28 I. C. 365; 51 I. C. 57=37 M. L. J. 113=1919 M. W. N. 866, 62 I. C. 220; 62 I. C. 630=40 M. L. J. 475=13 L. W. 416=1921 M. W. N. 255: **Dist:** 71 I. C. 130=16 L. W. 986=1923 M. W. N. 57; **Ref:** 81 I. C. 104, 72 I. C. 722=36 C. L. J. 231=27 C. W. N. 372; **Fol:** 74 I. C. 367=21 A. L. J. 372=45 All. 497; **Ref:** 83 I. C. 324=47 M. L. J. 85=20 L. W. 207=1924 M. W. N. 623=17 Mad. 850; **Dist:** 83 I. C. 196=46 M. L. J. 314=47 Mad. 462=20 L. W. 357;]

Two consolidated appeals (3 and 4 of 1910) from two judgments and decrees (27th March, 1906) of the High Court at Allahabad which varied the decree (11th April, 1903) of the Subordinate Judge of Aligarh.

The facts of this case are fully stated in the report of the appeal to the High Court (SIR JOHN STANLEY, C. J. and BURKITT, J.) in the judgment of the High Court, which will be found in I. L. R. 28 All., 510.

On these appeals, of which No. 3 was heard *ex parte*.

De Gruyther, K. C., and *B Dube* for the appellant, contended that on the evidence the respondent Maharaj Singh had attained his majority at the date of the execution of the bond in suit, and the High Court had wrongly exempted him from liability on the bond on the ground of his being a minor at that time. Eighteen was the age of majority by Act IX of 1875, and reference was made to an application made by Sheoraj on the 22nd of September, 1891, in which Maharaj was stated to be 19; proceedings in which he had acted as having attained his majority, in May, 1892, signing a written statement, and appointing a pleader in a suit, on the 26th of July, 1892, executing a mortgage; and on the 2nd of February, 1896, executing another mortgage in which he stated his age to be 23 all showing [297] that he was more than 18 when he signed the bond in suit. Even if he were not a minor then, he had ratified the transaction on attaining majority. But, irrespective of his age, he was, by the Hindu law, under a legal obligation to discharge those of the debts in suit which were contracted by his father or brother as managing member of the joint family.

* *Present*:—Lord SHAW, Lord ROBSON, Sir JOHN EDGE and Mr. AMEER ALI.

(1) (1906) I. L. R. 28 All. 508.

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The father and the two sons were members of a joint family, and the two sons remained joint after the father's death: there was no evidence of any partition between them, and the presumption until there was a separation was that they were joint. If so, the obligation to discharge the father's debts arises, unless they can show that the debts were contracted for immoral purposes, and the onus was on the sons to show that. General evidence that the father was immoral or extravagant was not sufficient to relieve the sons from the liability to pay the father's debts; nor because some of the debts were contracted for immoral purposes can it be inferred that all of them were; the High Court had wrongly presumed this. Reference was made to Mayne's Hindu law, 7th edition, 387, 388, and note (*h*) at page 389, and *Bhagbut Pershad Singh* v. *Girja Koer* (1). A *bona fide* purchaser in execution of a decree in such a case would obtain a good title, even if it were shown afterwards that the debt in respect of which the decree was made was tainted with immorality—*Girdharee Lall* v. *Kantoo Lall* (2); and the proposition applied equally to the case where the property was attached in execution of a decree, and the money was borrowed to relieve it from attachment,—*Suraj Bunsi Koer* v. *Sheo Pershad Singh*(3). [Sir *John Edge* referred to *Nanomi Babuasin* v. *Modhun Mohun* (4).] That question had been dealt with in *Pem Singh* v. *Partab Singh* (5), *Debi Dat* v. *Jadu Rai* (6) and *Chintamanrav Mehendale* v. *Kashi Nath* (7). The Transfer of Property Act (IV of 1882) section 59, and as to admissibility of documents in evidence, Evidence Act (I of 1872), sections 34, 47, 68 and 70 were referred to. There was no question of [298] limitation here on the case made out in the pleadings and evidence. It was submitted that the judgment of the Subordinate Judge should be restored.

Sir *Erle Richards*, *K. C.*, and *Kenworthy Brown* for the respondent, Maharaj Singh, contended that he was not bound by the mortgage sued upon, first, on the ground that he was a minor when he executed it, and against him it was therefore void. The evidence, it was submitted, showed that he was born on the 20th of December, 1874, and at the date of the mortgage (28th October, 1892) he had therefore not attained his majority. The appeal therefore failed as the deed could not be used in any way against Maharaj Singh. Secondly Sheoraj was not the manager of the joint family. In the courts below that question was not raised either in the pleadings or the issues. Sheoraj's act could not bind Maharaj. He was not in fact manager, nor did he purport to act as manager in the matter of borrowing the money. He represented himself to be the owner of an impartible estate, and it was in that character the Bank gave him credit, and accepted his security for the loan. Moreover, a large proportion of the debts could be traced to immorality, and the debts of the respondent's father were barred by limitation before institution of the present suit. The Bank, so far as appears from the evidence, made no inquiries, and did not deserve any consideration.

DeGruyther, *K. C.*, replied citing *Oahud Buksh* v. *Bindoo Bashinee Dossee* (8) as to the authority of an elder brother to sell property for payment of debts, *Succaram Morarji Shetay* v. *Kalidas Kallianji* (9) as to

(1) (1888) I. L. R. 15 Cal 717 (723, 724); L. R. 15 I A 99 (103, 104).
(2) (1874) L. R. 1 I. A. 321 (323, 326, 331, 333).
(3) (1879) I. L. R. 5 Cal. 148 (165, 168, 172); L. R. 6 I. A. 88 (101, 104, 107).
(4) (1885) L. R. 13 I. A. 1; I. L. R. 13 Cal. 21.
(5) (1892) I. L. R. 14 All. 179.
(6) (1902) I. L. R. 24 All. 459.
(7) (1889) I. L. R. 14 Bom. 320 (327.)
(8) (1867) 7 W. R. C. R. 298.
(9) (1894) I. L. R. 18 Bom. 631.

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the power of a widow in a like case where there are minor sons, and *Sayad Muhammad* v. *Futteh Muhammad* (1) and *McLean* v. *McKay* (2), as to the discretion of the Privy Council in deciding a case on the merits without too strictly regarding the terms of the pleadings.

1912, *February* 28*th*:—The judgment of their Lordships was delivered by Sir JOHN EDGE:—

These are two consolidated appeals from decrees of the High Court of Judicature for the North-Western Provinces at Allahabad, dated the 27th of March, 1906, which varied a decree of the Subordinate Judge of Aligarh, dated the 14th of April, 1903.

[299] The suit in which these appeals have arisen was brought on the 26th of September, 1901, by the assignee of a mortgage to recover Rs. 5,67,978-8-0 principal and interest, claimed under the deed of mortgage. The mortgage deed, which is dated the 28th of October, 1892, purports to have been made between Raja Sheoraj Singh Bahadur, mortgagor, of the first part, Maharaj Singh, the only brother of the said Raja Sheoraj Singh, of the second part, and the Bank of Upper India, Limited, of the third part. Sheoraj Singh and Maharaj Singh were, with others, made defendants to the suit.

Sheoraj Singh was the sole mortgagor, and, by the deed of mortgage, Sheoraj Singh, declaring that he was the absolute owner in possession of the several villages, lands, hereditaments, and premises in the deed mentioned, and that there was no sharer in the said property, purported to mortgage the property to the Bank of Upper India, Limited, as security for the repayment with interest of Rs. 3,00,000 lent to him by the Bank. Maharaj Singh was not a mortgagor, nor did it appear by the mortgage deed that he had any proprietary interest in the mortgaged property or was obtaining any benefit from the loan to his brother Sheoraj Singh; Maharaj Singh was made a party to the deed of mortgage in order that the fact of his having signed the deed might afford evidence that he had assented to the taking of the loan by Sheoraj Singh and the granting of the mortgage. The suit is one for sale of the property mentioned in the mortgage deed, and by the suit the plaintiff sought to make Maharaj Singh personally liable for the mortgage debt and interest, and to bring to sale Maharaj Singh's share in the mortgaged property, which in fact, was the ancestral property of the joint Hindu family which at the date of the mortgage consisted of Sheoraj Singh and Maharaj Singh. The mortgage was assigned on the 2nd of August, 1897, by the Bank of Upper India, Limited, to Raja Balwant Singh, who was the plaintiff in the suit. Raja Balwant Singh is now dead, and his minor son, Raja Surajpal Singh, is represented in this litigation by the Collector of Etah, who is in charge of his estate.

Sheoraj Singh, the mortgagor, is the elder of the two sons of Raja Shankar Singh, now dead. The younger of the two sons of Raja Shankar Singh is Maharaj Singh, a defendant in the suit, and the respondent in one of these two appeals. Raja Shankar Singh [300] was the only son of Raja Dilsukh Rai, long since dead. At the time of the Indian Mutiny of 1857-58, Dilsukh Rai, who was then a patwari, did good and meritorious service for the Government. In recognition of those services the Government granted to Dilsukh Rai a considerable estate, now said to produce annually some Rs. 50,000 gross income. The lands granted to Dilsukh

(1) (1894) I. L. R. 22 Cal. 324: L. R. 22 I. A. 4.

(2) (1878) L. R. 5 P. C. 327 (337).

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Rai were not granted as an impartible estate. They are the lands which were mortgaged by Sheoraj Singh to the Bank of Upper India, Limited. In further recognition of his services the Government conferred upon Dilsukh Rai the title of Raja as a personal distinction. Raja Dilsukh Rai was a saving and apparently a penurious man. On his death the estate was unincumbered, and he left a large sum of money which he had accumulated. The Government also conferred upon Shankar Singh the title of Raja as a personal distinction. The title was never made hereditary, and although Sheoraj Singh was described in the mortgage deed as a Raja he was not entitled to be so described. Raja Shankar Singh borrowed considerable sums of money, and died on the 24th of August, 1891, leaving debts which he had contracted undischarged. It was to discharge those debts of Raja Shankar Singh, and also some debts which had been contracted by Sheoraj Singh, that the mortgage on which this suit has been brought was made by Sheoraj Singh.

Several issues were raised and tried in the Court of the Subordinate Judge. One of those issues arose on a defence of Maharaj Singh that at the date of the mortgage he was under the age of 18 years, and being at that date a minor was legally incapable of entering into any contract or of binding himself or his interest in the estate by his execution of the deed of mortgage as an assenting party to the taking of the loan and the granting of the mortgage by Sheoraj Singh. Another issue which was tried by the Subordinate Judge related to an alternative case which the plaintiff put forward, by which he sought to make Maharaj Singh and his interest in the estate liable for the payment of the money due under the mortgage, on the alleged ground that it was his duty as a Hindu son to pay with interest the money advanced by the Bank of Upper India, Limited, to Sheoraj Singh, as that money had been lent by the Bank to Sheoraj Singh to discharge the debts which had been contracted by Raja Shankar Singh and had been applied [301] by Sheoraj Singh to the discharge of those debts. On behalf of Maharaj Singh it was alleged in answer to the plaintiff's alternative case that Raja Shankar Singh had contracted those debts for the purposes of immorality, and it was consequently contended that there was no duty on his sons to discharge them by payment, and that the payment of those debts by Sheoraj Singh out of money lent to him by the Bank of Upper India, Limited, for that purpose, created no liability on Maharaj Singh or his interest in the family estate.

The Subordinate Judge found as a fact that at the date of the mortgage, the 28th of October, 1892, Maharaj Singh was of full age, and being apparently under the impression that in obtaining the loan from the Bank of Upper India, Limited, and in making the mortgage, Sheoraj Singh might be regarded as having acted as the manager of the joint Hindu family, the Subordinate Judge dealt with the plaintiff's alternative case and found that it was not proved that the debts which had been contracted by Raja Shankar Singh had been contracted for the purposes of immorality, and exempting certain portions of the property which were held by persons who are not parties to either of these appeals, made a decree for sale of the rest of the property mentioned in the deed of mortgage. With the portions of the property which were exempted from sale these appeals are not concerned. From that decree of the Subordinate Judge Maharaj Singh and another defendant, the Reverend J. B. Thomas, who is now represented by the Reverend Rockwell Clancy, filed separate appeals in the High Court. The High Court on a careful and exhaustive

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review of the evidence found as a fact that Maharaj Singh was a minor on the 28th of October, 1892, and consequently that the mortgage deed as against him and his interest in the estate was void. Although the High Court obviously considered that an inquiry into the origin and nature of the debts which had been contracted by Raja Shankar Singh was irrelevant in this suit, the High Court reluctantly, and only in view of the question possibly becoming material in an appeal from their decree, carefully considered the evidence bearing on that question, and found as a fact that the debts which Raja Shankar Singh had contracted had been contracted by him for the purposes of immorality. The High Court allowed the appeal of Maharaj [302] Singh, dismissed the suit so far as Maharaj Singh and his interests in the estate were concerned, and, by a separate decree allowed the appeal of the Reverend J. B. Thomas to the extent of a moiety of the property claimed by him. From those decrees of the High Court these consolidated appeals have been brought. In support of the appeal in which the Reverend Rockwell Clancy is a respondent no argument has been addressed to their Lordships to show that the appeal against the decree of the High Court which was passed in the appeal of the Reverend J. B. Thomas could be supported if the appeal against the decree obtained by Maharaj Singh in the High Court should fail.

Some of the questions which had been considered in the Courts below were on behalf of the appellant argued at considerable length before this Board, and it was also contended on his behalf that in borrowing the Rs. 3,00,000 from the Bank of Upper India, Limited, and in making the mortgage of the 28th October, 1892, Sheoraj Singh had acted as the manager of the family, and for the benefit and protection of the estate, and consequently, as it was urged, that it was immaterial whether Maharaj Singh was or was not of full age at the date of the mortgage. It will be convenient to deal with that contention at once. The contention that Sheoraj Singh had acted as the manager of the family in borrowing the Rs. 3,00,000, and in making the mortgage is unfounded. Evidence, oral and documentary, which their Lordships accept as reliable, proves that Sheoraj Singh, after the death of his father Raja Shankar Singh, assumed without authority the title of Raja, and asserted that the family estate was impartible, and as an impartible estate had descended to him as the elder son of Raja Shankar Singh, and that his brother Maharaj Singh was entitled only to an allowance for maintenance. It was in that assumed position as the absolute owner of an impartible estate, and not as manager of a joint Hindu family, that he obtained the loan from the Bank of Upper India, Limited, and made the mortgage in favour of the Bank. The mortgage deed was drawn up by an official of the Bank, and in that deed Sheoraj Singh is described as Raja Sheoraj Singh Bahadur, mortgagor, and it is recited that—

"the said mortgagor is the absolute owner or proprietor of the several villages, lands, hereditaments, and premises hereinafter mentioned, and more particularly described in the schedule hereto attached and intended to be hereby [303] mortgaged in possession free from all incumbrances save and except being mortgaged and under attachment of decrees as mentioned hereinafter . . . and the said Maharaj Singh, brother of the said mortgagor, has been made a party to this indenture in order to make known his consent and approval to this loan being taken, and the said villages, lands, hereditaments and premises, being mortgaged as security for the same, and the said mortgagor doth hereby declare that the said property is absolutely his own and he has full power to alienate the same by a mortgage, sale or otherwise, and that he has only one brother, the said Maharaj Singh, and no sons or any sharer in the said property."

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In face of that deed it cannot be contended that the Bank of Upper India, Limited lent the money to Sheoraj Singh, or that Sheoraj Singh made the mortgage in favour of the Bank as manager of the joint Hindu family, which consisted of himself and Maharaj Singh. The Bank of Upper India, Limited, made some inefficient inquires, and lent the Rs. 3,00,000 to Sheoraj Singh, not as the manager or even as a member of a joint Hindu family, but in his assumed position as the absolute owner of an impartible estate. Sheoraj Singh, on his own behalf and in his own interests, and not as representing Maharaj Singh, discharged the debts which Raja Shankar Singh had contracted. It need hardly be observed that Sheoraj Singh was not an ancestor or a predecessor of Maharaj Singh; he was at the date of the mortgage merely a co-sharer with his brother Maharaj Singh in the property of the joint Hindu family of which they were members.

The evidence on the question of Maharaj Singh's age on the 28th of October, 1892, is partly oral and partly documentary. According to the evidence, oral and documentary, which the High Court considered to be entirely reliable, Maharaj Singh was born on the 20th of December, 1874 and consequently was under the age of 18 years on the 28th of October, 1892. The Subordinate Judge had treated the oral evidence that Maharaj Singh had been born on the 28th of October, 1874, as the false evidence perjured witnesses, and had treated the documentary evidence as fabricated on behalf of Maharaj Singh for the purposes of his defence to the suit. Before coming to the conclusion that Maharaj Singh was born on the 20th of December, 1874, the High Court, bearing in mind the adverse comments of the Subordinate Judge on that oral and documentary evidence, and with the object of ascertaining how far, if at all, the comments and findings of the Subordinate Judge were justified, had carefully considered the oral evidence of the witnesses, and had [304] examined the documents and papers which had been put in evidence. There was some other documentary evidence which standing alone and unexplained would suggest that Maharaj Singh had probably arrived at the full age of 18 years before the 28th of October, 1892.

The oral and documentary evidence upon which the High Court relied for their finding that Maharaj Singh was a minor when he signed the mortgage deed on the 28th of October, 1892, has been criticised minutely and at length by the learned counsel who argued these appeals on behalf of the appellant, but their Lordships are unable to see any reason for doubting, on the question of the date of birth of Maharaj Singh, the evidence of Pandit Ganesh Ram, Pancham Ram, Jhamman Lah, Ram Prasad, Ganesha Ram the barber, and the defendant respondent Maharaj Singh. If the evidence of those witnesses is believed, Maharaj Singh was born on the 20th of December, 1874. The documentary evidence as to the date of birth of Maharaj Singh is in their Lordships' opinion not open to suspicion. Pandit Ganesh Ram proved that he prepared the *tewa* or abstract horoscope on the day when Maharaj Singh was born, and from it prepared the horoscope which was presented to Raja Dilsukh Rai on the day of the *daston* ceremony. The *tewa* and the horoscope were put in evidence. The horoscope bears upon it in the writing of Raja Dilsukh Rai the name Maharaj Singh which Raja Dilsukh Rai gave to his grandson at the *daston*. That horoscope was produced and examined on the occasion of the marriage of Maharaj Singh, and it has been clearly and amply identified as the original horoscope relating to the birth of Maharaj Singh. Ram

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Prasad, who with other pandits was called in on the birth of Maharaj Singh to prepare a horoscope, produced the almanac in which at the time he had entered the birth of a son in the house of Kunwar Shankar Singh under the date 12th Aghan Sudi, Sambat 1931, which was the 20th of December, 1874. Ganesh, who was the family barber, took the news of the birth of a son of Shankar Singh, from Bilram to Raja Dilsukh Rai at Etah, and received from him a present of Rs. 2. Ganesha also said in his evidence that on that occasion Raja Dilsukh Rai gave Rs 50 to Balwant Singh for household expenses. The original accounts of the expenditure of Raja Dilsukh Rai, which according to the evidence bear his signature, on the occasions when he examined them, show [305] that in December, 1874, Rs. 2 were given to Ganesha, barber, who brought the news of the birth of a son in the house of Kunwar Sahib, who was Raja Shankar Singh, and which show that Rs. 50 was sent to Bilram on account of the birth of a son in the house of Kunwar Singh, who was Raja Shankar Singh. Ganesha, the barber, proved that that son was Maharaj Singh, and there is no evidence to show that Raja Shankar Singh ever had more than two sons. Their Lordships cannot regard that oral and documentary evidence as false or even as open to suspicion. In their opinion it conclusively proves that Maharaj Singh was a minor when he signed the mortgage deed on the 28th of October, 1892. There is, however, documentary evidence that prior to the 28th October, 1892, Maharaj Singh had acted as if he was of full age. For instance on the 26th of May, 1892, Maharaj Singh signed a vakalatnama appointing Muhammad Tahir Husain, a pleader, as his attorney in a suit in which he and Sheoraj Singh were defendants, and authorizing Muhammad Tahir Husain to appear for him, to file documentary evidence, and to refer the matter to arbitrators or to enter into a compromise. In that suit Sheoraj Singh, in his written statement of the 26th of May, 1892, made an allegation in reference to section 444 of the Code of Civil Procedure which can be construed only as meaning that Maharaj Singh was at that date a minor. For another instance, in a suit in which Sheoraj Singh and Maharaj Singh were plaintiffs, they, on the 13th of August, 1892, signed a vakalatnama appointing Muhammad Tahir Husain, pleader, their attorney, and authorizing him to act for them in the suit. On the other hand, on the 19th of August, 1892, a decree was made in a suit which had been instituted on the 14th of July, 1892, and in which Maharaj Singh had been treated throughout as a minor under the guardianship of his brother Sheoraj Singh. It is probable that until it became necessary in this suit to ascertain the actual date of the birth of Maharaj Singh, neither he nor Sheoraj Singh knew his precise age. However that may have been, their Lordships find as a fact on the clear and reliable evidence to which they have referred that Maharaj Singh was a minor under the age of 18 years when he signed the mortgage deed of the 28th of October, 1892.

Having found as a fact that Maharaj Singh was a minor on the 28th of October, 1892, it is not necessary for their Lordships to [306] consider any other issue. This suit has been brought on the mortgage deed of the 28th of October, 1892, by the assignee of that mortgage, and as their Lordships have held, that the mortgage was not made by Sheoraj Singh as the manager of the family, or in any respect as representing Maharaj Singh, and as Maharaj Singh was then a minor, the mortgage deed as against him and his interest in the estate was not merely voidable; it was void and of no effect, and must be regarded as a mortgage deed to which he was not

even an assenting party and as a mortgage deed which did not affect him or his interest in the estate.

Their Lordships will humbly advise His Majesty that the decrees of the High Court be affirmed and these appeals be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant:—*Pyke, Parrott and Co.*

Solicitor for the respondent Maharaj Singh:—*Douglas Grant.*

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PRIVY COUNCIL.

34 A. 296=14 I. C. 629=1912 M. W. N. 462=11 M. L. T. 344=9 A. L. J. 809=16 C. L. J. 476=16 C. W. N 877=23 M. L J. 18=14 Bom. L. R. 422=39 I. A. 109.

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34 A. 306 (=9 A. L. J. 311=13 I. C. 625).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

GOPI NARAIN AND OTHERS (*Defendants*) *v.* KUNJ BEHARI LAL (*Plaintiff*) AND SHEO DAYAL (*Defendant*).*

[15th January, 1912.]

Act No. II of 1882 (*Indian Trusts Act*), *section* 88—*Trust—Trustee entering into dealings in which his own interest may come into conflict with his duty as trustee—Purchase of mortgage deed comprising property belonging at the time of purchase to the trust.*

A member of a body of trustees purchased for a very low price at an auction sale in execution of a simple money decree held by the trustees as such a mortgage bond comprising, amongst other property, a village of which two-thirds had been previously purchased by the author of the trust and formed part of the trust property. Neither the purchaser nor the trustees had obtained the leave of the court to bid. The auction purchaser claimed the purchase for himself and sought to enforce the mortgage by suit.

Held, that the auction purchaser could not be allowed to do this, but must, on the contrary, be taken to have made the purchase for the benefit of the trust. All that he was entitled to was to be repaid the actual sum which he himself paid for the mortgage deed at the auction sale.

THE facts of this case were as follows:—

One Fateh Chand on the 19th of June, 1887, executed a mortgage in favour ostensibly of Abdul Kafil but really in favour of [307] Abdul Jalil, a pleader of Cawnpore. The property mortgaged comprised three villages—Pali Kalan, Pali Khurd and Sadikpur. The mortgage money was Rs. 50,000, carrying interest at 14 annas per cent. per mensem. One-third in each of these villages had been sold in discharge of prior debts.

Two-thirds of Pali Kalan was purchased by one Gaya Prasad in execution of a simple money decree on the 31st of May, 1896.

Of the remaining villages one Abdul Hamid purchased two-thirds of Pali Khurd in execution also of a simple money decree on the 20th of July, 1892, and the third village, Sadikpur, was purchased by one Sheo Dayal on the 20th of December, 1906, also in execution of a simple money decree.

Gaya Prasad died on the 16th of July, 1899, leaving a will, dated the 13th of July, 1899. By that will he bequeathed the bulk of his property to certain charities subject to certain legacies. The trustees under that will were Kunj Behari Lal as vice-president and Gopi Narain, as president of the board of trustees, and four other persons. Kunj Behari Lal was also one of the legatees under the will.

*First Appeal No. 132 of 1910 from a decree of Pitambar Joshi, Subordinate Judge of Mainpuri, dated the 8th of February, 1910.

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The mortgagee rights under the mortgage deed of 1887, were sold in execution of a money decree held by the trustees as representing the estate of Gaya Prasad against Abdul Jalil and purchased by Kunj Behari Lal on the 24th of January, 1905 or rather by one Sheo Prasad who, after the completion of the sale, gave out that he had been bidding for the plaintiff.

Kunj Behari Lal claimed that he made the purchase for himself and brought the present suit for sale of the property comprised in the mortgage. The Court of first instance decreed the claim.

This was an appeal by the trustees other than the plaintiff and Abdul Hamid, Sheo Dayal having submitted to the decree of the lower court.

The Hon'ble Pandit *Moti Lal Nehru* (with him Dr. *Tej Bahadur Sapru* and Mr. *Jagmohan Nath Chak* for the trustees other than the plaintiff :—

The trustees intended to purchase the property for the estate and had applied for leave to bid. The plaintiff himself being one of the decree-holders could not bid and would have required leave of **[308]** Court. It did not appear that leave was granted. Even if there was no dishonesty on the part of the plaintiff, every benefit he acquired was for the estate. He could not put himself in a position where his interest might conflict with that of the estate. It did not matter if there was nothing suspicious about it. The law is extremely jealous on the point, the principle is that a trustee should not be exposed to the temptation of benefiting himself at the expense of the *cesti que trust*: Lewin on Trusts, 11th edition, p. 304, Williams on Executors, 10th edition, Vol. II, p. 1488, Coote on Mortgages, 7th edition, Vol. II, p. 841. The same principle was enunciated in Story on Equity Jurisprudence, Grigsby's edition, p. 211, and Pomeroy Equity, Vol. III, p. 2079, and the principle was the same as in the leading case of *Keech* v. *Sandford* (1), which was followed in *Griffin* v. *Griffin* (2).

So long as the relation subsisted and was of a fiduciary nature it did not really matter whether the property was the subject of trust or not : *Durcy* v. *Hall* (3).

Section 88 of the Trust Act dealt with trustees and covered the entire ground. The English cases only laid down the principle which was embodied in that section. The leading case was that of *Ex parte Lacey* (4), which was followed in *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (5).

It was to the interests of the mortgagee to have the property sold, whereas as a mortgagor, it was the duty of the plaintiff to show that the mortgage was a bad one and Fateh Chand had been imposed upon. A case where a purchase by a trustee was held good was that of *Barwell* v. *Barwell* (6), which shows the steps he must take before a purchase by him can stand.

Maulvi *Muhammad Ishaq* (for *Abdul Hamid*), for the other defendant appellants, adopted the argument of the advocate for trustees.

Mr. *B. E. O'Conor* (with him Maulvi *Ghulam Mujtaba* and Pandit *Baldeo Ram Dave*), for the respondent, argued that consideration had passed and that there was nothing to restrict Fateh **[309]** Chand's right of alienation. The plaintiff could not be debarred from bidding in his personal capacity at a sale brought about by a body of persons of whom

(1) (1724 Sel. Ch. Ca. 61; 15 Ruling Cases, p. 455.
(2) 1804) 1 Sch. and Lef., 352; 9 R. R. 51.
(3) (1682) 1 Vern., 49; 23 R. R. 302.
(4) (1802) 6 Ves. 625, 628 ; 31 R. R. 1228
(5) (1899) 2 Ch. 44.
(6) (1865) 34 Beav., 371; 55 R. R. 678.

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he was one. The effect of authorities was summed up rather widely in Lewin. The view of the other side went beyond provisions of the Indian Trusts Act. The essence of them was that the person holding a fiduciary position "should not avail himself of that character" to benefit himself. The English cases did not apply. Here he must not take advantage of his fiduciary position. The question had only reference to Pali Kalan which was the trust estate and not the other two villages.

RICHARDS, C. J., and BANERJI, J :—This appeal arises out of a suit on foot of a mortgage, dated the 19th of June, 1887. The mortgagor was one Fateh Chand, and the mortgagee was one Abdul Kafil. The mortgage was for Rs. 50,000 at 14 annas per cent. per mensem interest. It is clear now that Abdul Kafil was not the real mortgagee, but was only *benamidar* for one Abdul Jalil, a pleader in Cawnpore. This mortgage was subsequently attached and sold in execution of a simple money decree which Gaya Prasad had obtained against Abdul Jalil and which was being executed against the representatives of the latter. The certificated auction purchaser of this mortgage was Babu Kunj Behari Lal, the plaintiff in the present suit. This bond has been the subject of a good deal of litigation which, in the view we take of the case, it is not material to refer to. It was made, as already stated, by Fateh Chand in favour of his pleader, and one of the defences taken in the present suit is the plea that there was no consideration for the bond. The bond, no doubt, was of a very suspicious nature, made as it was in favour of the pleader of Fateh Chand. Fateh Chand was a man who managed to dissipate what must originally have been an estate of considerable value, and had the suit been one between Fateh Chand and Abdul Jalil, we might have had great difficulty in holding that anything like the full principal sum of Rs. 50,000 was due. We think, however, for reasons which we shall presently state, that the defendants appellants in the present appeal cannot be allowed to say that the bond was not for its full face consideration. Three villages were mortgaged, one called Pali Khurd, another called Pali Kalan, and third called Sadikpur. A one-third share in each of these villages has been sold in satisfaction of prior mortgages, but two-thirds of Pali [310] Khurd was purchased by the defendant Abdul Hamid and two thirds of Pali Kalan was purchased by Gaya Prasad, both in execution of simple money decrees. Sadikpur was purchased by Sheo Dayal. The price paid for Pali Khurd by Abdul Hamid must clearly have been based upon the property being subject to a heavy incumbrance. In a written statement by Abdul Hamid in certain litigation between one Sheo Prasad and himself and others, he expressly admitted that at the sale of this property the mortgage of the 19th of June 1887, was proclaimed and that he purchased the property subject to that mortgage. Pali Kalan was also purchased at a price which would have been an absurdly low value unless the property was subject to a heavy incumbrance. After the death of Gaya Prasad the defendants, Gopi Narain and the other trustees (who are the defendants appellants and are hereinafter referred to as "the trustees"), in their application for probate of the will of Gaya Prasad placed a very small value on the property and expressly stated that it was subject to this mortgage for Rs. 50,000 and interest. Neither the trustees nor Abdul Hamid have given any affirmative evidence of the want of consideration. Under these circumstances we think that the decision of the learned Subordinate Judge that the bond had been given for full consideration must be accepted.

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It is now necessary to state some further facts upon which the other pleas taken in the suit are based. Gaya Prasad was a man possessed of considerable wealth. He made a will on the 13th of July, 1899, and thereby appointed certain persons to be his trustees, and amongst them the plaintiff in the present suit, Kunj Behari Lal. He named as president of the board of trustees the defendant appellant Gopi Narain and the respondent, Kunj Behari Lal, selected by his co-trustees as vice-president of the board. Under the will of Gaya Prasad both Kunj Behari Lal and Gopi Narain took considerable benefits. After some litigation the will was duly proved, and it was at the instance of the trustees that the decree already mentioned against Abdul Jalil was being executed against the latter's widows. It must be borne in mind that the trustees were at the time of the execution of decree in possession of the village of Pali Kalan under the will of Gaya Prasad, and that the mortgage which was attached in execution of the decree against Abdul Jalil affected this village as well as the other two villages already [311] mentioned. The trustees executed a power of attorney on the 30th of January, 1900, in favour of Kunj Behari Lal. This document will be found at page 75 of the appellant's book. It sets forth that the trustees other than Kunj Behari Lal have other engagements and have no time to attend court in a body and look after and contest cases, and they then proceed to appoint Kunj Behari Lal, their general attorney, to act for them in all court matters; he was not, however, empowered to purchase or take property in mortgage or borrow money in their names. On the 7th of January, 1905, Kunj Behari Lal wrote to Gopi Narain, as president of the committee, a letter, which will be found at page 45 of the respondent's book. In this letter he points out that the mortgage of the 19th of June, 1887, would be sold on the 24th of January, 1905, and that in his opinion it would be most advisable for the trustees to purchase this bond. He says in the letter:—" If any stranger purchases this village and is successful in his suit the whole of the share in mauza Pali Kalan will be lost." He says further that if the trustees do not buy the bond, he himself would do so. No one can doubt the soundness of the advice given in this letter. Granted that the bond was a little shady and that some claim was being made to it by the widows of Abdul Jalil, it was still most advisable to purchase it. Kunj Behari lived at Etawah, the other trustees lived at Cawnpore. In the ordinary course of events the letter would reach Gopi Narain about the 8th of January and on the 10th of January an application was made in the execution case that the trustees should be permitted to bid for the bond of the 19th June, 1887, which was to be sold in execution of Gaya Prasad's decree. The will of Gaya Prasad provided for the holding of meetings of the trustees at stated times, and in the letter of Kunj Behari Lal to which we have already referred, he suggested that an extraordinary meeting of the committee should be called to consider the question of purchasing the bond. It appears from the evidence that a notice of a meeting was sent out and that on the agenda the question of the purchase of the bond was expressly mentioned. It also appears that there was no quorum at the meeting which was summoned for the 22nd of January, that is to say, two days before the sale. It therefore appears that there was no express resolution on the part of the trustees on the subject of the purchase of the bond. Kunj Behari Lal attended the sale. [312] He never obtained any express leave on his own account to bid at the sale, although undoubtedly he was one of the decree-holders. It does not appear from the evidence whether any order was made on the application of the trustees for leave to bid, and strictly speaking, Kunj Behari

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Lal had no right to bid at the sale either on his own behalf or on behalf of the trustees without leave of the court, but he nevertheless attended the sale, and it appears that he and one Sheo Prasad bid at intervals from the commencement of the sale, and that the last bid was made by Sheo Prasad. We may here mention that Sheo Prasad was also a general attorney for the trustees. He was also attorney for Kunj Behari Lal. The bond was knocked down for the sum of Rs. 3,115. Kunj Behari Lal was examined and he states that the purchase was made by Sheo Prasad for him, that he had not money with him and that he borrowed it from Gopi Narain. Gopi Narain lent him the money not out of the trust fund but out of private moneys of his own, and the amount was subsequently repaid to him. He says also that after he had purchased the document, that is to say, the bond in question, Gopi Narain asked him to give the document to the committee "and I said that I would not give it." A number of the notices issued for the subsequent meetings of the trust committee have been put in evidence, and those show that time after time amongst the list of business to be transacted is the question of the purchase of the bond, but no resolution was ever come to on the subject either by the trustees to surrender any rights they might have or for the taking of any steps against Kunj Behari Lal. The matter finds a place in the agenda for the last time in the notice, dated the 2nd of July 1905. Kunj Behari Lal did not obtain a sale certificate for some three years after the date of purchase, and in the meantime the bond had been claimed by the widows of Abdul Jalil. In our opinion the inference to be drawn from the evidence is that Kunj Behari bid for the bond in the first instance possibly with the intention of allowing the trustees to have the benefit of it. It is equally possible that when he found that before the sale the trustees had come to no resolution, he bid for the bond on his own behalf intending to keep it for himself. We do not believe that the trustees as a body ever intended that Kunj Behari Lal should purchase the bond for himself, and we are satisfied that they never gave him such permission. The application for leave to bid strongly [313] suggests that the trustees at once saw the soundness of the advice given them by Kunji Behari Lal, namely, that it would be advantageous to purchase the bond. We are satisfied also that after the purchase had been made they would have been glad to take over the purchase from Kunj Behari Lal. This is shown by the fact that time after time the question of the bond is placed upon the agenda of the meetings of the trustees, and also by the fact that Gopi Narain asked Kunj Behari Lal to let the trustees have the bond. We think that it is most probable that Kunj Behari Lal having succeeded in getting the property knocked down to him or to his attorney at a very low price, determined to keep it himself, and that the trustees thought they could not compel him to give it up. Kunj Behari Lal was probably supposed to know more of court matters than his co-trustees and they considered that they were at his mercy.

The question then arises, can Kunj Behari Lal under those circumstances retain the benefit of his purchase? We are of opinion that he cannot. Section 88 of the Indian Trusts Act provides:—'Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be,

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adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person, the advantage so gained." Illustration (*h*) is as follows :—" A, a guardian, buys up for himself incumbrances on his ward B's estate at an under value. A holds for the benefit of B the incumbrances so bought and can only charge him with what he has actually paid." This section incorporates and codifies the law which prevails in England on the subject of purchases made by trustees. The authorities will be found collected in Lewin on Trusts, page 304, 11th Edition, Williams on Executors, page 488, 10th Edition, and Coote on Mortgages, Vol. II, page 841.

In the present case Kunj Behari Lal purchased for Rs. 3,115 a mortgage for Rs. 50,000 and the value of two-thirds of the village Pali Kalan if unincumbered must have been over Rs. 25,000. He **[314]** was not only one of the co-trustees and therefore bound to do all in his power to protect the interests of the trust estate, but he was also the general attorney of the trustees. It seems to us that when he made the purchase of this incumbrance, he must be held to hold it for the benefit of the trust and can only charge the trust with the amount which he actually paid for it. The case seems to us to fall within the second part of section 88 of the Indian Trusts Act. It is quite clear that his interests as purchaser of this bond were or might be adverse to the interests of the trust estate as owner of the equity of redemption in the village of Pali Kalan. The mortgage, however, affected not only the village of Pali Kalan but also the village of Pali Khurd and Sadikpur, and the plaintiff therefore is entitled to a decree against the purchaser of Pali Khurd, that is, Abdul Hamid, and against the purchaser of Sadikpur, but his decree against these villages must only be for the proportion which they ought to bear, having regard to the value of these villages as compared with that of Pali Kalan. These two villages formed no part of the trust estate. As against the village of Pali Kalan, the suit must be dismissed upon the terms that the trustees do pay to the plaintiff that portion of the price paid by him for the purchase of the bond which is proportionate to the value of the village Pali Kalan as compared with the value of the two other villages. He should get the said amount of the purchase money, together with interest, at the rate of 10½ per cent. per annum, the rate fixed in the bond. If the defendants, trustees, fail to pay such sum, the decree of the court below should stand. The parties have agreed as to the respective values of the three villages, and we are thus enabled to fix the amount for which the decree ought to be made against the villages of Pali Khurd and Sadikpur in the event of the defendants trustees paying the apportioned amount of the price paid by Kunj Behari and interest, and we are also able to fix the proportionate amount of such price. By agreement this price with interest up to the date fixed for payment, namely, the 24th of March, 1912, amounts to Rs. 2,260. We accordingly modify the decree of the court below as follows : In the event of the trustees paying into court the sum of Rs. 2 260 as aforesaid, the other defendants, *viz.*, Abdul Hamid and the heirs of Pathak Sheo Dayal, shall pay to the plaintiffs on or before the 5th of July, 1912, the sum **[315]** of Rs. 50,327-10-9 (*i. e.*, Rs. 38 272 principal and Rs. 12,055-10-9 interest up to the aforesaid date), together with costs in both courts and future interest at 6 per cent. per annum, but in the event of the said defendants, Abdul Hamid and the heirs of Sheo Dayal not paying the said sum of Rs. 50,327-10-9, together with costs and future interest as aforesaid

a two-thirds share of Pali Khurd, pargana Bharthana, district Etawah, and mahal Rani Indumati of mauza Sadikpur, pargana Bharthana, district Etawah, shall be sold. In case the trustees do not pay the said sum of Rs. 2,260, as aforesaid, all the defendants shall pay to the plaintiff on or before the 5th of July, 1912, the sum of Rs. 85,475, (i. e., Rs. 65,000 principal and Rs. 20,475 interest, up to the date above-mentioned), together with costs in both courts and future interest at 6 per cent. per annum. On failure by the defendants to pay the said amount on or before the date above-mentioned, the plaintiff will be entitled to bring to sale Mahal Gopi Narain of mauza Pali Kalan, pargana Bharthana, district Etawah, and mahal Rani Indumati of mauza Sadikpur, pargana Bharthana, district Etawah, and two-thirds of mauza Pali Khurd, pargana Bharthana, district Etawah. In the event of the trustees paying the said sum of Rs. 2 260 they will have their costs in the court below and in this Court to be paid by the plaintiffs, but in calculating the costs of the trustees in this Court they will only be allowed one-third of the costs of translating and printing.

Decree modified.

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Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

KHADIM HUSAIN (*Plaintiff*) *v.* BHARAT SINGH AND ANOTHER (*Defendants*).*

[29th January, 1912.]

Act No. XVI of 1908 (*Indian Registration Act*), *sections* 36, 73, 77—*Registration—Refusal by Sub-Registrar to register Appeal to Registrar—Refusal to register based on inability to procure attendance of executants—Suit to compel registration.*

A sale deed was presented for registration, but the executants did not appear before the Sub-Registrar, who, after four months from the date of execution, reported the fact to the Registrar and was directed by the latter not to register it. Registration was accordingly refused. An appeal against that order [316] to the Registrar was dismissed. It appeared that the summonses by the Sub Registrar to the executants had been returned unserved. The vendees brought a suit for registration of the document. *Held*, that the suit was maintainable, the refusal by the Sub-Registrar to register not being based upon denial of execution. *Luckhi Narain Khettry* v. *Satcowrie Pyne* (1) distinguished.

THE facts of this case were as follows:—

The plaintiff presented a sale deed, dated the 2nd of June, 1909, for registration, before the Sub-Registrar of Bijnor, on the 10th of July, 1909, and asked under section 36 of the Registration Act for the issue of summons to the executants, alleging that the defendants had by that deed transferred to him a certain share of a zamindari; that the defendants promised to get the deed registered within fifteen days from the date of execution, and that the defendants were not willing to get it registered. Twice on his application summonses were issued, but were returned unserved, and the Sub-Registrar, after the expiry of the usual four months from the date of execution, reported the matter to the Registrar for his orders under Rule 182 of the Registration Manual. The District Registrar by his order, dated the 9th of October, 1909, refused

* First Appeal No. 39 of 1911, from a decree of Pratab Singh, Subordinate Judge of Moradabad, dated the 9th of September, 1910.

(1) (1888), I. L. R. 15 Cal 189.

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registration of the document, and the Sub-Registrar, in accordance with that order made an endorsement on the sale deed on the 12th of October, 1909, to the following effect, "Registration refused." An appeal was preferred to the District Registrar against the order of the Sub-Registrar of the 12th of October, 1909. The District Registrar dismissed the appeal on the 25th of November, 1909, on the ground that no appeal lay. Thereupon the plaintiff instituted the present suit on the 22nd of December, 1909, under section 77 of the Registration Act, in the court of the Subordinate Judge of Moradabad, praying for a decree directing the sale deed to be registered. The suit was dismissed as against Musammat Mathuri and decreed *ex parte* against Bharat Singh, the husband of the lady. The plaintiff appealed.

Babu *Surendra Nath Sen*, for the appellant:—

The lower court was clearly wrong in holding the suit not to be maintainable under section 77 of the Regitration Act, because the order of the Sub-Registrar, dated the 12th October, 1909, was an order refusing registration, from which the appeal was preferred to the District Registrar, and the suit having been brought within thirty days from the dismissal of that appeal was clearly within time.

[317] Dr. *Satish Chandra Banerji*, for the respondent.

Section 77 of the Registration Act provides for those cases in which registration is refused either under section 72 or 76 of the Act. The order of the Registrar was clearly not under section 72 nor under 76 (*a*): *Gangava* v. *Sawava* (1). The order was one under section 25 made in the exercise of discretion, and the Civil Court could not interfere with the exercise of that discretion. It was in the discretion of the Registrar to allow or disallow registration of the document after the usual four months from the date of execution had expired. The order of the Registrar refusing registration was the real order in the case and, as such, the appeal which was prepared was an appeal against the Registrar's own order and hence was not entertainable. Even if the order be construed to be one falling under section 76 (*a*), the suit would be time-barred, having been brought more than thirty days from the date of that order. The order of the Sub-Registrar ("Registration refused"), dated the 12th of October, 1909, endorsed on the sale deed, was not an order really *refusing registration*—for the Sub-Registrar had no discretion left after the Registrar's order—but was simply an order *not registering the document.*

Reliance was placed on the following cases:—

Veeramma v. *Abbiah* (2); *Kudrathi Begum* v. *Najibunnessa* (3); *Udit Upadhia* v. *Imam Bandi Bibi* (4).

Babu *Surendra Nath Sen*, replied.

GRIFFIN and CHAMIER, JJ.:—This appeal arises out of a suit instituted by the plaintiff, Khadim Husain, to have a document alleged to have been executed by the defendants on the 2nd of June, 1909, registered. Musammat Mathuri is the wife of the defendant No. 1. She was joined as a defendant on the allegation that a portion of the property conveyed by the sale deed had been acquired *benami* in her name. The plaintiff made two attempts to obtain attendance of the executants at the registration office. On each occasion service of the summons was not effected on the executants. By an order, dated the 12th of October, 1909, the Sub-Registrar refused to register the document for reasons set out at length in his order of that date. He stated that the plaintiff, Khadim Husain, had

(1) (1896) I. L. R. 21 Bom. 699.
(2) (1898) I. L. R. 18 Mad. 99.
(3) (1897) I. L. R. 25 Cal. 98.
(4) (1902) I. L. R. 24 All. 402.

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been unable to effect service of summons on [318] the executants and that from the 17th of August, 1909, up to the date of the order, he had failed to take further steps. On the expiry of the four months from the date of the execution, the Sub-Registrar, under Rule 182 of the Registration Manual, submitted a report to the District Registrar, and in pursuance of the direction received from the Registrar on the 5th of October, 1909, he passed an order on the 12th of October, 1909, refusing to register the document. The plaintiff filed an appeal against this order within time to the District Registrar. That officer, by an order, dated the 25th of November, 1909, rejected the appeal. The suit out of which this appeal has arisen, was instituted on the 22nd of December, 1909. It was decreed *ex parte* against both the defendants on the 30th of June, 1910. On an application of the defendant No. 2 the *ex parte* decree against her was set aside, and the suit was retried so far as she was concerned. The result of the retrial of the suit was that it was dismissed as against defendant No. 2. The plaintiff comes in appeal against this order of dismissal. The lower court was of opinion that the suit was not maintainable. We find some difficulty in understanding the reasons given by the court below for holding that the suit was not maintainable. On behalf of the respondent it is contended that the order of the court below was right on two grounds; the first is that no suit lay under section 77 of the Registration Act because the non-attendance of the executants at the office of the Sub-Registrar is equivalent to denial of execution, and therefore the plaintiff's remedy lay in an application under section 73 of the Registration Act (XVI of 1908) and not in an appeal under section 72. Various rulings were placed before us. They are all clearly distinguishable on the facts from the present case with one exception. In all these cases the summons was served on the executant, and the Sub-Registrar refused registration on the ground of denial of execution.

In *Luckhi Narain Khettry* v. *Satcowrie Pyne* (1), which is the exception we have alluded to, the judgment of the High Court shows that the Registrar had, on the facts before him, assumed or found that the alleged execution had been denied by the executant of the document and he therefore refused to register it. In the present case it is quite clear from the order of the [319] Sub-Registrar that the ground on which he refused registration was not denial of execution. The grounds were those set out in his order. It is next contended that the order of the District Registrar was not an order refusing registration. The order of the 9th October, 1909, is not before us. We gather it was merely a direction to the Sub-Registrar as to what he should do under the circumstances. It could not have been a refusal to register the document, because at that stage of the proceedings the document was not before the Registrar. In our opinion an appeal did lie against the order of the Sub-Registrar, dated the 12th of October, 1909, refusing to register the document. The order of the District Registrar, dated the 25th of November, 1909, was in effect a dismissal of the appeal. An appeal did lie to him and he refused to entertain it. The plaintiff is, therefore, entitled to come into the Civil Court under the provisions of section 77 and claim to have his document registered. We allow the appeal of the plaintiff, set aside the order of dismissal and direct that the suit go back for retrial under order XLI, rule 23, of the Code of Civil Procedure. Costs of this appeal will be costs in the cause.

Appeal allowed—Cause remanded.

(1) (1888) I. L. R. 16 Cal. 189.

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REVISIONAL CRIMINAL.

34 A. 319=14 I C. 666=9 A L. J. 288 =13 Cr. L. J. 282.

34 A. 319 (=14 I. C. 666=9 A. L. J. 298 =13 Cr. L. J. 282).

REVISIONAL CRIMINAL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

EMPEROR *v.* BABU LAL*

[5th February, 1912.]

Act No. I of 1878 (*Opium Act*), *sections* 5, 9—*Master and servant—Liability of master for act of servant.*

Where the servant of a licensed vendor of opium, in the course of his employment as such servant, sold opium to a person under the age of fourteen years, it was *held* that the licensed vendor also was liable under section 9 of the Opium Act even though he might not have been aware of the sale. *Queen-Empress* v. *Tyab Ali* (1) followed.

[Ref: 82 I. C. 139=15 All. 642.]

THE facts of this case were briefly as follows :—

One Babu Lal was a licensed vendor of opium. One of the conditions of his licence was that sales should not be made to children under the age of fourteen years. In the absence of Babu Lal his sales-man sold opium to a person under fourteen. Both the licensed vendor and the sales-man were convicted under section 9 of the Opium Act, 1878. Babu Lal applied in revision to the **[320]** Sessions Judge, who, being doubtful whether his conviction was proper, referred the case to the High Court.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

The applicant was not represented.

KARAMAT HUSAIN and TUDBALL, JJ. :—This is a reference by the Sessions Judge of Agra. The facts of the case are briefly as follows :— One Babu Lal was a licensed vendor of opium. One of the general conditions under which he was licensed to sell was that sales should not be made to children below the age of fourteen years. In his absence his sales-man sold opium to a person under the age of 14. Both the sales-man and the licensed vendor have been convicted. The learned Sessions Judge is of opinion that the licensed vendor, Babu Lal, is not liable under the circumstances of the present case for the act of his servant. He has been convicted under section 9 of the Opium Act in that he has sold opium in contravention of the rules made and notified under section 5. Rules made and notified under this section set out the general condition which we have mentioned above. The question is whether the master in the circumstances of the present case is liable for the act of his servant committed by the latter in the course of his employment but without the master's knowledge. In Criminal Reference No. 69 of 1890 a Judge of this Court held in similar circumstances in a case under the Excise Act of 1881 that the licensee was responsible for breaches of the conditions of his licence though not committed with his knowledge and permission. In the case of *Queen-Empress* v. *Tyab Ali* (1) a similar class of offence was also under consideration. That was an offence under section 22 of the Indian Arms Act No. XI of 1878. A licensed vendor of arms and ammunition had employed a manager to conduct his business. In the absence of the licensed vendor and without his knowledge the manager delivered certain military stores to a person without previously ascertaining that such person was legally authorized to possess the same. It was held

* Criminal Reference No. 706 of 1911.

(1) (1900) I. L. R. 24 Bom. 423.

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34 A. 319=14 I. C. 666=9 A. L. J. 283 =13 Cr. L. J. 222.

in that case that the master was liable. The Court ruled as follows:—"We fail to see how it can be contended that under these circumstances a delivery of goods by the man in charge would not be a delivery by the owner of the shop. It is not a question of intention, of *mens rea* or of knowledge. It is the delivery which the Act makes penal, [321] and the delivery by the manager is clearly in this case a delivery by the licensee. The authorities are concurrent upon this point. In *The Attorney-General* v. *Siddon* (1), the rule is thus stated:—"Whatever a servant does in the course of his employment with which he is entrusted and as a part of it is the master's act." This rule which is of general application so far as civil liability goes is applicable to certain criminal proceedings also." The court then noted the instances of *Mullins* v. *Collins* (2), *Coppen* v. *Moore* (3), the former of which was a case in which a sales-man of a licensed victualler supplied liquor to a constable on duty and without the authority of his superior officer, and in which it was held that the licensed victualler himself was liable to be convicted. In our opinion the offence in the present case is similar to the offences considered in the above-mentioned cases. It is not a question of intention, *mens rea* or of knowledge. The licensee holds his shop on certain conditions. One of those conditions has been broken by his servant; and the mere act of selling opium in contravention of the conditions of his licence constitutes the offence. It is one of those cases in which the act of a servant is the act of the master. In our opinion the conviction of the master is legal. We therefore direct that the record be returned.*

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34 A. 321 (=9 A. L. J. 290=14 I. C. 506).

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

GOBARDHAN SAHAI (*Judgment-debtor*) *v.* MAHABIR SINGH AND OTHERS (*Decree-holders*).†

[7th February, 1912.]

Execution of decree—Decree passed in favour of several persons one of whom was a minor and not properly represented.

Held that the mere fact that at the time when the final decree in a suit was passed, one of the decree-holders was a minor whose guardian *ad litem* had died and had not been replaced, was not sufficient to invalidate the decree.

THE facts of this case were as follows:—

Mahabir Singh and others obtained a decree in the court of the Munsif of Deoria, which was confirmed on appeal by the Subordinate [322] Judge. The defendant appealed to the High Court, and pending this appeal, the guardian of one of the plaintiffs respondents, Sita Ram, who was a minor, died, and the appellant took no steps to have him properly represented. The High Court dismissed the appeal. In execution proceedings objection was raised by the judgment-debtor, the present appellant who was a *pro*

*[But see '*In the matter of Bhoobun Chunder Shaw and another*,' 11 C. L. R. 464.—Ed.]

† Second Appeal No. 648 of 1911, from a decree of F. D. Simpson, Additional Judge of Gorakhpur, dated the 3rd of May, 1911 confirming a decree of Bans Gopal, Munsif of Deoria, dated the 23rd of December, 1910.

(1) (1830) 1 Cr. and J. 220.
(2) (1874) L. R. 9 Q. B. 292.
(3) [1898] 2 Q. B. 306.

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APPELLATE CIVIL.

34 A 321=9 A. L. J. 290=14 I. C. 606.

forma respondent in the original suit, that the decree could not be executed as it was invalid. The court of first instance dismissed the objection and this order was confirmed by the lower appellate court. The judgment-debtor appealed to the High Court.

Babu *Surendra Nath Sen*, for the appellant.

Mr. *Muhammad Raoof* (for The Hon'ble *Nawab Muhammad Abdul Majid*), for the respondents.

KARAMAT HUSAIN and TUDBALL, JJ.:—An application by the decree-holders was put in for the execution of their decree. An objection was taken by the judgment-debtor that there was no valid decree which could be executed against him. The facts as shown by the objection of the judgment-debtor are the following:—The decree-holders obtained a decree from the lower appellate court against the present appellant and other judgment-debtors. The latter preferred a second appeal to this Court. While the appeal was pending, the guardian *ad litem* of Sita Ram, one of the respondents, died. No application was made by the judgment-debtor, appellant in that case, to have another guardian *ad litem* appointed to represent the minor decree-holder Sita Ram. This Court dismissed the appeal of the judgment-debtor in that case and affirmed the decree of the lower appellate court. The present appellant was one of the original judgment-debtors and a *pro forma* respondent in that appeal. Under these circumstances the mere fact that one of the respondents in whose favour there was a valid decree was not represented at the instance of the appellant in that case is not, in our opinion, sufficient to render the decree of this Court void and incapable of execution, and as that decree is not a void decree, the executing court has no power to go behind it. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

34 A. 323 (=9 A. L. J. 323=14 I. C. 674).

[323] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

MANOHAR LAL AND ANOTHER (*Defendants*) *v.* RAM BABU (*Plaintiff*).*

[7th February, 1912.]

Mortgage—Prior and subsequent mortgages—Suit by first mortgagee without impleading second—Decree and sale—Subsequent suit by second mortgagee against purchasers under decree in first suit—Plaintiff held bound to redeem prior mortgagee.

The plaintiff brought his suit for sale of certain property in satisfaction of a mortgage of the year 1877, which was a renewal of a mortgage of 1875.

The defendants were purchasers at a sale in execution of a decree on a mortgage which bore a later date in 1875 than the plaintiff's first mortgage, but was a renewal of a previous mortgage of 1869. To the suit in which this decree had been passed the plaintiff had not been made a party. The defendants had been in possession of the property so purchased by them for some twenty years.

Held that the plaintiff had no absolute right to bring the property to sale in satisfaction of his mortgage subject to the mortgage of 1869, and that in the circumstances he ought to redeem that mortgage before bringing the property to sale. *Mata Din Kasoahan* v. *Kazim Husain* (1), *Ram Shankar Lal* v. *Ganesh Prasad* (2), *Har Prasad* v. *Bhagwan Das* (3), *Kanti Ram* v. *Kutubud-*

* First Appeal No. 261 of 1910 from a decree of Banke Bihari Lal, Subordinate Judge of Aligarh, dated the 23rd of January 1910.

(1) (1891) I. L. R. 13 All. 432.
(2) (1907) I. L. R. 29 All. 385.
(3) (1882) I. L. R. 4 All. 196.

din Mohomed (1), *Baldeo Prasad* v. *Uman Shankar* (2), *Mati-ullah Khan* v. *Banwari Lal* (3), *Kanhai Lal* v. *Hulas Singh* (4), *Cangayam Venkataramana Iyer* v. *Henry James Colley Gomperts* (5), and *Har Pershad Lal* v. *Dalmardan Singh* (6) referred to. *Debendra Narain Roy* v. *Ramtaran Banerjee* (7) discussed and doubted.

[Ref. 36 All. 123; 1 Pat. L. W. 269; 38 I. C. 179 ; 65 I. C. 841=20 A. L. J. 216.]

THE facts of this case are fully stated in the judgment of the Court

Dr. *Satish Chandra Banerji*, for the appellants :

Secondary evidence of the mortgage of the 5th December, 1869, should have been admitted. The mortgage is recited in the later deed of the 8th November, 1875; presumably it was returned to the mortgagor. In any case the admission of the mortgagor is binding on the plaintiff, who is a subsequent transferee from him, and the certified copy of the deed produced by us was wrongly rejected by the court below.

The Hon'ble Pandit *Sundar Lal* (with him Mr. *M. L. Agarwala*), for the respondent :

[324] The defendants laid no foundation for the admission of secondary evidence; they adduced no evidence to prove that the original deed was either returned to the mortgagor or had been lost.

The court ruled that the certified copy of the mortgage-deed was admissible in evidence.

Dr. *Satish Chandra Banerji*, for the appellants, next contended that the decree should be one for redemption of the prior mortgage in the first instance and then for sale, and not one for sale subject to the prior mortgage. The uniform practice in the Allahabad High Court had been to direct redemption of a prior mortgage when the same was set up as a shield, and this wholly irrespective of the doctrine of *Matadin Kasodhan's case* (8), *Har Prasad* v. *Bhagwan Das* (9), *Mamraj* v. *Ramji Lal* (10), *Baldeo Prasad* v. *Uman Shankar* (2), *Mati-ullah Khan* v. *Banwari Lal* (3) *Kanhai Lal* v. *Hulas Singh* (4).

There was a distinction to be made between the position of a prior mortgagee and that of a purchaser in execution of a decree on the prior mortgage. The rights of the mortgagor and the first mortgagee are now vested in the purchaser, the whole property in fact, with the exception of the fragment of the equity of redemption transferred to the second mortgagee by the mortgagor. This has not been yet foreclosed, because the second mortgagee was no party to the suit on the first mortgage. Had he been duly impleaded in that suit, all he could have claimed was a right to redeem the first mortgage. His position did not improve because he was left out. He can claim no higher equity now nor oust the purchaser from possession without paying him up; *Kanti Ram* v. *Kutbuddin* (1), *Ram Narain* v. *Bandi Pershad* (11), *Har Pershad Lal* v. *Dalmardan Singh* (6), *Cangayam Venkataramana Iyer* v. *Gompertz* (5), *Dhondo Balkrishna* v. *Raoji Dadu* (12), *Debendra Narain Roy* v. *Ramtaran Banerjee* (7), *Umesh Sirkar* v. *Zahur Fatima* (13), *Muhammad Usan Rowthan* v. *Abdulla* (14). *Chait Narain* v. *Gunga Pershad* (15), Ghose on *Mortgage*, ed. 4, 620—2.

(1) (1894) I. L. R. 22 Cal. 33.
(2) (1907) I. L. R. 32 All. 10.
(3) (1910) I. L. R. 32 All. 138.
(4) (1911) 9 A. L. J. 29.
(5) (1908) I. L. R. 31 Mad. 425.
(6) (1905) I. L. R. 32 Cal. 891.
(7) (1908) I. L. R. 30 Cal. 599.
(8) (1891) I. L. R. 13 All. 482.
(9) (1882) 4 All. 196.
(10) (1909) 7 A.L. J. R. 15, 18.
(11) (1901) I. L. R. 31 Cal. 737 (742).
(12) (1895) I. L. R. 20 Bom. 390.
(13) (1890) I. L. R. 18 Cal. 164.
(14) (1900) I. L. R. 24 Mad. 171.
(15) (1876) 25 W. R. 216.

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34 A. 323=9 A. L. J. 323 =14 I. C. 674.

[325] The Hon'ble Pandit *Sundar Lal*, for the respondent.

The law defines the rights respectively of the prior and puisne mortgagees. The latter has the privilege to redeem, but it is not a legal duty. Referred to section 74, Transfer of Property Act. The puisne mortgagee has also the right to sell the property mortgaged to him. It is not necessary that the prior mortgagee should be impleaded, but, if he is, then the subsequent mortgagee may sell subject to the first mortgage. If the latter wants to sell free from mortgage, then he must redeem. The nature of his right will depend upon the form of his suit or his prayer. According to section 67 of the Transfer of Property Act the ordinary right of a mortgagee is either to foreclose the property or to sell the property. The term 'property' means the *property mortgaged to the mortgagee*. It follows, therefore, that a subsequent mortgagee can sell what is mortgaged to him, that is, the equity of redemption, and leave the prior mortgage outstanding. His position would not be worse if he is not made a party. Where the puisne mortgagee is made a party to a prior mortgagee's suit, the object is to bind him by the decree which is passed. See 1 Daniell, *Chancery Practice*, 6th ed., 217. Fisher, *Law of Mortgage*, ed. 6., para. 1670.

Where the subsequent incumbrancer has been omitted from the suit by a prior mortgagee, the decree does not bind him. Hence, he may sell or he may redeem. In the first case he can sell such rights as he possesses; if he redeems he can sell the entire estate. But there is no case except the case of *Mata Din Kasodhan*, which would compel him to redeem. He may choose to sell subject to the first mortgage. The view of the Calcutta High Court favours this position; *Debendra Narain Roy* v. *Ramtaran Banerjee* (1). *Ram Narain Sahoo* v. *Bandi Pershad* (2) is distinguishable. The right to redeem is the right which a subsequent mortgagee has as against a prior mortgagee who has obtained a decree behind his back; but that does not do away with the right which is available against the mortgagor, *viz.*, the right to sell the property. By compelling him to redeem only one side of the question is looked at and not the other, and a right is converted into a duty which is contrary to principle. The latest case in Madras in which the view was [326] adopted is *Malla Vittil Seethi* v. *Karambath* (3). Reference was also made to *Ram Shankar Lal* v. *Ganesh Prasad* (4).

Dr. *Satish Chandra Banerji*, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit in which the plaintiff sought to realize the amount of a mortgage, dated the 4th of June, 1877, by sale of the mortgaged property. The plaintiff alleged that the mortgage was in renewal of another mortgage of the 12th of June, 1875, and he claimed priority for his mortgage as of that date. He further set forth in his plaint that the ancestor of the defendants first party had made a mortgage of the 8th of November, 1875, in favour of the ancestor of the defendants 9—11, that a suit had been instituted on foot of this mortgage of the 8th of November, 1875, and the property sold, but he submitted that this mortgage of the 8th of November, 1875, must under the circumstances, be deemed to be puisne to his mortgage, but that if any part of the defendant's mortgage should be held to have priority over his mortgage, then he asked that the property might be sold subject to the debt that had priority.

(1) (1903) I. L. R. 30 Cal. 599 (605).
(2) (1904) I. L. R. 31. Cal. 737.
(3) (1911) 21 M. L. J. 218.
(4) (1907) I. L.R. 29 All. 385 (397, 405).

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The defendants 9—11 pleaded, amongst other things, that the mortgage of the 8th of November, 1875, was a renewal of a still earlier mortgage bond of the 5th of December, 1869, and that consequently they had priority, and that the plaintiff could not have a sale of the mortgaged property without redeeming them.

It appears from the evidence that the defendants 9—11 brought a suit on foot of the mortgage of the 8th of November, 1875, in the year 1887. A decree was obtained upon foot of that mortgage, the property was sold and purchased by the defendant, 3rd party, and they have been in possession ever since 1892 or thereabouts. It appears, however, that the mortgagors of the mortgage of the 4th of June, 1877, were not parties to the suit. The present suit was instituted in the year 1909. The original amount secured was Rs. 350, the interest being 13 annas per cent. per mensem compound interest. The amount due on this bond at the date of the institution of this suit was Rs. 7,000, but the plaintiff only claimed Rs. 6,000, because the property was not value for the full amount. The learned Subordinate Judge gave the plaintiff a decree for so much of the mortgage debt and interest as was due under the [327] mortgage of the 12th of June, 1875. He disallowed the rest of the claim as being puisne to the plaintiff's mortgage of the 8th of November, 1875, and the plaintiff waived his claim thereto. The learned Subordinate Judge also disallowed the defendants' pleas wherein they sought to take advantage of the earlier mortgage of the 5th of December, 1869, on the ground that this bond of the 5th of December, 1869, was not produced and that secondary evidence to prove it was not admissible.

In our opinion secondary evidence was admissible, and we have allowed an application of the appellant to admit a copy. Under ordinary circumstances the bond of the 5th of December, 1869, might have been given back. It was fully recited in the later mortgage of the 8th of November, 1875.

The position, therefore, necessary for the disposal of the appeal may be shortly stated as follows:—The answering defendants are and have been in possession of the property since about year 1892. They must be deemed to have had a mortgage in their favour, which is prior to the mortgage of the plaintiff. On the other hand the plaintiff has a puisne incumbrance, and his rights under that incumbrance have never been foreclosed by the prior incumbrancers. The answering defendants contend that having a prior incumbrance and being in possession of the mortgaged property, their possession cannot be disturbed unless the plaintiff pays the amount due upon their prior incumbrance. On the other hand the plaintiff contends that he has the right to realize his security and that he is accordingly entitled to have the property sold subject to the mortgage of the 5th of December, 1869, and that the decree in the suit brought on foot of the mortgage of the 8th of November, 1875, is an absolute nullity against him, because he was not made a party thereto. We think that the plaintiff ought to be ordered to redeem the mortgage of the 5th of December, 1869. The present suit is brought on foot of a mortgage of the 4th of June, 1877, which is, on the face of it, puisne to the mortgage of the 8th of November, 1875, and the plaintiff has to ask us as a court of equity to allow him priority as of the 12th of June, 1875. He comes to this Court seeking equity. Had the answering defendants made the plaintiff or his predecessor in title a party to the suit on foot of the mortgage of the 8th November, 1875, the sole right of the latter would have

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been to redeem [328] the mortgage of the 5th of December, 1869. By allowing the plaintiff to redeem the mortgage of 1869 we are able now to place the plaintiff in exactly the same position as he would have been in if he had been made a party to that suit. If, in the present case, we were to direct that the property should be sold subject to the mortgage of 1869, the result would probably be that the appellants, who have been in undisputed possession ever since about the year 1892, would be put out of possession, and it is doubtful if they could ever bring a fresh suit against the plaintiff having regard to the law of limitation. There is no doubt that where a puisne incumbrancer is in a position to ignore the prior incumbrancer and does not make him a party to his suit, the puisne incumbrancer is entitled to realise his security, or, in other words, to have the property sold subject to the prior incumbrance. It was held in the case of *Mata Din Kasodhan* v. *Kazim Husain* (1) that the expression "property" in the Transfer of Property Act meant the actual property itself and did not include rights and interests in such property and that accordingly a puisne incumbrancer could never bring the property to sale without redeeming all prior incumbrances. This view was dissented from in the Full Bench case of *Ram Shankar Lal* v. *Ganesh Prasad* (2), and the question has been finally settled by order XXXIV, rule 1, of the Code of Civil Procedure, which expressly provides that a prior incumbrancer is not a necessary party to the suit. It is true that in the present case the plaintiff only claims to sell subject to the prior incumbrance, but he has made the prior mortgagees parties. He had to do so because they were in possession. In England it would seem to be the rule that where the prior mortgagee is made a party, the plaintiff (that is the mortgagor or the puisne incumbrancer) must be ready to redeem him. See Daniell's Chancery Practice, 7th ed., p. 217.

This would seem to have been the practice in this Court even before the case of *Mata Din Kasodhan* v. *Kazim Husain* was decided. See also *Har Prasad* v. *Bhagwan Das* (3). In the case of *Kanti Ram* v. *Kutubuddin Mahomed* (4) a Bench of the Calcutta High Court held that the puisne incumbrancer was entitled to have the property sold subject to the prior incumbrance even where the prior incumbrancer was a party. The attention of the Court was [329] called to the case of *Har Prasad* v. *Bhagwan Das* and other rulings of the various High Courts. The learned Judges say, at p. 45 : —"It will be found upon examination of the facts of those cases that the first mortgagee, had subsequent to the second mortgage, purchased the equity of redemption of the mortgagor, and it was held that the second mortgagee was bound to redeem the earlier mortgage. In that state of facts we should be disposed to say that the second mortgagee is not entitled to bring to sale the mortgagor's interest, because it no longer exists in the mortgagor; it has already passed into the hands of the first mortgagee."

In the present case the prior incumbrancers have acquired the equity of redemption by virtue of the proceedings in 1878 just as effectually as they would have done if they had purchased it by private treaty. See also *Baldeo Prasad* v. *Uman Shankar* (5), *Mati-ullah Khan* v. *Banwari Lal* (6) and *Kanhai Lal* v. *Hulas Singh* (7). The very question which

(1) (1891) I. L. R 13 All. 432.
(2) (1907) I. L. R. 29 All. 385.
(3) (1882) I. L. R. 4 All. 196.
(4) (1895) I. L. R. 22 Cal. 33.
(5) (1910) I. L R 32 All. 10.
(6) (1910) I. L. R. 32 All. 133.
(7) (1911) 9 A. L. J. 29.

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arises in this case was decided in favour of the prior incumbrancer in the case of *Cangayam Venkataramana Iyer* v. *Henry James Colley Gompertz* (1).

The respondent contends that he has an absolute right to bring the property to sale subject to the prior incumbrances and that the decree and sale to which he was no party cannot take away that right. His learned advocate relies on the case of *Ramshankar Lal* v. *Ganesh Prasad*. We do not think that this case applies to the facts of the present case. There the question was whether, having regard to the decision in *Mata Din Kasodhan* v. *Kazim Husain*, a sub-mortgage (a mortgage of mortgagee rights) was valid. It was held in the affirmative, and the decision is no longer of much importance having regard to the order XXXIV, rule 1 of the Code of Civil Procedure, to which we have already referred. It was not necessary to decide, nor did the court decide, that in a suit brought by a puisne incumbrancer, to which a prior mortgagee who was also in possession of the property after acquiring the equity of redemption the court was bound to make a decree for sale of the mortgaged property subject to the prior mortgage and could not direct the puisne incumbrancer to redeem the earlier mortgage.

[330] The judgment in the case of *Debendra Narain Roy* v. *Ramtaran Banerjee* (2) no doubt supports the contention of respondent. With all respect we cannot agree with the learned Judges if in that case they intended to decide that in all cases, irrespective of whether the prior incumbrancer is or is not a party and irrespective of whether the prior incumbrancer has or has not obtained possession of the mortgaged property by acquiring the equity of redemption, the court is bound to grant a decree at the suit of the puisne incumbrancer for the sale of the property subject to the prior incumbrance.

A somewhat contrary view seems to have been taken by two learned Judges of the same court in *Har Pershad Lal* v. *Dalmardhan Singh* (3).

It is unnecessary to decide in the present appeal that in all suits by a puisne incumbrancer to which the prior incumbrancer is a party, the court is bound to direct redemption of the prior incumbrance, but we think that, as a general rule, is the prior incumbrancer is a party and so desires, it will be convenient to direct redemption.

Such a course will avoid multiplicity of suits and will give the puisne incumbrancer what he is equitably entitled to. In a mortgage suit the court ought to have the fullest power to direct what is right and equitable having regard to the circumstances of the case and the interests of all the parties to the suit in the property. In the present case the appellants have a strong claim to defend a possession extending over a period of nearly 20 years by insisting that the plaintiff should be directed to redeem them by payment of the amount due on foot of the mortgage of 1869.

Before passing a final decree it will be necessary to refer issues to the lower appellate court. We accordingly refer the following issues:—
(1) At what date did the appellants or their predecessors in title obtain possession of the property? (2) What is the amount due on foot of the mortgage of the 6th of December, 1869, up to the date of obtaining such possession?

The court will take such additional evidence as the parties may tender. On receipt of the findings the usual ten days will be allowed for filing objections.

Issues remitted.

(1) (1908) I. L. R. 31 Mad. 425.
(2) (1903) I. L. R. 30 Cal. 599.
(3) (1905) I. L. R. 32 Cal. 89.

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[331] APPELLATE CIVIL.

Before Mr. Justice Sir Henry Griffin and Mr. Justice Chamier.

JAMBU PRASAD (*Plaintiff*) *v.* MUHAMMAD AFTAB ALI KHAN AND OTHERS (*Defendants*).*

[13th February, 1912.]

Act No. III of 1877 (*Indian Registration Act*), *sections* 32, 33—*Registration—Evidence—Presumption of validity of registration—Presumption rebutted by evidence showing a document to have been presented by an unauthorized person.*

Although, when the validity of the registration of a document is in question after the lapse of a considerable period of time, it is to be presumed that the registration was carried out according to law, yet when there exists evidence which disclose a fatal defect in procedure, as for instance, that the person who presented the document for registration was not legally authorized to do so, the registration must be held to be invalid. Such a defect as presentation by an unauthorized person cannot be cured by subsequent admission of execution on the part of the executants. *Mohammed Ewaz* v. *Brij Lall* (1) and *Mujib-un-nissa* v. *Abdur Rahim* (2) referred to. *Wilaiti Begam* v. *Fazal Husain Khan* (3) and *Ram Chanara Das* v. *Farzand Ali Khan* (4) distinguished.

[Not Fol. 35 All. 72.]

THE facts of this case were as follows:—

The plaintiff sued on four deeds, of which two were executed in 1882 and the other two in 1892. The first two deeds were presented for registration by Nathu Mal, "mukhtar-am" of Lala Mittar Sen, who was the mortgagee. The registration endorsement was to the following effect:—

"This document was presented in the office of the Sub-Registrar of tahsil Saharanpur, on Tuesday, the 11th July, 1882, at 3 p. m.

Dated the 11th July 1882. (Sd.) Nathu Mal, general attorney of Lala Mittar Sen.

Signature of the Sub-Registrar.

Nawab, &c (names and descriptions of the mortgagors) identified by, names (&c.) admitted the execution and completion of this document and received at this time in my presence the sum of Rs. 59,000 in cash, as per detail given in this document.

Dated the 11th July, 1882.
Signature of the Sub-Registrar.
Signatures of the mortgagors and of the witnesses.
Registered as No. &c., &c., Signature of Sub-Registrar."

The two deeds of 1892 were presented for registration by Maula Bakhsh "karinda" of the mortgagors. The registration endorsement ran as follows:—

"Present:—Munshi Anand Singh Sub-Registrar.

Maula Baksh, Karinda, presented this document in the office of the Sub-Registrar of tahsil Saharanpur to-day, the 26th October, 1892, at 1 p. m.

[332] Signature of the Sub-Registrar.
(Sd). Maula Bakhsh, Karinda.

Nawab, &c., (name, &c., of the mortgagors) admitted the execution and completion of this document.....

Dated the 26th October, 1892.
Signature of the Sub-Registrar.
Signature of the mortgagors.
Registered as No. &c. &c. Signature of the Sub-Registrar."

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*First Appeal No. 3 of 1911 from a decree of Muhammad Shafi, Subordinate Judge of Saharanpur, dated the 26th of September, 1910.

(1) (1877) L. R. 4 I. A. 166.
(2) (1900) I. L. R. 28 All. 233.
(3) (1910) 9 A. L. J. 148.
(4) (1912) I. L. R. 34 All. 258.

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No power of attorney authorizing either Nathu Mal or Maula Bakhsh or Ilahi Bakhsh to present documents for registration was produced in evidence. The plaintiff produced evidence to prove that the mortgagors were present in the office of the Sub-Registrar when the deeds of 1882 were presented for registration, and that they then asked Nathu Mal to present the deeds for them, which he accordingly did. This evidence was disbelieved by the Subordinate Judge. He held that the deeds were presented by unauthorized persons and the registration was invalid and dismissed the suit accordingly. The plaintiff appealed.

The Hon'ble Pandit *Sundar Lal* (with him The Hon'ble Pandit *Moti Lal Nehru*), for the appellant :—

There is no definition of the term "presentation" in the Registration Act, nor does the Act prescribe the exact mode in which a document is to be actually handed over to the registering officer. If, as the plaintiff's evidence shows, the executants presented themselves in person before the Sub-Registrar, but instead of themselves placing the document in the hands of the Sub-Registrar, they asked Nathu Mal to hand it over for them and he then and there did so, the presentation would be valid. For, it would in all respects be their own act, although Nathu Mal performed for them the merely physical act of actually placing the document in the Sub-Registrar's hand. The registration endorsement does not say that the documents were presented by Nathu Mal. Similarly, when a pleader presents a petition to the court, the presentation is deemed to be by the pleader none the less because of the fact that it is not he but the reader of the court who actually places the petition in the hands of the Judge. We have to look to the substance of the thing. There is no delegation of authority in such cases, and so no power of attorney is required. I rely on *Wilaiti Begam* v. *Fazal Husain Khan* (1). In that case the executant, who was a *parda-* [333] *nashin* lady, appeared before the Sub-Registrar in a *duli* and the document was handed over to him by her father who had no power of attorney ; and it was held that there was a valid presentation by the lady. If it be held that the presentation was by Nathu Mal and not by the mortgagors themselves, then I rely on the presumption which arises when a document is registered and the registration certificate is endorsed on it. Every presumption will be made that everything was done as required by law. I rely on the ruling in *Ram Chandra Das* v. *Farzand Ali* (2). The result, in the present case, of that presumption is that it must be proved by positive evidence by the other side that the persons presenting the deeds had no authority whatsoever to do so. It is not enough for the other side to produce a power of attorney and to show that it contained no authority to present documents for registration. They must exhaust all possibilities and establish that there was no power of attorney containing such authority. Otherwise, the presumption which fully goes to this extent, holds good.

Mr. *B. E. O'Conor* (with him Mr. *Abdul Raoof*, Mr. *Nihal Chand* and Mr. *S. A. Haidar*), for the respondents :—

The persons by whom the documents were presented were unauthorized persons; the presentations were invalid, and the registration infructuous. On this point the law is laid down in *Majib-un-nissa* v. *Abdur Rahim* (3). Regarding the documents of 1882, the endorsement shows that they were presented by Nathu Mal and not by the executants ;

(1) (1910) 9 A. L. J. 148.
(2) (1912) I. L. R. 34 All. 253.
(3) (1900) I. L. R. 23 All. 233.

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otherwise, the signature of Nathu Mal would not have been taken below the entry about the presentation, vide section 52, clause (*a*), of the Registration Act. The evidence adduced by the plaintiffs on the plea that Nathu Mal, at the request of the executants who were present, merely handed over the document for them is worthless and the ruling in *Wilaiti Begam* v. *Fazal Husain Khan*, does not, therefore, help them. In that case the father merely handed over the document at the request and in the presence of the executant. He did not act or purport to act as an agent. In the present case the persons presenting the documents purported to act as agents, as the endorsements, signed by them as mukhtar-ams, show. So it was for them to prove that they were duly constituted agents. The ruling in *Ram Chandra* [334] *Das* v. *Farzand Ali*, which is in conflict with the spirit of the rulings in the cases already cited by me and in the case of *Ishri Prasad* v. *Baijnath* (1) is distinguishable. All that was laid down in that case was that where there was no evidence either way, to prove or disprove the existence of a proper power of attorney it would be presumed that such a power did exist. In the present case we have established by evidence that no proper power of attorney existed. The executants being residents of Saharanpur, such a power of attorney would be registered at Saharanpur. We called the Sub-Registrar of Saharanpur with his registers extending over a number of years. Only one power of attorney in favour of Nathu Mal, and one in favour of Ilahi Bakhsh, could be found in the registers. Neither of these powers of attorney contained any provision for the presentation of documents for registration. We have disproved the existence of any proper power of attorney, and there is no room for any presumptions in favour of the plaintiffs. As laid down in both of the cases cited by me, an invalid presentation is not a matter of mere technicality but one affecting the jurisdiction of the Sub-Registrar. A person presenting a document in the capacity of an agent is tied down to one or other of the three provisions contained in clauses (*a*), (*b*) and (*c*) of section 33 which are imperative.

The Hon'ble Pandit *Sundar Lal*, in reply :

The evidence produced by the respondents to disprove the existence of a valid power of attorney is not exhaustive.

GRIFFIN and CHAMIER, JJ. :—This appeal arises out of a suit for sale on two mortgages ; the first executed on the 2nd July, 1882, by Muhammad Ilias Khan, now deceased, the father of defendant 1 and the husband of defendant 2, and by one Syed Muhammad Khan, now deceased, who is represented, by defendant 1 and the second executed on the 25th October, 1892, by defendant 1 and Syed Muhammad Khan, now represented by defendant 1. Defendant 3 has been joined as a puisne mortgagee. The suit was defended on various grounds, among others on the ground that the documents on which the suit was based had not been validly registered according to law. The learned Subordinate Judge framed the following issue :—Whether or not the documents in suit had been presented for registration by persons [335] authorized to do so ; and whether or not they had been validly registered ; and whether or not they affected the property sought to be sold ; and whether the claim for money was time-barred. The court below has found that the registration of both documents was invalid, and on this ground alone, has dismissed the suit. The plaintiff appeals.

(1) (1906) I. L. R. 28 All. 707.

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The material portions of the registration endorsements on the two documents are as follows:—

On the mortgage deed of the 2nd July, 1882.

"Present —Narain Singh, Sub-Registrar of Saharanpur.

This document was presented in the office of the Sub-Registrar of tahsil Saharanpur, on Tuesday, the 11th July, 1882, at 3 p. m.

Dated the 11th July, 1882.

(Sd). Nathu Mal, general attorney of Lala Mittar Sen.

Signature of the Sub-Registrar.

Nawab Syed Muhammad Khan, aged 50 years, and Muhammad Ilias Khan, aged 85 years, son of Muhammad Sardar Khan, sect Afghan, Bahraich, occupation zamindars, rais and residents of Kasba Saharanpur, identified by Rao Muhammad Ali Khan, Rajput, 35 years, occupation zamindari, rais and resident of mauza Sakranda, tahsil Roorkee, and Syed Tawangar Ali, son of Syed Kabir Ali, aged 50 years, mukhtar of the court, resident of Kasba Saharanpur, who are known to me personally, admitted the execution and completion of this document and received at this time in my presence the sum of Rs. 59,000 in cash, as per detail given in this document.

Dated the 11th July, 1882.

Signature of Sub-Registrar.

(Sd.) Syed Muhammad Khan, in autograph.

(Sd.) Muhammad Ilias Khan, in autograph.—Witnesses.

(Sd.) Muhammad Ali Khan.

(Sd.) Tawangar Ali Khan, Mukhtar of the Court."

On the mortgage-deed of the 25th October, 1892 :—

"Present :—Munshi Anand Singh, Sub-Registrar, Maula Bakhsh (karinda) (agent), presented this document in the office of the Sub-Registrar of tahsil Saharanpur, to-day (Wednesday), the 26th October, 1892, at 1 p. m.

Signature of the Sub-Registrar.

(Sd.) Maula Bakhsh, karinda, in autograph.

Nawab Syed Muhammad Khan, son of Sardar Khan, aged 65 years, and Aftab Ali Khan, son of Muhammad Ilias Khan, aged 24 years, by occupation zamindars, residents of Saharanpur, sect Pathan, residents of mohalla Nawabganj, admitted the execution and completion of this document. I am satisfied as to (the identity of) these executants. The document be made over to Nathu Mal 'karinda' (agent).

Dated the 26th October, 1892.

Signature of the Sub-Registrar.

[336] (Sd) Syed Muhammad Khan, in autograph.

(Sd.) Muhammad Aftab Ali Khan, in autograph."

Section 32 of the Registration Act No. III of 1877, the Act then in force, is as follows :—

"32. Except in the cases mentioned in sections 31 and 89, every document to be registered under this Act whether such registration be compulsory or optional, shall be presented at the proper registration office, by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or by the representative or assign of such person, or by the agent of such person representative or assign, duly authorized by power of attorney executed and authenticated in the manner hereinafter mentioned."

The material portions of section 33 are as follows :—

"33. For the purposes of section 32, the powers of attorney next hereinafter mentioned shall alone be recognized, (that is to say) :

" (a) if the principal at the time of executing the power of attorney resides in any part of British India in which this Act is for the time being in force, a power of attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides.

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"Any power of attorney mentioned in this section may be proved by the production of it without further proof when it purports on the face of it, to have been executed before and authenticated by the person or court hereinbefore mentioned on that behalf."

In both the documents in suit, Lala Mittar Sen (now represented by plaintiff), in whose favour they were executed, is described as a resident of Saharanpur. It is not alleged that at the time of execution of these documents, Lala Mittar Sen resided elsewhere than at Saharanpur. The validity of the registration of the documents was impugned by the defendant No. 1 on the ground that they were presented for registration by persons not qualified under the Registration Act to make such presentation. The registration endorsements show that in the case of the mortgage-deed of 1882, it was presented by one Nathu Mal, described as the general attorney of Lala Mittar Sen, and in the case of the mortgage of 1892, that it was presented by one Maula Bakhsh, described as karinda (agent).

There is on the record no power of attorney in favour of either Nathu Mal or Maula Bakhsh such as is required by section 33 (a).

In appeal it is contended on behalf of the appellants that every presumption should be made in favour of the validity of the registration proceedings, and that it should be presumed that the Sub-Registrar had in each instance satisfied himself that the document [337] was presented for registration by a person duly authorized under the law. Reliance is placed on the observations of their Lordships of the Privy Council in *Mohammed Ewaz* v. *Birj Lall* (1):—

"Undoubtedly, it would be a most inconvenient rule if it were to be laid down generally that all courts upon the production of a deed which has the Registrar's endorsement of the registration, should be called on to inquire before receiving it in evidence, whether the Registrar had properly performed his duty. Their Lordships think that this rule ought not to be thus broadly laid down.....if the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely on, or when they would be safe."

We have been further referred to two unreported decisions of this Court in F. A. No. 244 of 1910, decided on the 10th January, 1912, (2) and in F. A. No. 389 of 1909 (3). The facts of neither case bear any resemblance to those of the case before us. In F. A. No. 244 of 1910 the court said:—

"In our opinion the production of the bond with the certificate of due registration endorsed thereon raised a strong presumption in favour of the due registration of the bond, and that in the absence of clear proof that the requirements of law were not complied with, the court was bound to admit the document in evidence. Section 114 of the Evidence Act coupled with section 60 of the Registration Act seems to us to be abundant justification for this proposition."

Conceding the existence of the presumption contended for by the learned advocate for the appellant, we have to consider the evidence by which the respondent sought to rebut that presumption. They called the Sub-Registrar of Saharanpur to produce the register of powers of attorneys for the Saharanpur division from 1878 to 1886. The Sub-Registrar appeared as a witness. His evidence printed at page 1 of the respondent's book shows that he produced in Court Register No. IV of 1882. That register contained a general power of attorney registered on the 19th of July, 1882 (13 days before the execution of the mortgage-deed of 1882) executed by Lala Mittar Sen in favour of Nathu Mal. The power of

(1) (1877) L. R. 4 I. A. 166. (257).
(2) Since reported : I. L. R. 34 All. 253 (3) Since reported : 9 A. L. J. 148.

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attorney did not authorize Nathu Mal to register documents on behalf of Lala Mittar Sen nor was it authenticated in the manner prescribed by section 33 of the Registration Act.

The evidence of this witness was recorded on the 30th August, 1910. The suit was not decided until the 26th September, 1910. The plaintiff, therefore, had ample time in which to have a thorough [338] search made in the records of the registration office. No other power of attorney except that deposed to by the Sub-Registrar has come to light. It is contended on behalf of the appellant that the respondents have not exhausted every possibility, but we must hold nevertheless that the respondents have established by evidence the existence of a very strong probability that Nathu Mal held no such power of attorney as would authorize him to present documents for registration, and that in respect of the deed of 1882, the respondents have succeeded in rebutting the presumption in favour of the validity of registration proceedings.

With regard to the deed of the 25th October, 1892, the matter stands on a different footing. The registration endorsement shows that the document was presented for registration by one Maula Bakhsh described as a *kurinda* (agent). In paper No. 213 a petition filed in the court below on behalf of the respondent No. 1, it was stated that Maula Bakhsh was not a general attorney. He appears to have been employed as a *karinda* (agent) by the executants of the bond. No power of attorney in his favour is on the record, nor is there any evidence that any such power of attorney exists. There is no proof of any search having been made for powers of attorney between 1886 and 1892. In the case of the mortgage-deed of the 25th October, 1893, therefore, we must give effect to the presumption in favour of the validity of the registration proceedings.

It was further contended on behalf of the appellants that the substance of the proceedings before the Sub-Registrar should be looked to, and that it was immaterial by whose hands the document reached that of the Sub-Registrar provided there were persons present before that official who were qualified under the law to have the document of 1882 registered. It is pointed out that the registration endorsement on that document shows that the executants were present before the Sub-Registrar and admitted the execution of the document. We were also referred to the evidence of one Gobind Rai, a witness called by the plaintiff. He was an attesting witness to the document. He says that he was present at the registration and that the executants asked Nathu Mal to present the documents before the Sub-Registrar. The learned Subordinate Judge did not believe his evidence. He was produced [339] on the 21st September, 1910, (by which time the plaintiff had realized that Nathu Mal was not duly authorized to present the document for registration), no doubt, with the object of showing that Nathu Mal had handed the document to the Sub-Registrar at the request of the executants. We think it impossible for him to remember such a trifling incident after a lapse of 28 years, and we do not accept his evidence. As to the other branch of the argument for the appellant that the executants who were present at the regitration office should be regarded as the persons presenting the document for registration, there is the initial obstacle in the way of the appellant that the registration endorsement shows that it was presented by Nathu Mal. It has not been proved in this case that the executants were actually present when the document was presented for registration. Their presence in the office of the Sub-Registrar at that

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particular moment of time cannot be inferred from the registration endorsement. The only inference that can be drawn from that endorsement is that the executants attended the Sub-Registrar's office on the same day as the document was presented. The argument on behalf of the appellant is in effect that it does not really matter by whom the document was presented for registration provided the executants appeared before the Sub-Registrar and admitted execution. The provisions of sections 32 and 33 of the Registration Act No. III of 1877, are not open to this lax interpretation. In *Mujib-un-nissa* v. *Abdur Rahim* (1) their Lordships of the Privy Council observed :—

"When the terms of section 32 are considered with due regard to the nature of registration of deeds, it is clear that the power and jurisdiction of the Registrar only come into play when he is invoked by some person having a direct relation to the deed."

In this case we have found that the mortgage-deed of 1882 was presented by Nathu Mal, a person who had no authority to present the document for registration. In view of the observations of their Lordships of the Privy Council, set out above, we are unable to hold that this initial defect, if it can be said to be merely a defect, can be held to be cured by the subsequent admission of execution by the executants. Nor can we hold that the provisions of section 87 of the Act can be invoked in aid of the validation of registration proceedings done in violation of the express provisions of sections 32 and 33 of the Registration Act.

[340] We, therefore, dismiss the appeal in so far as the suit on the mortgage-deed of the 2nd July, 1882, is concerned. We allow the appeal in so far as the suit on the mortgage-deed of the 25th October, 1892, is concerned. The respondents will receive their proportionate costs in both courts in so far as they have been successful. The costs of the appeal in so far as the suit on the second mortgage is concerned will be costs in the cause. We remand the case for decision on the merits in respect of the mortgage deed of the 25th October, 1892.

Decree reversed.—Cause remanded.

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34 A. 340 (=9 A. L. J. 307=13 Cr. L. J. 303=14 I. C. 764).

APPELLATE CRIMINAL.

Before Mr. Justice Sir George Knox.

EMPEROR v. JASAULI.*

[14th February, 1912.]

Act No. XLV of 1860, (*Indian Penal Code*), *section* 366—*Kidnapping—Taking out of custody.*

Where two girls under the age of 16 years ran away from their houses and remained for one or two days in the house of a woman who belonged to the caste of *Naiks* in Kumaun and no report was made to the padhan or the patwari; *held* that the woman in whose house the girls stayed was properly convicted of an offence under section 366 of the Penal Code, *Queen* v. *Gunder Singh*, (2) dissented from.

TWO girls, inhabitants of Kumaun, both of them under the age of sixteen years, ran away from their homes and were discovered some

*Criminal Appeal No. 878 of 1911 from an order of D. Calnan, Sessions Judge of Kumaun, dated the 20th of November, 1911.

(1) (1900) I. L. R. 28 All. 288.

(2) (1865) 5 W. R. Cr. R. 6.

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distance away in the house of one Musammat Jasauli, a Naik, where they had been for one or two days. Jasauli, had made no report of their arrival to the padhan or the patwari. On these facts Jasauli was prosecuted and convicted under section 366 of Indian Penal Code. Against her conviction and sentence Jasauli applied in revision to the High Court.

Mr. *M. L. Agarwala*, for the accused.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

KNOX, J.—Musammat Jasauli has been convicted of an offence under section 366, Indian Penal Code, and sentenced to five years' rigorous imprisonment. She has sent in a petition of appeal from jail and has been represented in this Court by learned counsel. **[341]** It is contented, on her behalf that nothing more is established against her beyond this—that the two girls, Dhanauli and Gidauli, both of them under sixteen years of age, were wandering about and found their way to the village where Musammat Jasauli lives—Both girls admit that they had run away from their houses—and that they remained nearly one or two days in Musammat Jasauli's house; and that these facts are not enough to bring the Musammat within the four corners of section 366 and do not justify the sentence passed; at the outside the offence is merely a technical offence. I have considered all these points, also the evidence on the record and I consider that the view taken by the learned Sessions Judge is justified by the evidence on the record. I have been referred to the case of *Queen* v. *Gunder Singh* (1). With every respect to the learned Judges who decided that case, I find myself unable to agree with the view they took; there is the further element in this case that Musammat Jasauli belongs to the well-known caste of Naiks in Kumaun. I cannot think that she took these two girls out of charity. She made no report to the padhan or the patwari. I dismiss the appeal.

Appeal dismissed.

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34 A. 341 (=9 A. L. J. 351=14 I. C. 116).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

BELA RANI AND ANOTHER (*Plaintiffs*) *v.* MAHABIR SINGH AND OTHERS (*Defendants*).*

[15th February, 1912.]

Act No. 1 of 1872 (Indian Evidence Act), sections 11 and 32—Evidence—Admissibility—Statements of deceased persons.

Held, that if the terms of a deposition made by a person since deceased do not fall within the provisions of section 32 of the Indian Evidence Act, 1872, the provisions of section 11 of the Act will not avail to make such deposition evidence.

[Fol. 30 I. C. 464.]

THIS was a suit for possession of immovable property. One Beni Ram, who died in 1866, owned the property in dispute. He was succeeded by his wife, Musammat Mathuri, who died in 1878, and was succeeded by her daughter, Musammat Dasodri: After her death the plaintiffs, the

* First Appeal No. 388 of 1910, from a decree of Achal Behari, Subordinate Judge of Banda, dated the 17th of June, 1910.

(1) (1865) 5 W. R. Cr. R. 6.

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transferees of the rights of the reversioners, brought this suit for possession of the property as against the defendants who were the transferees (or their [342] representatives) of Musammat Dasodri. The main defence was that the Musammat died more than 12 years prior to the institution of the suit, which was accordingly barred by limitation. The Subordinate Judge dismissed the suit as barred by limitation. The plaintiffs appealed.

The Hon'ble Dr. *Sundar Lal*, for the appellants.

Munshi *Damodar Das*, for the respondents.

RICHARDS, C. J.—This appeal arises out of a suit for possession of immovable property. The property originally belonged to one Beni Ram who died in the year 1866. He was succeeded by his wife, Musammat Mathuri, who died in the year 1878. After her death, Musammat Dasodri, daughter of Beni Ram, was in possession. The plaintiffs are more or less speculative purchasers from the persons who would be entitled to the property on the death of Musammat Dasodri, assuming that she had made no valid transfer. The defendants are transferees or representatives of Musammat Dasodri. The main defence was that the suit was barred by limitation; and the learned Subordinate Judge found that the suit was barred.

It is common ground that the right to bring the present suit arose on the death of Musammat Dasodri. It is also admitted that neither the plaintiffs, nor their predecessors in title, have ever been in possession of the property in dispute. There can be no doubt, therefore, that it lay upon the plaintiffs to establish their case and to show that Musammat Dasodri died within the twelve years before the institution of the suit. I also think that it is very just and equitable that the plaintiffs should be held to strict proof. A very long time has elapsed since the transfers were made. The reversioners did not attempt themselves to challenge the transfer, and it is not easy for the transferees to bring forward proof of legal necessity. The suit was instituted on the 4th of March, 1910. In the plaint it was alleged that Musammat Dasodri died on the 28th of March, 1898. In appeal here the date of her death is alleged to be the 16th of March, 1898. It will, therefore, appear that on the plaintiff's own case the suit was not instituted until the period of limitation had almost expired.

The learned Subordinate Judge considered that the oral evidence adduced by the plaintiffs was almost worthless, and in this I quite agree. It is, however, contended on behalf of the appellants that [343] there was certain documentary evidence to which great weight should be attached. It appears that on the death of Musammat Dasodri applications were made for mutation of names in respect of some of the property in the possession of which she had been. These applications were supported by depositions of the reversioners, two of whom were sons of the Musammat, and the date of her death was stated to be the 16th of March, 1898. There is no doubt that, if these depositions are admissible in evidence, they supported the case of the plaintiffs. They are not necessarily conclusive, but, having regard to the date at which they were made and the persons who made them they would be important. The persons who made the depositions are dead and the depositions accordingly are simply the statements of relevant facts by persons who are dead. Such statements are not relevant facts, unless they come under some one or more of the sub-sections of section 32 of the Evidence Act. It has to be admitted that under the circumstances of the present case the depositions in question are not admissible under section 32. The learned advocate for the appellants ingeniously argues that

while the depositions cannot be admitted under the provisions of section 32 nevertheless the fact that these persons made the statement that Musammat Dasodri died on the 16th of March, 1898, makes it highly probable that she did die on that particular date and that, therefore, the depositions are admissible under section 11 of the Evidence Act. In my opinion this argument is not sound. I think it impossible to hold that a statement of a relevant fact which would be inadmissible under section 32 could be admissible under section 11. If these depositions are excluded, there is practically no evidence as to the actual date of the death of Musammat Dasodri, and I think, that the learned Subordinate Judge was correct in holding that the plaintiffs had failed to prove their case. I would accordingly dismiss the appeal with costs.

BANERJI, J.—I am of the same opinion. The question is whether Musammat Dasodri died at some time subsequent to the 4th of March 1898. If it cannot be established that she died subsequently to that date, the claim is clearly time barred. The oral evidence adduced to prove the date of her death is unreliable, though not for the reasons given by the learned Subordinate Judge, which are [344] clearly erroneous. Unless, therefore, the statements made in the mutation case referred to in the judgment of the learned Chief Justice, can be admitted in evidence, the allegation of the plaintiff as to the date of Musammat Dasodri's death must be held not to have been proved.

I agree with the learned Chief Justice that the statements relied on cannot be admitted in evidence. They are the statements of persons who are dead. Statements of such persons can only be admitted under sections 32 and 33 of the Evidence Act. It is conceded that the statements in question do not come within the purview of those sections and are, therefore, not admissible under those sections, but it is contended that they are admissible under section 11 as being facts which make the existence or non-existence of a fact in issue highly probable. The making of such a statement is, no doubt, a fact which would make the fact in issue highly probable and, as such, might be admissible in evidence, but it must be proved before it can be admitted. The terms of section 11 are, it is true, wide, but they must be read subject to the other sections of the Act and therefore the fact relied on must be proved in accordance with the provisions of the Act. If that fact is a statement made by a person who is not called or cannot be called, the statement cannot be admitted unless it comes within the purview of subsequent sections of the Act, for example, sections 32 and 33. That such was the intention of the Legislature is manifest from the elaborate provisions of the Act as to relevancy of evidence. Surely it cannot be said that the statement of a person who said to another person that he had seen a murder committed can be admitted unless the person who made the statement is called.

As I have pointed out above, a statement made by a person who is not produced as a witness is only admissible in the exceptional cases provided for by the Evidence Act and in no other cases. The statements which the plaintiffs ask us to admit are clearly not statements which come within the exceptional provisions of the Act: they are, therefore, not admissible and we must hold that the plaintiffs have failed to prove that their claim is within time. I agree in dismissing the appeal.

BY THE COURT:—The appeal is dismissed with costs.

Appeal dismissed.

34 A. 345 (=9 A. L. J. 355=13 I. C. 999=13 Cr. L. J. 183).

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REVISIONAL CRIMINAL.

34 A. 345=9 A. L. J. 355 =13 I. C. 999 =13 Cr. L. J. 183.

[345] REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR v. BHAROSA PATHAK AND OTHERS.*

[19th February, 1912.]

Criminal Procedure Code, section 133—Public nuisance—Construction of dam causing injury to village lands.

A, B and C being contiguous villages, of which C lay at a lower level than A and B, the surplus water falling on A and B used to run off through certain natural channels over the lands of village C. The inhabitants of C erected a dam to keep the water from their lands, and by so doing caused flooding of and damage to the lands of A and B. *Held* that the area and number of persons affected by the action of the inhabitants of C were sufficient to justify a magistrate in treating their action as a public nuisance and taking steps to abate it under section 133 of the Code of Criminal Procedure.

[List. 36 All. 209; Ref. 66 I. C. 186.]

IN this case three villages were concerned. Aman and Basarat on the one side and Barkagaon on the other. The villages were contiguous and the last mentioned lay at a lowor level than Aman and Basarat, and in consequence the surplus water from these two villages escaped through certain natural channels over the lands of Barkagaon. To some extent this water was retained by means of a dam, which had been the subject of former litigation. The men of Barkagaon extended this dam and thereby caused the lands of the other two villages to be flooded. The inhabitants of Aman and Basarat thereupon petitioned the magistrate to take action under section 133 of the Code of Criminal Procedure; and he did so and ordered the removal of the new portions of the dam. Against this order the inhabitants of Barkagaon applied in revision to the High Court.

Babu *Surendra Nath Sen*, for the appellants.

Dr. *Tej Bahadur Sapru*, for the opposite party.

TUDBALL, J.—This application for revision arises out of proceedings taken by a Magistrate under section 133 of the Criminal Procedure Code. The facts, as far as they can be gathered from the record and the not very luminous judgment of the lower court, appear to be as follows:—The complainants in the matter are residents and cultivators of Aman and Basarat, two villages, and the opposite party are residents of Barkagaon. Apparently the lands of the latter village lie at a lower level than those of the two former and when excessive rain falls the water from the higher [346] lands flows down upon the lower lands of Barkagaon. Presumably both sets of lands lie in an ill-defined hollow. In 1885, there was civil litigation between the parties in regard to a dam which the Barkagaon people built across their fields to prevent the excess water from the lands above flowing on to their lands. The Civil Court held that the dam was an ancient one and maintained it. The patwari's evidence also shows that there is a *tal* or *jhil* in Aman, the end of which is also dammed to keep back its waters, and that this dam is broken in several places.

The complaint made to the Magistrate was to the effect that the opposite party, the Barkagaon men, had extended their old dam both eastwards and westwards, thereby adding a further obstruction to the flow of excess water along its natural channel over the lands of Barkagaon with the result that the lands above the dam were flooded and a large area of

* Criminal Revision No. 740 of 1911 from an order of Ganga Prasad, Magistrate, first class, of Gorakhpur, dated the 24th of November, 1911.

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crops damaged. As usual, they exaggerated their case by pleading that houses in their villages had been flooded out and had fallen.

The Magistrate, who inspected the locality and recorded the evidence has found that there has been a considerable extension of the dam resulting in the holding up of a large volume of water, and that this has resulted in considerable injury to the crops growing over a considerable area above the dam. He has, therefore, passed an order for the removal of the extensions. He has ostensibly taken action under Chapter X of the Criminal Procedure Code which relates to public nuisances.

The pleas raised and pressed in this Court are :—

(1) That the Magistrate had no jurisdiction in the matter as it was merely a case of disputed civil rights.

(2) That the applicants were justified in their action as it was taken to protect their own lands and crops.

In regard to jurisdiction the matter is by no means clear. Section 133 enables the Magistrate to take action under it if he considers on information and inquiry (if any) that an unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public or from any public place.

There can be no doubt that the applicants have placed (by extending their dam) an unlawful obstruction in the channel along [347] which the complainant party has in the past drained off the surplus waters which flow upon their lands. This extension has been found by the Magistrate to have been recently made. It affects the lands of at least two villages. A person is guilty of a public nuisance who does any act which causes common injury to the public or the people in general who dwell or occupy property in the vicinity (*vide* section 268, Indian Penal Code). The resultant injury in the present case affects a large area of cultivated land and a considerable body of persons. It is difficult, if not impossible, to lay down any fixed boundary between what constitutes a public nuisance and what a private nuisance; but in the present case, seeing that the cultivators of two villages are affected, there can be little doubt that the case is one of a public nuisance. There cannot be any doubt that even from before 1885, that portion of the public affected by the act has been draining off the excess waters which come upon its lands over the lands of the applicants, and that the applicants have placed an unlawful obstruction to prevent the flow of water along its natural channel, a channel which the public body affected has a right to use for the removal of excess water over and above that held up by the smaller pre-existing dam. The case, no doubt, is close to the border line between private and public nuisances, but in the circumstances I do not see sufficient cause for interference on revision on this point. The second plea has no force. A common nuisance cannot be excused on the ground that it causes some convenience or advantage to the applicants (section 268, Indian Penal Code).

The case is one in which I do not think interference is necessary or advisable, and I therefore dismiss the application.

Application dismissed.

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REVISIONAL.
CIVIL.

34 A. 348=9
A. L. J. 294.
=14 I. C. 507

34 A. 348 (=9 A. L. J. 294=14 I. C. 507).

[348] REVISIONAL CIVIL.

Before Mr. Justice Sir George Knox.

HEYDORN AND COMPANY (*Plaintiffs*) *v.* MUHAMMAD SHAFI AND ANOTHER (*Defendants*).*

[20th February, 1912.]

Act No. IX of 1887, (*Provincial Small Cause Courts Act*), *section* 25—*Jurisdiction of High Court—Revision—Refusal of leave to amend plaint.*

Held that the refusal on the part of a Court of Small Causes of permission to amend a technical defect in the plaint amounted to an irregularity such as would justify the interference of the High Court in revision under section 25 of the Provincial Small Cause Courts Act, 1887.

[Ref. 59 I. C. 232 (cf : cases under S. 115 C. P. Code ; 1 L. W. 230 ; 15 L. W. 667 ; 22 M. L. J. 136 ; 80 I. C. 278]

THE plaintiffs, a firm carrying on business in Germany, sued the defendants for recovery of a sum of money as the price of goods sold. The plaint and the vakalat-namah in favour of the pleader appearing for the plaintiff were signed by one Mumtaz Ahmad holding a power of attorney bearing a German stamp. At the hearing it was contended for the defendant that the power of attorney was invalid as not bearing on it a British Indian stamp. The case was postponed on several occasions, and at the final hearing Mumtaz Ahmad asked for leave to amend the verification of the plaint by inserting "Mumtaz Ahmad, agent of Heydorn & Co." The Judge of the Court of Small Causes held that as Heydorn & Co. did not carry on business either in their own names or in that of Mumtaz Ahmad, the amendment applied for by the latter did not improve matters. He thereupon dismissed the suit. The plaintiff company applied in revision to the High Court.

Dr. *Satish Chandra Banerji*, for the applicants, contended that the Judge had overlooked the provisions of order VI, rule 14, of the Code of Civil Procedure, order III, rule 1, had no application. 'Duly authorized' meant duly authorized under the *lex loci*. Under section 35 of the Stamp Act the power of attorney could have been stamped on payment of a penalty. The suit should not have been dismissed. He referred to *Basdeo* v. *John Smidt* (1).

Babu *Balram Chandra Mukerji* (for Maulvi *Ghulam Mujtaba*), for the opposite party, contended that no revision lay.

The court below had jurisdiction to dismiss the suit. Section 25 of the Small Cause Courts Act no doubt gave the High Court [349] wider jurisdiction than that conferred on it under section 125 of the Code of Civil Procedure, but the High Court should not interfere in a case like this where at most there was an error of law. It was the plaintiff's duty to pray for an adjournment and get the power of attorney properly stamped. No such effort was made. The Court had no option but to dismiss the suit. The course adopted by the plaintiff showed fully that he never took his stand on the grounds now urged. Order VI rule 17, presupposes a valid plaint. Order III, and previous orders must be complied with before order VI, rule 17, could be applicable. Revisional powers being discretionary should not be exercised in this case.

* Civil Revision No. 125 of 1910.

(1) (1900) I. L. R. 22 All. 55.

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REVISIONAL CIVIL.

34 A. 34?=9 A. L. J. 294 (=14 I. C. 507.

KNOX, J.—A suit was instituted in the Court of Small Causes at Cawnpore on the 24th of May, 1911. The plaint was signed and verified by one Mumtaz Ahmad. Mumtaz Ahmad purported to be acting and to be authorized to act for Messrs. Heydorn & Co. When the power under which he professed to act was scrutinized, it was found that it did not bear the stamp required by Act No. II of 1899. The result was that the power could not be admitted in evidence for any purpose. Apparently the defect in the power was not realized by the court until some time after the plaint had been brought upon the register. But when the case came on for hearing a preliminary objection was taken on behalf of the defence to the effect that the suit was not entertainable, as the plaint was not properly signed and verified, and there was no proper presentation of the plaint. The Court of Small Causes arrived at the conclusion that Mumtaz Ahmad had no *locus standi* and the pleader appointed by Mumtaz Ahmad had no *locus standi* before the court and the suit was accordingly dismissed. It does not appear that the attention of the court was directed to a case of this Court, *Basdeo* v. *John Smidt* (1). That case was, it is true, decided upon the Code of Civil Procedure as it stood in the year 1899. But in regard to this matter the only difference that I can find between the Code as it stood in 1899 and the Code of 1908 is that the present Code is in favour of all mere technical defects in pleadings being amended in such a manner that the court can determine the real questions in controversy between the parties. The real questions in controversy are set out in the four issues [350] framed by the court below. Those questions have not been determined. The court has acted upon a technical plea. It is no doubt of the utmost importance that a defendant should not be required to plead until his adversary has shown that he has put in such a case before the court as the defendant is required to answer and if the Court of Small Causes allowed the plaintiff to amend the pleadings in such a way as to place this point beyond dispute, and the plaintiff had failed within the time allowed to make the necessary amendments, it would have very properly dismissed the suit. The court might have put the plaintiff to terms such as seemed necessary to indemnify the defendant for having brought him to court for answering a premature suit. The Court of Small Causes not having done so has acted with such irrgularity as calls for an interference. I accordingly set aside the order of dismissal and I order that the suit be returned to the Court of Small Causes, Cawnpore, with directions, to take it up at the stage at which it was before the order of the 12th of August, 1911, was passed, and under the provisions of order VI, rule 17, to allow the plaintiff to amend the pleadings and then to determine the real questions in controversy between the parties or if the necessary amendments have not been made within the time allowed, to dismiss the suit. Costs will abide the event.

Application allowed.

(1) (1900) I. L. R. All. 55.

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APPELLATE CIVIL.

34 A. 351=9 A. L. J. 367 =14 I. C. 639.

34 A. 351 (=9 A. L. J. 367=14 I. C. 639.)

[351] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

RISALI AND ANOTHER (*Plaintiffs*) *v.* BALAK RAM AND OTHERS (*Defendants*)*

[20th February, 1912.]

Pleading—Suit for cancellation of father's will brought by daughters—Plea of custom excluding daughters from inheritance—Custom not allowed to be raised in this suit.

On suit by the daughters of the testator for a declaration that a will alleged to have been executed by their father was a false and fraudulent document and not binding on them, the defendants set up a custom by virtue of which the daughters, but not apparently daughters' sons, were excluded from inheritance to their father's property.

Held, that, as members of their father's family, the daughters, who but for the will, on the death of their mother, would take the property of their father, had a cause of action which entitled them to bring the suit, and the issue whether or not a custom existed excluding them from inheritance was not a fit and proper issue to be determined in the present suit.

[Ref. 24 I. C. 982.]

THE facts of this case were as follows :—

This appeal arose out of a suit in which the plaintiffs sought a declaration that a will said to have been executed by one Ramji Lal shortly before his death was not a genuine document, but was a false and fraudulent will. The plaintiffs in the suit were Musammat Shibbo, the widow of Ramji Lal, and Musammats Baldai and Risali, his minor daughters, under the guardianship of their mother. The defendants were fifteen persons who would take the property under the will of Ramji Lal, if genuine. It is admitted that possession is still with the widow, Musammat Shibbo. The defendant, pleaded that the will was genuine and also that there was a custom prevailing amongst *Jats*, to which class Ramji Lal belonged, which prevented the daughters inheriting any right in their father's property. They also pleaded, as to Musammat Shibbo, that she had no interest in the suit because her rights as widow were not interfered with by the alleged will.

The Subordinate Judge dismissed the suit. As against the widow he dismissed it on the ground that she was entitled to the property under the will, and therefore she had no cause of action. He further decided that the will was a forgery, but that the daughters had no right to maintain the suit, because he found that a custom prevailed amongst the community which prevented daughters inheriting. The plaintiffs appealed.

[352] Babu *Balram Chandra Mukerji*, for the appellants.

The Hon'ble Pandit *Moti Lal Nehru* and Pandit *Mohan Lal Nehru*, for the respondents.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises out of a suit in which the plaintiffs sought a declaration that a will said to have been executed by one Ramji Lal shortly before his death was not a genuine document, but was a false and fraudulent will. The plaintiffs in the suit were Musammat Shibbo, the widow of Ramji Lal, and Musammats Baldai and Risali, minors, under the guardianship of their mother. The defendant were fifteen persons who would take the property under the will of Ramji Lal, if genuine. It is admitted that possession is still with the

* First Appeal No. 229 of 1910, from a decree of Muhammad Husain, Additional Subordinate Judge of Meerut, dated the 19th of April, 1910.

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APPELLATE CIVIL.

34 A. 351=9 A. L. J. 367 =14 I. C. 639.

widow, Musammat Shibbo. The defendants pleaded that the will was genuine and also that there was a custom prevailing amongst *Jats*, to which class Ramji Lal belonged, which prevented the daughters inheriting any right in their father's property. They also pleaded, as to Musammat Shibbo, that she had no interest in the suit because her rights as widow were not interfered with by the alleged will.

The learned Subordinate Judge dismissed the suit. As against the widow he dismissed it on the ground that she was entitled to the property under the will, and therefore she had no cause of action. He further decided that the will was a forgery, but that the daughters had no right to maintain the suit, because he found that a custom prevailed amongst the community which prevented daughters inheriting.

Musammat Shibbo has not appealed, but the daughters have appealed, and it is contended on their behalf that the learned Subordinate Judge ought not to have gone into the question of the existence or non-existence of the alleged custom. All that they asked in their plaint was to have the question of the validity of the will decided, and that if that question was decided, in their favour, the court ought to have made a decree in the terms of the prayer in the plaint.

In our opinion the contention of the appellants is sound. It is quite clear that the widow had an interest in bringing the suit. The estate that she would take under the will would be quite a different estate from what she would take under the ordinary Hindu law. The latter would entitle her to alienate the property for pious purposes and for legal necessity. As, however, she has not appealed, we are not concerned with her.

[353] [The judgment after discussing the evidence thus proceeded :—

It is strongly contended on behalf of the defendants that, notwithstanding this finding, the decree of the court below ought to be upheld because the learned Subordinate Judge has found that a custom exists which excludes the daughters from inheriting their father's property. In our opinion this issue ought not to have been gone into at all. *Prima facie* and until the defendants succeed in showing that a custom exists which excludes them, they are entitled upon the death of their mother to succeed to the property, unless, of course, a valid will stands in their way. They are, in our opinion, entitled to get rid, by a declaration of the court, of a false and fraudulent document interfering with the rights which they would have under the ordinary law. Furthermore, the custom as alleged in the defence was merely a custom which excluded them from inheritance. The custom, as stated in the defence, did not disentitle the sons of daughters. We have already mentioned that the fifteen persons referred to in the will are not the persons who would take even if the alleged custom were proved. Therefore it might fairly be said that the daughters, as members of their father's family, had an interest in getting rid of a false and fraudulent will under which persons not entitled under the ordinary or customary law would take the family property. They claim that on the death of the widow, their mother, they would be entitled to the property; and therefore this alleged will casts a cloud upon their title which they are interested in having removed. In our opinion the appellants the daughters of Ramji Lal, had a cause of action which entitled them to bring the suit, and the issue as to whether or not a custom existed excluding them from inheritance was not a fit and proper issue to be tried and determined in the present suit. We express no opinion as to the existence or non-existence of the alleged custom, or on the question whether or not,

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assuming some custom to exist, it excludes not only daughters but daughters' sons. These are questions which may have to be tried at some future time.

We allow the appeal, set aside the decree of the court below, and decree the plaintiffs' claim with costs in both courts. The objections filed on behalf of the respondents must be disallowed, and we dismiss them.

Appeal allowed.

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34 A. 354 (=14 I. C. 599=13 Cr. L. J. 247=9 A. L. J. 308).

[354] REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox.

RAM SINGH *v.* MATHURA AND OTHERS.*

[21st February, 1912.]

Criminal Procedure Code, section 250—Frivolous or vexatious complaint—Award of compensation to accused—Award to be made by order of discharge or acquittal and not by separate order.

Held that section 250 of the Code of Criminal Procedure was not intended to meet the case of false accusations, but of frivolous and vexatious accusations.

Held also that the direction to pay compensation in a case found to be frivolous or vexatious cannot be made in a subsequent proceeding, but must form part of the order of discharge or acquittal.

This was a reference made under section 438 of the Code of Criminal Procedure by the Sessions Judge of Banda. The facts are thus stated in the order of reference :—

"This is an application for revision of an order purporting to have been passed under section 250, Code of Criminal Procedure, by Mr. Gwynne, Joint Magistrate of Mahoba sub division, by which Ram Singh, applicant, was ordered to pay Rs. 30 to Mathura and others as compensation.

"It appears that Ram Singh brought a complaint against Mathura and others, charging them with offences under sections 343 and 154, Indian Penal Code. The case was tried by Mr Gwynne, who recorded an order of acquittal on the 21st September, 1911. At the end of this order he recorded :—'The complainant must show cause why he should not be mulcted in Rs. 50 under section 250, Code of Criminal Procedure.'

"He then recorded separate proceedings under section 250, Code of Criminal Procedure, and fixed the 16th October for hearing evidence. On the 16th October he took the evidence of eight witnesses, and on the 30th October, 1911, recorded an order by which he ordered Ram Singh to pay Rs. 30 compensation to Mathura and others or in the default to undergo 20 days' simple imprisonment.

"It is urged in support of this application that the order as to compensation should have been made along with the order of acquittal passed on the 21st September 1911. The Joint Magistrate had no jurisdiction to make it subsequently.

"Further it is urged that the order as to imprisonment could not be made until it was found that the compensation could not be recovered. I am of opinion that both contentions are right, and that the Joint Magistrate had no jurisdiction to order payment of compensation on the 30th October, 1911. In *In the matter of the complaint of Sajaur Husain* (1) it was held by the Hon'ble High Court that compensation must be awarded by the order of discharge or acquittal and that an order for payment of compensation made in a separate proceeding after the accused had been discharged was not merely irregular but without jurisdiction. The present case is on all fours with *Sajaur Husain's* case.

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* Criminal Reference No. 77 of 1912.

(1) (1903) L. R. 26 All. 325.

[355] " I, therefore, order the record to be submitted to the Hon'ble High Court under section 438, Code of Criminal Procedure, with the recommendation that the order of the Joint Magistrate as to payment of compensation be set aside, and that the amount if paid, be ordered to be refunded. The Joint Magistrate will be called upon to furnish the necessary explanation, if any."

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REVISIONAL CRIMINAL.

34 A. 354=14 I. C. 599=13 Cr. L. J. 247 =9 A. L. J. 308.

KNOX, J.—This case has been rightly reported. I find that the learned Magistrate in his judgment says :—" The case is utterly false and I acquit all the accused." Section 250 of the Code of Criminal Procedure was not intended to meet the case of false accusations. It was meant to meet with frivolous and vexatious accusations. Where a person complains that he was kept in confinement for three days, he is going a long step beyond making a frivolous or vexatious accusation. Over and above this, the words contained in section 250 are clear. If a Magistrate wishes to direct payment of compensation in frivolous cases, he is to give the direction by his order of discharge or acquittal. In other words, before pronouncing the order of discharge or acquittal, he has to call upon complainant and to record and consider any objections that the complainant may make. After having done so, and not before, should he place on record or, at any rate, only then, pronounce his order of discharge or acquittal. I set aside the order of payment of Rs. 30 as compensation and direct that it be returned to Ram Singh.

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34 A. 355 (=9 A. L. J. 352=14 I. C. 812).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

NATH MAL AND ANOTHER (*Plaintiffs*) *v.* ABDUL WAHID KHAN AND OTHERS (*Defendants*).*

[22nd February, 1912.]

Act No. III of 1877 (*Indian Registration Act*), *section* 32—*Registration*—"*Presentation.*"

Where the executants of a document which it is desired to register are present acquiescing in the handing over of the document to the Registrar for registration, the fact that the physical act of handing the document to the Registrar is performed by a person who is not authorized to 'present' the document for registration will not render the presentation invalid.

[Fol. 85 All. 72.]

THE facts of this case were as follows :—

The plaintiffs brought a suit on the basis of a registered mortgage bond, dated the 27th of January, 1887. In the court of the Subordinate Judge of Saharanpur a preliminary objection was [356] taken by the defendants that the registration of the deed was invalid. What happened at the time of the registration was that the deed was handed over to the Registrar by one Kundan Lal, who was evidently representing the mortgagees, but held no power of attorney as is mentioned in section 33 of the Registration Act. But the executants of the deed, who were present and identified before the Registrar, admitted the execution of the deed and the receipt of consideration. The Subordinate Judge dismissed the suit on the ground that the registration of the deed was invalid inasmuch as there was no proper presentation of the deed according to the provisions of section 32 of the Indian Registration Act of 1877.

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*First Appeal No. 28 of 1911 from a decree of Muhammad Shafi, Subordinate Judge of Saharanpur, dated the 28th of September, 1910.

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APPELLATE CIVIL.

34 A. 355=9 A. L. J. 362 =14 I. C. 812.

The plaintiffs appealed.

Mr. *Agha Haidar*, for the appellants :—

Even if the deed was handed over by Kundan Lal to the Registrar, inasmuch as the executants were present, acquiesced in the presentation and admitted execution of the deed, the presentation was a proper one. *Wilaiti Begam* v. *Fazal Husain Khan* (1). Therefore the document, the basis of the suit, is in every respect a valid one.

Babu *Durga Charan Banerji*, for the respondents :—

The endorsement on the deed by the Registrar shows clearly that the deed was presented for registration by Kundan Lal, who had no power to present it, either under the provisions of section 32 or 33 of the Registration Act. Those two sections enumerate the persons who alone can present a deed for registration. The defect in presentation was not covered by section 87 of the Act. *Ishri Prasad* v. *Baij Nath* (2) ; *Mujib-un-nissa* v. *Abdur Rahim* (3). The deed being invalid for want of proper registration, the suit was rightly dismissed.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises out of a suit upon a mortgage. Paragraph 1 of the plaint, which alleged that the plaintiffs were mortgagees of the property, was admitted in the written statement. The learned Subordinate Judge, however, dismissed the suit upon the ground that the mortgage deed had not been properly " presented " for registration. The presentation of a mortgage deed for registration is a proceeding which is prescribed by section 32 of the Registration Act of [357] 1877, which was in force at the time when this document was registered. A deed must be " presented " for registration by some person executing or claiming under the deed, or by his agent, or representative or assign duly authorized in the manner prescribed by the Act. The name of Kundan Lal appears on the endorsement on the deed, which was in fact registered. It also appears from the endorsement that the mortgagors were present and were identified before the Registrar. Kundan Lal was examined as a witness, and he stated that he was present at the registration representing the mortgagees. He states that the mortgagors were all present. It is true that he says that it was not he but the mortgagors who " presented " the deed. Evidently he was afraid that if he did state that he himself " presented " the document, the side for whom he was giving evidence would lose their case. It seems to us that the word " presented " has a technical meaning and that we ought to consider what the real facts are, and then to come to a conclusion whether having regard to those facts the document was duly " presented " within the meaning of the section. Taking into consideration the evidence of Kundan Lal coupled with the endorsement on the bond, we have not the least doubt that all the mortgagors were peresent at the time of registration, and when the document was brought before the Sub-Registrar, Kundan Lal was sent to represent the mortgagees, to pay over the money to the mortgagors and to bring the document away after registration. It is true that Kundan Lal was not authorized in the manner prescribed by the Act and it is clear that if none of the executants were present, Kundan Lal alone could not have " presented " the document because he was not " duly authorized," and the presentation by him would not have satisfied the requirement of the Act. We think, however, that where the executants were present acquiescing in the handing over of the document to the Registrar for regis-

(1) (1910) 9 A. L. J. 148.
(2) Weekly Notes, 1906, p. 195.
(3) (1900) I. L. R. 23 All. 233.

tration, the document was being "presented" by them for registration within the meaning of the Act. We accordingly think that this appeal ought to be allowed. We allow the appeal, set aside the decree of the court below and, remand the case to that court with directions that it be readmitted under its original number in the register and tried on the merits. Costs here and hitherto will follow the result.

Appeal allowed. Cause remanded.

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34 A. 358 (=14 I. C. 138=9 A. L. J. 431).

[358] FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Tudball.

SHEOAMBAR AHIR AND OTHERS (*Plaintiffs*) *v.* THE COLLECTOR OF AZAMGARH AND OTHERS (*Defendants*) AND MAHABIR AHIR AND ANOTHER (*pro forma Plaintiffs*).*

[24th February, 1912.]

Jurisdiction—Civil and Revenue Courts—Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 4, 95, 167, 197—*Act (Local) No. III of* 1901 *(United Provinces Land Revenue Act), sections* 56, 233 (*i*)—*Suit for declaration regarding various alleged customary rights of zamindars, mostly of the nature of cesses.*

A suit was filed by certain tenants of a village against the zamindars praying for a declaration that no custom existed in their village which entitled the zamindars to take certain fruits and wood, or to the use of a plough, or to a number of other dues, including sugarcane juice from some of the tenants, poppy seed from the Koeries, and various other matters of the same description.

Held that the suit was properly filed in a Civil Court, and was not excluded from the jurisdiction of such court by anything contained in either the Agra Tenancy Act, 1901, or the United Provinces Land Revenue Act, 1901.

[Ref. 35 All. 19; 71 I. C. 432.]

The facts of this case were as follows:—

At the seventh settlement of the district of Azamgarh an entry was made in the wajib-ul-arz of mauza Jamalpur to the effect that the zamindars were, by usage, entitled to certain dues, by way of cess, from the tenants; namely, half the fruit and wood of trees, including clumps of bamboo, five seers of poppy seed from each Koeri tenant, one pot of sugarcane juice from each tenant, one rupee from each tenant pressing sugarcane in a mill, &c. The tenants of mauza Jamalpur brought a suit in the court of the Subordinate Judge on the allegations that the said entry was made behind their backs at the instance of the zamindars; that at the sixth settlement the zamindars attempted to obtain a similar entry, but it was decided that there was no such custom in their favour; that there never had been nor was any custom or usage by which the zamindars were entitled to the said dues. The relief sought was a declaration as to the non-existence of any such custom or usage. One of the pleas in defence was that the suit was not cognizable by the civil courts but by the revenue courts. Both the [359] lower courts gave effect to this plea and dismissed the suit. The plaintiffs appealed to the High Court.

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* Second Appeal No. 619 of 1911 from a decree of Ram Autar Pande, District Judge of Azamgarh, dated the 6th of April, 1911, confirming a decree of Ram Chandra Chaudhri, Subordinate Judge of Azamgarh, dated the 18th of August, 1910.

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Babu *Surendra Nath Sen*, for the appellants :—

The suit is cognizable by the civil court. The relief sought is a declaration that an alleged custom does not exist. It is the civil court alone which can go into the question whether a certain custom exists or not; the revenue courts have no jurisdiction to entertain such a suit. The disputed entry in the wajib-ul-arz expressly bases itself upon a usage, and not upon an agreement between the landlord and tenant. If these dues were claimed as a matter of contract between the landlord and tenant, the case would be different. Whether the dues are of the nature of rent or cess or other dues, the suit, having regard to the relief claimed, is of a nature cognizable by the civil court alone.

Section 167 of the Tenancy Act bars the cognizance by civil courts of certain suits specified in the Act. The only provision of the Act which might be regarded as applicable to this suit is section 95, clause (*d*). But the suit does not come under section 95 (*d*), for it is not a suit for a declaration as to the rent payable *in respect of a holding*. That section applies to all matters in dispute relating to the contract or agreement between landlord and tenant in respect of a holding; it has no application where the dues claimed are neither based on agreement nor are in respect of the holding. The disputed dues are quite independent of the nature or extent of the holdings; they are something over and above the rents. For example five seers of poppy seed are claimed from a tenant, not because of his holding, but because he is a Koeri; one rupee is to be paid, not because a tenant grows sugarcane, but because he presses it in a mill. Some of the plaintiffs have only groves, which are not "holdings," having regard to the definitions of "holding" and "land" in the Tenancy Act.

Again, section 95 (*d*) cannot apply unless the dues are "*rent*". The defendants claim them to be, and they are entered in the wajib-ul-arz as "cesses" within the meaning of section 56 of the Land Revenue Act. The wording of that section shows that a clear distinction is drawn between (1) rent and cess, and (2) between rent and dues "which are of the nature of rent payable in addition to the rent of tenants." Neither cesses nor such dues are "rent," [360] therefore, within the meaning of the Land Revenue Act. Now, the meaning of the word "rent" in that Act is defined to be the same as that under the Tenancy Act. The dues, therefore, are not "rent" within the meaning of the Tenancy Act; and, so, section 95 (*d*) does not apply.

Mr. *A. E. Ryves* (with him Dr. *Satish Chandra Banerji* and Maulvi *Muhammad Ishaq*), for the respondents :—

It is not the civil court alone which can determine a question as to the existence or otherwise of a custom. A revenue court is quite competent to entertain and decide such a question if it arises in connection with the amount of rent payable, *vide* section 37 of the Tenancy Act. If the zamindars sued one of these tenants for rent, saying that so much was rent proper and, besides, so much on account of dues based on custom, the rent court could enter into the question of the existence of the custom in order to determine the correct amount of the rent. Having regard to the relief claimed, therefore, it cannot be said that the suit is not cognizable by the revenue court.

On the other hand, it is exclusively cognizable by the revenue court; for it comes under section 95 (*d*). The dues are not independent of the holdings, but in respect of them. They are payable by the tenants *as such*; that is to say, in respect of their holdings. The test is not whether

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the dues are proportional in amount to the extent of the holdings, but whether they are payable by the tenants only or by other persons as well, who are not agricultural tenants.

Then, these dues come under the term "rent" in section 95 (*d*). The definition of "rent" in the Tenancy Act is wide enough to cover these dues. It includes whatever is payable for the occupation of land. The ruling in *Mahabir* v. *Sheodihal* (1) is in my favour.

There is no real distinction between "rent" and things in the nature of rent drawn by section 56 of the Land Revenue Act, under which section most of these dues were professedly entered. No sharp line of demarcation can be drawn. The Act is badly framed. Besides section 95 (*d*) of the Tenancy Act, section 233, clause (*i*), of the Land Revenue Act, also bars the jurisdiction of the [361] civil Court. The definition of rent is the same for both the Acts, but there is this difference that section 233 (*i*) does not speak of the rent *payable in respect of a holding*. The ruling in S. A. No. 497 of 1910. decided on 8th June, 1913, supports my case.

Babu *Surendra Nath Sen* was not heard in reply.

RICHARDS, C. J.,—This and the connected appeal arise out of suits in which the plaintiffs sought a declaration that no custom existed in their village which entitled zamindars to take certain fruits and wood, or a right to the use of a plough and a number of other alleged dues, including sugar-cane juice from some of the tenants, poppy seed from the Koeries, and various other matters of the same description. The suit was instituted in the court of the Subordinate Judge of Azamgarh. He decided that the suit was not cognizable in a civil court and he declined to return the plaint for presentation in the proper court. The learned District Judge in first appeal affirmed the decision of the Subordinate Judge and dismissed the plaintiffs' suit. The plaintiffs come here in second appeal.

I think that the question whether or not the villagers are liable to these dues is a question of very great importance, no matter what is the proper tribunal to decide it. However, all that we have to decide in the present appeal is whether or not the suit is cognizable by a civil court.

In my opinion the suit was cognizable in the Civil Court. *Prima facie* the civil court is the court to decide all cases of a civil nature. Only cases which by express enactment are withdrawn from the cognizance of the civil court are not triable by that court. It is argued that section 95 read with section 167 excludes the present suit from the cognizance of the civil court. Section 167 provides that the suits specified in the fourth schedule shall only be cognizable in the revenue court : included in the fourth schedule are the suits specified in section 95. Section 95 provides that at any time during the continuance of the tenancy either the landholder or the tenant may sue for a declaration as to any matters there mentioned. Amongst these matters is the rent payable in respect of a holding and whether it is payable in cash or in kind. It is argued that this suit is a suit as to the rent payable for the holding, and whether it is payable in cash or kind. Reliance is also placed upon section 233, clause (*i*) of the Land [362] Revenue Act, which provides that no suit shall be instituted in the civil court by a tenant in respect of the rent payable by him.

It seems to me that rent in both section 95, clause (*d*), of the Tenancy Act, and section 233, clause (*i*), of the Land Revenue Act, refers to the ordinary conventional or contractual rent payable by a tenant for his holding

(1) Weekly Notes, 1885, p. 320.

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No doubt the definition of rent in section 4 of the Tenancy Act is wide. It is there defined as being whatever in cash or kind is to be paid or delivered by a tenant for land held by him or on account of groves, tanks, *et cetera*. Notwithstanding this definition, it seems to me that the plaintiffs in the present case cannot, in truth, be said to be suing in respect of a matter relating to the rent payable in respect of their holding. The claim of the zamidnars which the plaintiffs seek to resist in the present case is, it seems to me, a claim based on custom, the zamindars claiming by right of custom to be entitled to certain cesses or dues. These dues to some extent are claimed, no doubt, by reason of the fact that the plaintiffs are tenants, and to this limited extent it may be argued that they are payable in respect of their holdings. It is extremely difficult to see how fulfilment of some of these customary rights could be enforced in the revenue court. One custom is the giving to the zamindars the use of a plough. If the tenant refused, it seems to me that the zamindar's only right would be to sue for damages, and such a suit could only be brought in the civil court. Again, it would be impossible for the zamindar to enforce the delivery of the sugarcane juice, if, by chance, the tenant did not grow any sugarcane, and accordingly the value of the sugarcane juice would have to be assessed and sued for as damages. I may mention that the wajib-ul-arz, which is the basis of the claim of the zamindars, particularly specifies some of the items as being cesses referred to in section 56 of the Land Revenue Act. That section is as follows :—

"In the North Western Provinces all cesses which are payable by tenants on account of the occupation of land and which are of the nature of rent payable in addition to the rent of tenants, or in lieu of which property rights may be assigned under section 78, clause (*b*), shall be recorded by the record officer under the appellations by which they are known, and no cesses not so recorded shall be recoverable in any civil or revenue court."

In the Land Revenue Act it is expressly provided that the term *rent* is to have the same meaning as it has in the Tenancy Act. It [363] is quite clear that this section draws a distinction between rent and payments in the nature of rent. These latter payments are not "rent." In the words of the section itself they are payments which have to be made in addition to the "rent." It seems to me that there is no provision in either the Land Revenue Act or the Tenancy Act which excludes from the cognizance of the civil court a suit for a declaration that no custom exists in the village which renders the plaintiffs liable to the payment of these dues.

The plaintiffs also sue to have the entry as to these alleged dues declared null and void as against them, on the ground that they were entered in the wajib-ul-arz behind their back and without their having a proper opportunity of showing that no such custom existed. If these allegations are correct, it seems to me not at all unreasonable that the plaintiffs should have a declaration to the effect that the entries are not binding on them.

I would allow the appeal and remand the suit for trial on the merits.

BANERJI, J.—I also am of opinion that the suit brought by the plaintiffs was not excluded from the cognizance of the civil court. Section 167 of the Agra Tenancy Act provides that no court other than the revenue court shall take cognizance of any dispute or matter in respect of which any suit or application of the nature specified in the fourth schedule to the Act might be brought or made. Therefore, unless the suit is of the nature mentioned in the schedule, its cognizance by the civil court is not

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forbidden by the section. The plaintiffs' claim may be taken to be a claim for a declaration that they are not liable to pay the amounts or deliver the articles mentioned in the wajib-ul-arz of the village, which the defendants (zamindars) claim from them. Unless these payments can be brought within the meaning of the word "rent" as used in section 95, clause (*d*), of the Act, the suit would be cognizable by the civil court. Clause (*d*) of sect on 95 provides that a landholder or a tenant may sue for a declaration as to the rent payable in respect of the holding of a tenant. The word "rent" is defined in section 4, clause (iii), as meaning "whatever is in cash or in kind to be paid or delivered by a tenant for land held by him." The remainder of the definition is inapplicable to the present case. Now "land" as defined in the Act means "land which is let or [364] held for agricultural purposes." The amounts which the defendants claim as payable by the plaintiffs and the articles which they say the plaintiffs must deliver to them are not payable or deliverable in respect of land which is held for agricultural purposes. Therefore the matter to which the suit relates cannot be deemed to be rent within the meaning of the Agra Tenancy Act. In my opinion the rent mentioned in clause (*d*) of section 95 is rent payable in respect of an agricultural holding and cannot apply to what is payable in *addition* to rent, such as is referred to in section 56 of the Land Revenue Act. Therefore there is nothing in the Agra Tenancy Act which makes a suit like the present cognizable by a revenue court. As rent has the same meaning in the Land Revenue Act as it bears in the Agra Tenancy Act, section 233, clause (*i*), of the Land Revenue Act does not apply to a case of this kind. The suit not being cognizable by a revenue court, the only court which can take cognizance of it is the civil court, and the courts below ought to have tried it on the merits. I agree in the order proposed.

TUDBALL, J.—I also agree in the order proposed. To my mind it is quite clear that the present suit cannot be said to be one for a declaration as to the rent payable by the plaintiffs in respect of their holdings. It is unnecessary to go into details. Many of the items are such that they could clearly be only recovered in a civil court; for example, the claim of Re. 1, which, it is said, a tenant of the village pays to the zamindar when he sets up a sugarcane press in the village to press his own cane. This cannot by any possible stretch of the meaning of ordinary language be said to be part and parcel of the rent. It is a claim entirely independent of the holding and in no way concerned with it. It is an item to recover which the zamindar would have to sue in the civil court, and in the civil court alone. Section 56 of the Land Revenue Act also to my mind is quite clear; the claims made by the zamindars thereunder are claims made over and above the rent that is payable in respect of the holding. In this view I have not the slightest hesitation in holding that the present suit was cognizable by the civil court.

BY THE COURT.—The order of the court is that the appeal is allowed, the decrees of the courts below are set aside, and the case [365] is remanded to the court of first instance through the lower appellate court, with directions to readmit it under its original number in the register and proceed to hear and determine the same according to law. The appellants will have their costs in this court and in the court below. Other costs will abide the result.

Appeal allowed. Cause remanded.

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Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

BHAGWAN DAS (*Defendant*) *v.* RAJ NATH (*Plaintiff*).*

[26th February, 1912.]

Civil Procedure Code (1882), *sections* 278, 279, 280, 281—*Execution of decree—Attachment—Objection to attachment—Objection dismissed—Suit to recover possession—Jurisdiction.*

Held on a construction of sections 278, 279, 280 and 281 of the Code of Civil Procedure, 1882, that an objector may raise an objection to an attachment not only on the ground that he is in possession of the property attached but also on the ground that he has an interest in it, and that, when an executing court disallows the claim of an objector under section 281, the court has jurisdiction to do so notwithstanding the fact that it erroneously does not go into the question of possession but disallows the objection on some other ground.

THE facts of this case were as follows:—

One Kishori Lal was the owner of the property in dispute and other property. On the 5th of August, 1888, he made a simple mortgage of all the properties to Nizam-ud-din. After that, he, on the 22nd of December, 1888, mortgaged them to Kirpa Dayal and others, who obtained a decree on their mortgage on the 3rd of July, 1889. The prior mortgagee was no party to this suit. The prior mortgagee, Nizam-ud-din, on the 20th of August, 1889, got a decree on his mortgage without impleading the subsequent mortgagee. The latter purchased the property, on the 20th of June, 1891, in execution of his decree and afterwards obtained actual possession. By the consent of the two mortgagees, the sale proceeds were first applied to the satisfaction of the decree on the prior mortgage, but a balance remained unsatisfied. Then, on the 13th of September, 1898, Kirpa Dayal sold the property to one Bhagwan Das, and afterwards Durga Prasad got a portion of the property by pre-emption. Nizam-ud-din then purchased [366] the property in execution of his decree and obtained formal possession on the 21st of February, 1900. In 1904 the plaintiff, Raj Nath, attached this property, actual possession of which was with Bhagwan Das and Durga Prasad in exection of a simple money decree against Nizam-ud-din. Objections under section 278 of the Civil Procedure Code of 1882 were filed and were disallowed on the 4th of July, 1904. The plaintiff got the property sold and purchased it himself and obtained formal possession on the 9th of October, 1904.

The present suit for actual possession was brought on the 9th of October, 1909.

Mr. *G. W. Dillon*, for the appellant, submitted that the order of the 4th of July, 1904, was not such an order as could be final under section 281 of the Code of Civil Procedure, 1882. It was not an order under that section. It was merely a summary order which did not decide anything on the point of possession. It was not a case of erroneous decision, and the plaintiff's suit could not succeed on the ground that that order was not contested. He cited *Badri Prasad* v. *Muhammad Yusuf* (1) and *Jugobandhoo Bose* v. *Sachia Bibee* (2). The latter case is exactly in point,

*Second Appeal No. 504 of 1911, from a decree of H. W. Tyle, District Judge of Agra, dated the 24th of February, 1911, modifying a decree of Shiva Prasad, Subordinate Judge of Agra, dated the 11th of July, 1910.

(1) (1877) I. L. R. 1 All. 381.
(2) (1871) 8 B. L. R. App. 39; 16 W. R. C. R. 22.

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and it was followed and distinguished in *Gooroo Doss Roy* v. *Sona Monee Dossia* (1) and *Sreemunto Hajrah* v. *Syud Tajooddeen* (2). It was still good law. The present suit was filed 19 years after, and during the whole of that time, the appellant was in possession. The appellant's possession is *qua* mortgagee and hence he could not be liable for mesne profits. The sale having been made with the consent of the prior mortgagee and the sale proceeds having been applied in satisfaction of his decree, he did not get anything in the subsequent sale. He referred to *Monmohiney Dassee* v. *Radha Kristo Dass* (3).

Dr. *Tej Bahadur Sapru*, for the respondent, submitted that the objections on which the order of the 4th of July was passed, had been filed under section 278, and a third party need only say that the property was not liable to attachment. The grounds mentioned in section 279 had been made more specific than in section 278. A [367] court might be competent to go into the question of possession, but the Legislature never intended that it should go into that question. Having regard to sections 279, 280, it did not follow that a court was bound to go into that question. He cited *Sarahari Lal* v. *Ambika Pershad* (4) and *Malkarjun* v. *Narhari* (5). The court which passed the order had jurisdiction, and even if that order was bad, it was final until set aside. The order might not be correct, but it was an order purporting to be under section 279. The aggrieved party was entitled to bring a suit to set it aside within a year It was entirely immaterial if the order was erroneous. The conclusiveness of an order did not depend upon its correctness but upon the question whether the court which passed it had jurisdiction.

Mr. *G. W. Dillon* was heard in reply.

KARAMAT HUSAIN and TUDBALL, JJ.—One Kishori Lal was the owner of the property in dispute and other property. On the 5th of August, 1888, he made a simple mortgage of all those properties in favour of Nizam-ud-din. Subsequently, on the 22nd of December, 1888, he mortgaged them to Kirpa Dayal and others, who obtained a decree on their mortgage, on the 3rd of July, 1889, without impleading the prior mortgagee, Nizam-ud-din. The latter, on the 20th of August, 1882, obtained a decree upon his mortgage without impleading Kirpa Dayal and others. Kirpa Dayal and others executed their decree against the mortgaged property and purchased it on the 20th of June, 1891. They obtained actual possession afterwards. When they applied for the sale of the mortgaged property, Nizam-ud-din put in an application to the effect that he had no objection to the sale of the property, provided the sale proceeds were first applied to the satisfaction of his own decree. The court granted that application, and the whole sale proceeds were applied to the satisfaction of the decree in favour of Nizam-ud-din. A balance, however, remained unsatisfied. Kirpa Dayal, after obtaining actual possession of the property, sold it privately on the 13th of September, 1898, to Bhagwan Das. Durga Prasad succeeded in pre-empting a portion of the property sold by Kirpa Dayal to Bhagwan Das. Nizam-ud-din, on the 22nd of July, 1899, brought the property to sale in execution of his own decree and purchased it himself. He obtained formal possession on the 21st of [368] February, 1900. In 1904 the plaintiff, Raj Nath, attached the property, formal possession of which had been obtained by Nizam-ud-din, and

(1) (1873) 20 W. R. C. R. 345.
(2) (1874) 21 W. R. C. R. 409.
(3) (1902) I. L. R. 29 Cal. 543.
(4) (1888) I. L. R. 15 Cal. 521.
(5) (1900) I. L. R. 25 Bom. 337.

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the actual possession of which was with Bhagwan Das and Durga Prasad, in execution of a simple money decree against Nizam-ud-din. Bhagwan Das and the representatives of Kirpa Dayal filed objections under section 278 of the Civil Procedure Code of 1882. Those objections were disallowed on the 4th of July, 1904. Durga Prasad took no objections. The plaintiff got the property sold, and purchasing it himself, obtained formal possession on the 19th of October, 1904. He, then on the 9th of October, 1909, instituted a suit for actual possession of the property against Bhagwan Das and Durga Prasad. The relief sought by him is that the defendants may be ejected from the property and the plaintiff put in proprietary possession thereof, that if the defendants be allowed to redeem they should pay Rs. 2,250, the amount due to the plaintiff, and that the mesne profits for the past three years may be awarded. The court of first instance gave the plaintiff a decree for possession with mesne profits with the condition that the defendants should be allowed to retain possession of the property, provided they paid Rs. 2,250, without fixing any period for the payment of that sum. Two appeals were preferred from the decree of the first court, one by Durga Prasad and the other by Bhagwan Das. The court of first appeal allowed the appeal of Durga Prasad on the ground that, as he had taken no objection under section 278, he was not bound by section 283 of the Code of Civil Procedure of 1882, and that, as he was in possession of the property as the representative of Kirpa Dayal, the only remedy which the plaintiff as representative of Nizam-ud-din had against him was a suit for foreclosure, and that, as the suit brought by the plaintiff against Durga Prasad was not a suit for foreclosure, it must stand dismissed. Regarding the appeal of Bhagwan Das, the lower appellate Court came to the following conclusion. Bhagwan Das objected under section 278 of Act XIV of 1882. His objection was overruled, and the court came to the conclusion that the property which was in his possession was liable to sale in execution of the decree of Nizam-ud-din and his remedy was, if he was dissatisfied with that order, to have instituted a suit under section 283. As he did not do so, the order of the court, dated the 4th of July, 1904, became final, [369] between him and the plaintiff. The court found that, in this view of the case, Bhagwan Das was the representative of Kirpa Dayal, a puisne mortgagee, and that the plaintiff was the representative of Nizam-ud-din the prior mortgagee, and that on payment of the money due to Nizam-ud-din, *i. e.*, such part of Rs. 2,250 as was proportionate to the amount of the property in his possession, Bhagwan Das would be entitled to retain possession of the property. The lower appellate court also fixed no period for the payment of the money. It also gave the plaintiff a decree for mesne profits for three years. Bhagwan Das comes to this court in second appeal, and the points argued are, that the order of the 4th of July, 1904 was passed without jurisdiction, and that therefore it may be treated as a nullity, and that the possession of the appellant and his predecessors which began on the 20th of June, 1891, ripened by prescription into ownership and disentitled the plaintiff from succeeding in a suit for possession, and that the order as to mesne profits passed against him (Bhagwan Das) is incorrect. In support of the first contention the learned counsel for the appellant relies upon *Badri Prasad* v. *Muhammad Yusuf* (1), *Jugobundhoo Bose* v. *Sachya Bibee* (2), *Monmohiney Dassee* v. *Radha Kristo Dass* (3),

(1) (1876) I. L. R. 1 All. 381.
(2) (1871) 8 B. L. R. App. 39.
(3) (1902) I. L. R. 29 Cal. 543.

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and an unreported ruling of this court in Second Appeal No. 751 of 1874, decided on the 25th of July, 1874. The substance of his argument is that, under sections 278, 279, and 281 of Act XIV of 1882, an executing court has jurisdiction only to determine the question of possession, and that if such court passes an order under section 281 without going into the question of possession, that order is *ultra vires* and without jurisdiction. The learned advocate for the respondent in answer to the point taken by the learned counsel for the appellant says that it is not correct to say that an executing court in dealing with an objection taken to the execution of a decree under the sections of the Code already referred to has no jurisdiction, unless that court goes into the question of the possession of the property held either by judgment-debtor or the objector. That court, according to the contention of the learned advocate for the respondent, has jurisdiction either to allow or disallow the objection, and if that court does not go into the question of possession, it only does an act which is **[370]** wrong, but which is within the jurisdiction of that court. In support of his arguments the learned advocate for the respondent relies on *Sardhari Lal* v. *Ambika Pershad* (1) and *Malkarjun* v. *Narhari* (2). He submits that the ruling in 8 B L. R., App. 39, so far as it lays down that an order under section 246 of the Code of Civil Procedure of 1859, corresponding to section 281 of the Code of 1882, without dealing with the question of possession is a nullity, is not, in view of the rulings of their Lordships of the Privy Council in I L. R., 15 Cal. 521, and I. L. R. 25 Bom 337, a correct exposition of the law. Regarding I. L. R., 1 All. 381, he says that it does not lay down that an order passed by an execution court under section 246 of the Code of Civil Procedure of 1859 without dealing with the question of possession is without jurisdiction. We have carefully gone through sections 278, 279, 280 and 281 of the Code of Civil Procedure of 1882, and we have no doubt that an objector may raise an objection to the attachment not only on the ground that he is in possession of it but also on the ground that he has an interest in the property attached, and we have no doubt that having regard to the language of those sections when an executing court disallows the claim of an objector under section 281, the court has jurisdiction to do so notwithstanding the fact that it erroneously does not go into the question of possession but disallows the objection on some other ground. The result of our finding is that the order of 4th July, 1904, is conclusive between the parties, and it cannot now be contended that Nizam-ud-din is not the owner of the property under the sale in execution of his own decree subject, of course, to the equities in favour of the pusine mortgagee, or his representative, who was no party to the suit brought by Nizam-ud-din. The contention of the learned counsel for the appellant that the order as to mesne profits is wrong is, in our opinion having regard to the circumstances of the case, a valid contention. The plaintiff in this case represents the prior mortgagee and the defendant is a representative in interest of a puisne mortgagee. That being the relation between the parties, the question of mesne profits cannot arise on any account As the property in dispute was first sold in execution of a decree obtained by Kirpa Dayal and others with the consent of Nizam-ud-din, and as the sale-proceeds were applied to the satisfaction of Nizam-ud-din's own decree, and as only a portion of **[371]** his decree remained unsatisfied, in equity Nizam-ud-din or the plaintiff, who is the representative in interest of Nizam-ud-din, is entitled

(1) (1888) I. L. R. 15 Cal. 521.

(2) (1901) I. L. R. 25 Bom. 337.

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34 A. 368=14 I. C. 790=9 A. L. J. 474.

to put the property up to sale in accordance with the order passed on the 4th of July, 1904, for the recovery of the balance only to which Nizam-ud-din was entitled. Moreover, the plaintiff as the representative in interest of Nizam-ud-din is entitled only to proceed with the realization of a share of that balance proportionate to the share of the property which remained in the possession of Bhagwan Das after the success of the pre-emption suit by Durga Prasad against him. That being so, it is desirable to have findings on the following two points:—

(1) What was the balance which remained due to Nizam-ud-din on the 22nd of July, 1899, after the satisfaction of the bulk of his decree from the proceeds of the sale held on the 20th of June, 1891?

(2) What is the proportionate value of the property which remained in the possession of Bhagwan Das after the success of the pre-emption suit by Durga Prasad against him as compared with the value of the entire property mortgaged to Nizam-ud-din on the 5th of August, 1888?

The court below will be at liberty to take such additional evidence as the parties may adduce. Ten days will be allowed for objections on return of the findings.

Issues remitted.

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34 A. 371 (= 14 I. C 132=9 A. L. J. 336).

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

JWALA PRASAD (*Defendant*) *v.* ACHCHEY LAL AND OTHERS (*Plaintiffs*).*

[February, 1912.]

Act No. XV of 1877 *(Indian Limitation Act), section* 19—*Mortgage—Redemption—Limitation—Acknowledgement.*

Held that an acknowledgement of the title of the mortgagor made by only one of two mortgagees would not avail to save the mortgagor's right to redeem being barred by limitation where the mortgage was a joint mortgage and incapable of being redeemed piecemeal *Dharma* v. *Balmakund* (1) followed.

THE facts of this case were as follows: —One Kure mortgaged certain property to Sewa Ram and Daya Ram on the 10th of February, 1838, for Rs. 49. The plaintiffs were the purchasers of the [372] equity of redemption. The defendant was the representative of the mortgagees. The plaintiffs sought to redeem the mortgage. The defence, *inter alia*, was limitation. The court of first instance dismissed the claim, holding that it was barred by limitation and that an acknowledgement made in 1850 at the verification of the khewat, which was set up by the plaintiffs as saving limitation, was not proved by the original settlement record. On appeal the learned Subordinate Judge was of opinion that the copy that was filed was sufficient to prove the acknowledgement, and, reversing the decree of the court of first instance, remanded the case under order XLI, rule 23. The defendant appealed to the High Court.

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* First Appeal No. 120 of 1911 from an order of Girraj Kishor Dat, Judge, Small Cause Court, exercising the powers of a Subordinate Judge of Agra, dated the 11th of August, 1911.

(1) (1896) I. L. R. 18 All. 458.

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14 I. C. 132=
9 A. L. J. 386.

Munshi *Gobind Prasad*, for the appellant :—

As the mortgage-deed was executed in 1838, it was governed by the old Limitation Act: the present Limitation Act has no retrospective effect. Reliance was placed on *Kaunsilla* v. *Ishri Singh* (1). Acknowledgement is recognized in the Limitation Act of 1859 to save limitation, and it applies to deeds executed prior to its passing : *Zaib-un-nissa Bibi* v. *The Maharaja of Benares* (2). The copy of the khewat does not prove an acknowledgement, nor is it admissible under section 19 of the Limitation Act.

Pandit *Mohan Lal Sandal*, for the respondents :—

The original khewat of 1850 belonging to a pre-mutiny period, the copy which comes from the Collectorate of Muttra is admissible. Sections 61, 63, 65 (*e*) and 74 of the Evidence Act make it admissible. The presumption under section 90 of the Evidence Act will apply to the case of a copy : *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (3). Further, section 114 of the Evidence Act will raise the presumption that the signatories of the khewat signed the khewat.

[The court having sent for the settlement record of 1850, went through it and found out that only one of the co-mortgagees verified the khewat, though it purported to be signed by both of them.]

Munshi *Gobind Prasad* was not heard in reply.

KARAMAT HUSAIN and TUDBALL, JJ.—One Kure was originally the owner of the property in suit. He mortgaged it with possession to Sewa and Daya Ram on the 10th of February, 1838, **[373]** for Rs. 49. The plaintiffs are the representatives in interest of the mortgagor Kure, and the defendants are the representatives in interest of the mortgagees, Sewa and Daya Ram The suit was instituted on the 22nd of June, 1910. In paragraph 4 of the plaint it was alleged that in the settlement made in 1257 Fasli, corresponding to 1850 A. D., an acknowledgement was made by Sewa and Daya Ram which gave the plaintiffs a fresh starting point for limitation. One of the pleas raised in defence was that the suit was barred by limitation. That plea found favour with the court of first instance, which dismissed the claim. On appeal the lower appellate court came to the conclusion that the entry in the settlement papers of 1257 Fasli, corresponding to 1850 A. D., amounted to an acknowledgement, and sent back the case for trial on the merits to the first court. The lower appellate court in its judgment remarks :—

"I am unable to agree with the learned Munsif in the view which he has taken regarding the law applicable to the admissibility of evidence in this case. There is no doubt that the words *nagl-ul-nagl* (copy of a copy) are entered in the settlement record produced from the Collector's record room, but the moharrir of the record room who brought the said record in the lower court and was examined on oath before that court, stated that the said record was treated as original document and copies were issued from it, and the copy produced by the village patwari shows that the papers of the settlement of 1283 Fasli were verified by Sewa and Daya Ram, mortgagees, and thus the entries to the settlement record of "1283" Fasli amount to an acknowledgement of the mortgagor's title and his right to redeem the mortgaged property, and they gave the mortgagor a fresh starting point of limitation. In other words, by reason of the verification of the settlement record of 1283 Fasli by the mortgagees the period prescribed for the suit for redemption should be computed from the date when the mortgagees verified the papers in the said settlement record, and thus the plaintiff's claim is within time"

It is to be noticed that the plaintiffs very clearly based their claim upon the entry in the settlement papers of 1257 Fasli, corresponding

(1) (1910) I. L. R. 32 All. 499.
(2) (1911) 8 A. L. J. 1872.
(3) Weekly Notes, 1900, p. 82.

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34 A. 371=14 I. C. 132=9 A. L. J. 336.

to 1850 A. D., and that the entries in the settlement papers of 1257 Fasli were the only entries upon which reliance was placed in the court of first instance. It is also to be noticed that in the appellate court the appellant made an application on the 2nd of June, 1911, and in that application he asked the court to send for the settlement papers (*misl bondobast*) of 1257 Fasli only. He never applied to have the settlement papers of 1283 Fasli sent for at all. That being so, the reference by the lower [374] appellate court to the settlement papers of 1283 Fasli must be taken to be incorrect. In the first place those papers were not in evidence before that court. In the second place the originals of those papers were not proved to have been lost. In the third place, according to the statement of the patwari, one of the mortgagors, Sewa, was dead at that time, and the name of his minor son, Ram Chandar, under the guardianship of his mother, Musammat Lado, was entered, and there could have been no verification of the entry in 1283 Fasli by Sewa. Coming to the entry in the settlement papers of 1257 Fasli, we find that it is a copy, the original of which was lost during the mutiny of 1857. At the end of the copy there are copied the signatures of Sewa, mortgagee, and Daya Ram, son of Parsa, mortgagee, but in the certificates signed by the Settlement Officer on the 24th of August, 1850, and the 16th December, 1850, the names of two Daya Rams appear as the persons who verified that paper. There is no mention of the name of Sewa in either of the two certificates. Under these circumstances the utmost that could be presumed under section 114 of the Indian Evidence Act would be that Daya Ram did verify the khewat and sign it, provided he be the same Daya Ram whose name appears as the mortgagee. Under that section we cannot possibly presume that that document was either verified by Sewa or signed by him, and the copy before us does not show that he signed his name on the original. The utmost that in the circumstances of the case we can presume is that one of the two mortgagees only made an acknowledgement. It has been held in *Dharma* v. *Balmakund* (1) that an acknowledgement of the title of the mortgagor made by only one of the two mortgagees would not avail to save the mortgagor's right to redeem being barred by limitation where the mortgage was a joint mortgage and incapable of being redeemed piecemeal. We are, therefore, of opinion that the suit is barred by limitation. For the above reasons we set aside the order of the lower appellate court and restore the decree of the court of first instance with costs in all courts.

Appeal decreed.

34 A. 375 (=9 A. L. J. 439=14 I. C. 154).

[375] APPELLATE CIVIL.

Before Mr. Justice Sir Henry Griffin and Mr. Justice Chamier.

HIRA SINGH AND ANOTHER (*Plaintiffs*) *v.* MUSAMMAT AMARTI (*Defendants*).*

[29th February, 1912.]

Act No. IX of 1908 (*Indian Limitation Act*), *section* 31—*Mortgage—Suit for sale—Limitation—Act No. X of* 1897 (*General Clauses Act*), *section* 10.

*Second Appeal No. 725 of 1911 from a decree of A. W. R. Cole, Additional Judge of Aligarh, dated the 19th of June, 1911, reversing a decree of Abdul Hasan, Munsif of Khurja, dated the 27th of March, 1911.

(1) (1896) I. L. R. 18 All. 458.

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APPELLATE CIVIL.

34 A. 375=
9 A. L. J. 439
=14 I. C. 154.

The special period of limitation for suits for foreclosure or for sale by a mortgagee, prescribed by section 31 of the Indian Limitation Act, 1908, namely, two years from the date of the passing of the Act, expired on a Sunday. *Held* that a suit for sale to which section 31 applied instituted upon the following Monday was within time. *Shevdas Daulatram Marwadi* v. *Narayenvalad Asaji* (1) dissented from.

[Fol. 26 M. L. T. 23=21 I. C. 770.]

The facts of this case were as follows :—

This appeal arises out of a suit on a mortgage bond alleged to have been executed on the 25th January, 1881, by Nathu Singh and Kallu, who are now represented by Musammat Amarti, defendant No. 1. The suit was filed on the 8th August, 1910, the 7th August being a Sunday. The court of first instance decreed the plaintiffs' suit. Musammat Amarti, defendant No. 1, appealed to the lower appellate court. One ground taken in appeal was that the suit was barred by limitation. The lower appellate court held that as the courts were closed on the 7th August, 1910, the last day of limitation, the suit having been filed on the 8th August, 1910, the day on which the courts reopened, was within time. The appeal was accordingly allowed.

The plaintiffs appealed to the High Court.

On the question of limitation the arguments were as follows :—

Babu *Sital Prasad Ghosh*, for the respondents :—

The suit having been filed after the " two years period of grace " had expired, was clearly barred by limitation. The period of limitation " prescribed " by the Act is to be found in the schedule. The Legislature, in view of the Privy Council ruling *Vasudeva* v. *Srinivasa* (2) had provided an additional period of grace, and this period could not be extended by any of the provisions applicable to the " period of limitation prescribed." The prescribed period of limitation is not to be found in section 31 of the Limitation Act but in the schedule annexed thereto: *Dayaram Parasram Marwadi* v. *Laxman Runja Teli* (3). [376] Section 4 of the Limitation Act is not applicable to section 31, for that section is a self-contained provision and commences with the words " notwithstanding anything in this Act or in the Indian Limitation Act of 1877 " which clearly indicate that section 31 excludes the applicability of any other provision of the Limitation Act. The only other proviso which can be relied on, as authorising the presentation of the suit on the following Monday (August 8th, 1910) is section 10 of the General Clauses Act. In the first place that section was not intended to refer to suits ; and, secondly, by the proviso, the section was made inapplicable to proceedings to which the Limitation Act of 1877 applied. The Act of 1877 having been repealed, all references to that Act must be read as references to the new Act of 1908. This principle was recognised by section 8 of the General Clauses Act : *Shevdas Daulatram Marwadi* v. *Narayenvalad Asaji* (1).

Mr. *M. L. Agarwala*, for the appellants, in reply:

The Bombay rulings did not give due effect to section 10 of the General Clauses Act. The proviso to that section only excluded proceedings to which the Limitation Act of 1877 applied, and there is absolutely no warrant for reading the words "the Indian Limitation Act of 1908" for the words "Indian Limitation Act of 1877." There is no provision in the new Act of 1908 analogous to the provision contained in section 158 of the new Civil Procedure Code, whereby any reference made in any Act to

(1) (1911) I. L. R. 36 Bom. 268.
(2) (1907) I. L. R. 30 Mad. 426.
(3) (1911) 13 Bom. L. R. 284.

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the repealed Act of 1877 could be taken to have been made to the new Act of 1908. Section 8 of the General Clauses Act would not authorize such reading, because it only says that any reference to a repealed provision should be construed as a reference to the re-enacted provision. It cannot be said that section 31 of the Act of 1908 is a re-enacted provision substituted for a similar repealed provision. Therefore, the proviso to section 10 not applying, the section itself would apply. The word "proceedings" is wide enough to cover "suits" and therefore the plaint, though presented on Monday, August 8th, 1910, was within time. Section 10 simply embodies the general principle of law, namely, that the law does not compel a man to do that which he could not possibly perform, and there is nothing in the Limitation Act of 1908 to indicate that this general principle of law would not apply to section 31.

[377] GRIFFIN, J.—This appeal arises out of a suit on a mortgage-bond alleged to have been executed on the 25th January, 1881, by Nathu Singh and Kallu, who are now represented by Musammat Amarti, defendant No. 1. The suit was filed on the 8th August, 1910, the 7th August being a Sunday. The original bond was not produced. The plaintiffs alleged that it was in the possession of defendants 2 to 4 and filed a copy. Musammat Amarti, defendant No. 1, pleaded that the plaintiffs were not entitled to sue without first obtaining a succession certificate, and that the original bond had been paid off. In the court of first instance a succession certificate to collect a debt of Rs. 500 in respect of the bond now in suit was filed by the plaintiffs. No evidence was adduced by either party. The court held that, as the execution of the bond was not specifically denied in the written statement, it must be held to have been admitted and decreed the plaintiffs' suit. Musammat Amarti, defendant No. 1, appealed to the lower appellate court. One ground taken in appeal was that the plaintiffs had not shown that they were entitled to produce secondary evidence of the bond in suit. Another was that the suit was barred by limitation. The lower appellate court held that as the debt due on the bond in suit was over Rs. 2,000, whereas the plaintiff had obtained a succession certificate in respect of a debt of Rs. 500 only, the suit could not be maintained by the plaintiffs and must be dismissed. On the question of limitation the lower appellate court held that as the courts were closed on the 7th August, 1910, the last day of limitation, the suit having been filed on the 8th August, 1910, the day on which the courts reopened, was within time. The court further held that the execution of the bond was admitted by implication. The question whether the plaintiffs were entitled to produce secondary evidence of the bond in suit does not appear to have been argued before the court below. The appeal to that court having been allowed, the plaintiffs come here in second appeal.

I think the suit should not have been dismissed on the ground that the succession certificate held by the plaintiffs was not sufficient to cover the amount due on the bond in suit. The proper procedure for the court to have adopted was to allow the plaintiffs sufficient time within which to obtain an extension of the certificate.

[378] I also think that some evidence should have been required of the plaintiffs before admitting secondary evidence of the bond in suit. The learned vakil on behalf of the respondent supports the decision of the court below on the ground that on the date on which the suit was filed—the 8th August, 1910—the suit was barred by limitation.

The question of limitation is one of some importance and is not free from difficulty. The Limitation Act No. IX of 1908 became law, so far as

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section 31 was concerned, on the 7th August, 1908. By section 31 of that Act it was enacted that a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of the Act or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first. The two years expired on August 7th, 1910, which was a Sunday. The suit was filed on August 8th, 1910, the present Limitation Act being then in force.

Sections 3 and 4 of the Limitation Act No. IX of 1908 are as follows:—

3. Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule, shall be dismissed, although limitation has not been set up as a defence.

4. Where the period of limitation prescribed for any suit, appeal, or application, expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the court reopens.

At first sight it appears as if 'prescribed' in section 4 should be understood as 'prescribed in the schedule'. There is, however, ample authority for holding that section 5 of the Limitation Act of 1877 (now section 4 of the present Act) may be applied and proceedings not governed by the ordinary limitation law. I need only refer to 23 All. 277, and 28 All. 48 and to the authorities collected at page 297 of Mitra's Limitation Act. If the rule laid down in section 5 of Act No. XV of 1877 may be applied to cases not governed by that Act, it should also be held to apply to cases under the Limitation Act itself.

Section 10 of the General Clauses Act lays down the same rule as section 4 of the Limitation Act. It would appear that it was the intention of the Legislature that the rule should be of universal application. In the case before us, in the absence of any clear and unmistakable provision that the rule does not apply, I would hold [379] that the plaintiff is entitled to the benefit of section 4 of the Limiation Act.

I regret I am unable to agree with the learned Judges of the Bombay High Court who in *Shevdas Daulatram Marwadi* v. *Narayenvalad Asaji* (1) have arrived at an opposite conclusion. They were of opinion that section 31 of the Limitation Act of 1908 provided a period of grace, and that the special statutory provisions, section 10 of the General Clauses Act and section 4 of the Limitation Act, did not apply to the case.

In my opinion the time fixed for the institution of suits under section 31 is as much 'prescribed' as if suits under that section found place in the schedule. I would, therefore, allow the appeal and remand the case for decision to the court below, having regard to the observations set out above. The plaintiffs should be allowed an opportunity of producing evidence of facts which would entitle them to produce secondary evidence of the bond.

CHAMIER, J.—I agree that the suit should not have been dismissed upon the ground that the succession certificate produced by the plaintiff was not in order. The plaintiff should have been given time to get the certificate amended or extended.

I agree also that some evidence should have been required of the plaintiff that the mortgage-deed was in possession of defendants 2 to 4 before the plaintiff was allowed to use a copy of the deed.

On the question of limitation, I should like to say a few words. Section 31 of the Limitation Act, 1908, provides that, notwithstanding

(1) (1911) I. L. R. 36 Bom. 268.

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anything contained in that Act or in the Limitation Act, 1877, in the territories mentioned in the second schedule (which include the United Provinces) a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of the Act.

The last day of the two years was Sunday, August 7th, 1910. The present suit was instituted on Monday, August 8th. The question is whether the suit was within time with reference to the provisions of section 4 of the Limitation Act or section 10 of the General Clauses Act. It is contended on behalf of the defendant that section 4 of the Limitation Act does not apply, that it should be read with section 3, and that the words "period of limitation pre- [380] scribed" in section 4, mean period of limitation prescribed in the first schedule to the Act. There is a good deal to be said for this view, but it has been held by this court in several cases that the provisions of what is now section 4 apply to periods of limitation prescribed by other Acts.

Supposing, however, that section 4 does not apply to this case for the reason that the period is not "prescribed" within the meaning of section 4 of the Act, I am of opinion that the case is covered by section 10 of the General Clauses Act. The last mentioned section runs as follows:—

"10 (1) Where by any Act of the Governor General in Council or Regulation made after the commencement of this Act any Act or proceeding is directed or allowed to be done or taken in any court or office on a certain day or within a prescribed period, then, if the court or office is closed on that day or the last day of the prescribed period the act or proceeding shall be considered as taken or done in due time if it is done or taken on the next day afterwards on which the court or office is open;

Provided that nothing in this section shall be taken to apply to any act or proceeding to which the Indian Limitation Act, 1877, applies."

The defendant contends that as the Limitation Act, 1877, has been replaced by the Limitation Act, 1908, the proviso should be read as if the figures in it were '1908.'

She relies in the first instance upon section 8 of the General Clauses Act. It appears to me that that section does not apply at all to the case in hand. Section 31 of the Limitation Act, 1908, was enacted to meet a peculiar state of affairs. It is an entirely new provision and cannot in any way be regarded as the re-enactment with modifications of any provision of the Limitation Act of 1877. Sir M. D. Chalmers's note to section 8 of the General Clauses Act (Edition of 1899) is as follows:—

"This section is new and is taken from section 38 (1) of the Interpretation Act, 1889. It enacts as a general rule a provision which is commonly inserted in Acts, (see for instance section 3 of the Code of Criminal Procedure, 1898), but which is sometimes forgotten. Its operation may be illustrated as follows:—Suppose the Acts amending the Indian Penal Code were consolidated and in the new Code, section 188 (disobedience to orders of public servants) became section 200 Then any Act or document which referred to section 188 of the old Code would have to be construed as referring to section 200 of the new Code."

This note seems to me to state accurately the object and scope of the section.

Had the Limitation Act of 1908 contained a provision corresponding to the first few words of section 2 of the Limitation Act, [381] 1877 as that section stood at the date of the repeal of the Act, or to section 3 of the Code of Criminal Procedure, 1898, or section 158 of the Code of Civil Procedure, 1908, then it would have been permissible to read the proviso to section 10 of the General Clauses Act as referring to the Limitation Act of 1908. As matters stand, I am of opinion that this cannot be done. I

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see no reason why the words 'prescribed period' in section 10 of the General Clauses Act should not be held to apply to the period prescribed by section 31 of the Limitation Act of 1908. The defendants rely upon the decision of the Bombay High Court in *Shevdas Daulatram Marwadi* v. *Narayenvalad Asaji* (1). In that case the court gave no reasons for holding that section 10 of the General Clauses Act did not apply to a case like this. The reason given in the order by which the case was referred to the High Court is that the proviso to section 10 of the General Clauses Act should now be read as referring to the Limitation Act of 1908 on account of the provisions of section 8 of the General Clauses Act. For the reasons already given by me, I am of opinion that section 8 does not apply to the case.

It was suggested that the proviso to section 10 was and is surplusage, and that apart from it the preceding part of the section does not apply to any case governed by the Limitation Act for the time being in force. If the opening part of the section was not intended to apply to any case governed by the Limitation Act, it was because it was supposed that sufficient provision had already been made in the Limitation Act itself. The proviso to section 10 of the General Clauses Act still excludes from that section all cases which are covered by provisions of the Limitation Act of 1908, re-enacting with or without modification provisions of the Limitation Act, 1877. I see no reason for reading the provisions of the first paragraph of section 10 of the General Clauses Act in any but their ordinary and natural sense. They seem to me to be wide enough to cover the present case if it is not governed by section 4 of the Limitation Act.

For the above reasons I am of opinion that this suit was filed within time, whether it is governed by section 4 of the Limitation Act or by section 10 of the General Clauses Act. I agree in the order proposed by my learned colleague.

[382] BY THE COURT.—The appeal is allowed. The case will go back to the court below for decision having regard to the observations made in our judgment. The plaintiffs will be allowed an opportunity of adducing evidence of the facts entitling them to produce secondary evidence of the bond. Costs in this appeal will be costs in the cause. Defendants will be entitled to produce rebutting evidence.

Appeal allowed. Cause remanded.

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34 A. 382 (=9 A. L. J. 371=14 I. C. 162).

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

MAKHAN LAL (*Petitioner*) *v.* SRI LAL (*Opposite party*) *

[29th February, 1912]

Act No XII of 1887 (Bengal, N. W. P. and Assam Civil Courts Act), sections 820—Act No. III of 1907, (Provincial Insolvency Act), sections 13, 16, 3—Appeal—Jurisdiction—Effect of order of District Judge assigning work to Additional Judge.

Where an Additional District Judge sentenced an applicant for insolvency under section 43 of the Provincial Insolvency Act, 1907, acting in the matter under an order of the District Judge assigning the particular class of work to him

*First Appeal No 112 of 1911, from an order of A. W. R, Cole, Additional Judge of Aligarh, dated the 23rd of September, 1911.

(1) (1911) I. L. R. 36 Bom. 268.

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under section 8 of the Bengal, N. W. P. and Assam Civil Courts Act, 1887, it was held that an appeal from the Additional Judge's order lay to High Court and not to the District Judge.

[Fol. 36 A 576; Ref. 78 I. C. 701=3 Pat. 609.]

The facts out of which this appeal arose were, briefly, as follows :—

One Makhan Lal applied to the District Judge of Aligarh to be adjudicated an insolvent. The District Judge transferred that application to the file of the Additional District Judge. One Sri Lal was one of the opposing creditors. The Additional Judge found the applicant guilty under section 43 (2) of the Provincial Insolvency Act and sentenced him to one month's simple imprisonment. Makhan Lal appealed to the High Court.

Pandit *Jagjivan Nath Takru*, for the respondent, raised a preliminary objection that the appeal lay to the District Judge and not to the High Court. He submitted that the court of the Additional Judge was inferior to that of the District Judge; *vide* section 39 of the Bengal, Assam and N. W. P. Civil Courts Act, 1887. In section 3 of that Act, the different courts have been named in order of their inferiority. An appeal from an order of a court subordinate to the District Judge lay to the District Judge—*vide* section 46 of the Insolvency Act—and no appeal lay to the High Court.

[383] Mr. *R. K. Sorabji*, for the appellant, here referred to section 20 of the Bengal, N. W. P. and Assam Civil Courts Act. Under section 3 of the Insolvency Act no court except that of the District Judge could hear insolvency petitions. It was only when there was a special notification by the Government to that effect that any other court could hear such petitions. The Additional District Judge could only have a power to try such cases if his court were a court of concurrent jurisdiction with that of the District Judge. The words used in the Act were 'District Court.' In dealing with cases under section 43 the court had power as a criminal court, and the appellant should have been allowed a fair chance and opportunity to explain his conduct.

Pandit *Jagjivan Nath Takru*, for the respondent.

Section 47 of the Civil Courts Act gives general powers to District Judges in the exercise of their original jurisdiction and they have in the exercise of such jurisdiction power to transfer cases. Section 8 (2) gives to Additional Judges the same powers as to the District Judge.

KARAMAT HUSAIN and TUDBALL, JJ.—This is an appeal from the order of the Additional District Judge of Aligarh, whereby he, under section 43 of the Provincial Insolvency Act (Act III of 1907), sentenced the appellant to simple imprisonment for one month in that he had fraudulently or vexatiously concealed or refused to produce certain books of account before the Receiver appointed in the matter of his insolvency. A preliminary objection is taken that the appeal does not lie to this Court but to the court of the District Judge. It is urged that the court of the Additional District Judge is a court subordinate to the District Court as contemplated by section 46 of the Act and that the appeal under that section lies to the District Court. In this connection we may note that one of the grounds of appeal is that the Additional District Judge had no insolvency jurisdiction in that he has not been invested by the Local Government with powers under the proviso to section 3, clause (i) of the Act. In our opinion neither of these two pleas has any force. It is true that for certain purposes an Additional District Judge is subordinate to the District Judge. It is equally true that the Local Government has not issued any notification in respect to the Additional District

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34 A. 382=9 A. L. J. 371=14 I. C. 162.

Judge of Aligarh under section 3, clause I of the Act. Under that section [384] of the Act the District Courts are the courts which have jurisdiction under the Act. The District Court means the principal Civil Court of original jurisdiction of the district. But, under section 8 of the Civil Court Act (Bengal, N.-W.P. and Assam), Additional District Judges appointed under clause (1) of the section shall discharge any of the functions of a District Judge which the district Judge may assign to them and in the discharge of those functions *they shall exercise the same powers as a District Judge.* In the present case the District Judge having assigned one of the functions of a District Judge to his Additional District Judge, the latter has exercised the same powers as the former would have done but for his order. Under section 20 of the same Act the appeal therefore lies to this court. The lower court, therefore was in the present matter not subordinate to the District Court in the manner contemplated in sections 3 and 46 of the Insolvency Act. The lower court, therefore, was part and parcel of the District Court. It had jurisdiction, and the appeal lies to this Court. There remain only the merits of the case for consideration. The applicant was called upon to produce his books. He produced nearly all. In regard to the balance he stated that he had previous to the insolvency proceedings handed them over to three of his creditors. Apparently his case was that an attempt was made at first to come to a settlement with all his creditors, and for that purpose he had made over these books to these three. The opposite party, Sri Lal, is one of these three, and it was he who applied to the court to compel the appellant to produce the books. The appellant and Sri Lal were the only two persons examined by the lower court. The former swore that he had handed over the books and the latter denied it. The court also took into evidence a report by the Receiver that the other two creditors named had also denied receipt of the books from the appellant. These persons were alive, and could and ought to have been called and examined on oath. The inquiry has in our opinion been far too meagre and summary, and the appellant should have a further opportunity of proving his allegation. We, therefore, allow the appeal, set aside the lower court's order and remand the case for full inquiry and decision according to law.

The parties will abide their own costs of this appeal.

Appeal allowed.

34 A. 385 (=14 I. C. 814=9 A. L. J. 375).

[385] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

GUR NANAK PRASAD (*Objector*) *v.* JAI NARAN LAL AND OTHERS (*Decree-Holders*).*

[1st March, 1912.]

Hindu Law—Hindu widow—Reversioners—Decree fairly obtained against widow binding on reversioners, although the widow did not contest the suit.

A decree in a suit against a Hindu widow, respecting property of her husband, of which she is in possession as such widow, may be binding on the reversioners notwithstanding that the widow did not contest the suit, provided that the plaintiffs' case was properly and fairly stated and the widow had reasonable opportunities, of which she did not choose to avail herself, of defending the suit.

[Rel. 70 I. C 862.]

* First Appeal No 124 of 1911 form an order of F. D. Simpson, District Judge of Gorakhpur, dated the 29th of June, 1911.

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34 A. 385=
14 I. C. 814=
9 A. L. J. 375.

THE facts of this case were as follows :—

Sarabjit and Sheo Gobind sold the property in suit to Bhaiya Rajpal Singh on the 7th of December, 1852, for Rs. 275. On the same date Bhaiya Rajpal Singh entered into an agreement with the vendors that on payment of Rs. 200, in any Jeth, he would reconvey the property to the vendors. After Bhaiya Rajpal Singh's death, his son, Suraj Bali mortgaged the whole of that property along with some other property, nominally to Rabsa Kunwar, but really to her husband. Suraj Bali also made a gift of that property to Musammat Adhar Kunwar. Jai Narain and Raghunath Prasad, the representatives in interest of Sarabjit and Sheo Gobind, instituted a suit for redemption of the property transferred on the 7th of December, 1852. In that suit he impleaded Adhar Kunwar and Rabsa Kunwar, whose husband was then dead. The suit was defended by Adhar Kunwar only, and Rabsa Kunwar did not put in any appearance. The court of first instance gave the plaintiffs a decree on the 30th of September, 1907, entitling them to redeem the property on payment of Rs. 200 to Adhar Kunwar. Adhar Kunwar appealed against that decree, but Rabsa Kunwar took no steps in appeal. The appeal was withdrawn, and the result was that the decree of the court of first instance entitling the plaintiffs to redeem on payment of Rs. 200 to Adhar Kunwar became final. Musammat Rabsa Kunwar died, and the reversioners of her husband took possession of the property which was in possession of Rabsa Kunwar. The plaintiffs, decree-holders, deposited the money in Court. The reversioner, Gur Nanak, objected on the ground that as he was no party to the decree, it could not be enforced against him. The objection was accepted by the court of [386] first instance, which rejected the application for execution. In appeal the lower appellate court came to the conclusion that the decree was fairly and properly obtained against Rabsa Kunwar and that the reversioners were bound. It therefore allowed the appeal and sent back the case to the court of first instance for decision on the merits.

The reversioner, Gur Nanak Prasad, appealed to the High Court.

Munshi *Iswar Saran*, for the appellant.

Munshi *Jang Bahadur Lal*, for the respondent.

KARAMAT HUSAIN and TUDBALL, JJ.—Sarabjit and Sheo Gobind sold the property in suit to Bhaiya Rajpal Singh on the 7th of December, 1852, for Rs. 275. On the same date Bhaiya Rajpal Singh entered into an agreement with the vendors that on payment of Rs. 200, in any Jeth, he would reconvey the property to the vendors. After Bhaiya Rajpal Singh's death his son, Suraj Bali, mortgaged the whole of that property along with some other property nominally to Rabsa Kunwar, but really to her husband. Suraj Bali also made a gift of that property to Musammat Adhar Kunwar. Jai Narain and Raghunath Prasad, the representatives in interest of Sarabjit and Sheogobind, instituted a suit for redemption of the property transferred on the 7th of December, 1852. In that suit they impleaded Adhar Kunwar and Rabsa Kunwar, whose husband was then dead. The suit was defended by Adhar Kunwar only and Rabsa Kunwar did not put in any appearance. The court of first instance gave the plaintiffs a decree on the 30th of September, 1907, entitling them to redeem the property on payment of Rs. 200 to Adhar Kunwar. Adhar Kunwar appealed against that decree, but Rabsa Kunwar took no steps in appeal. The appeal was withdrawn, and the result was that the decree of the court of first instance entitling the plaintiffs to redeem on payment of Rs. 200 to Adhar Kunwar became final. Musammat Rabsa

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34 A. 385=
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9 A. L. J. 375.

Kunwar died, and the reversioners of her husband took possession of the property which was in possession of Rabsa Kunwar. The plaintiffs, decree-holders, deposited the money in court. The reversioner, Gur Nanak, objected on the ground that, as he was no party to the decree, it could not be enforced against him. The objection was accepted by the court of first instance, which rejected the application for execution. In appeal the lower appellate court came to [387] the conclusion that the decree was fairly and properly obtained against Rabsa Kunwar and that the reversioners were bound. It therefore allowed the appeal and sent back the case to the court of first instance for decision on the merits. The reversioner comes to this court in appeal, and it is urged by his learned vakil that as the widow did not protect the estate of her husband by contesting the suit for redemption, the decree is not binding on the reversioner. In support of the proposition he refers to the following cases:—*Nugender Chunder Ghosh* v. *Sreemutty Dossee* (1), *Sant Kumar* v. *Deo Saran* (2), *Sachit* v. *Budhua Kuar* (3), *Jevan Lalju* v. *Vetra* (4) and F. A. No. 384 of 1910, decided by a Bench of this Court, on the 21st of February, 1912.

Every case has to be decided with reference to its own particular facts and the rule laid down in one case does not apply to another case when its facts are different. In the case before us the representatives of the mortgagors did all they could to have the suit fairly and properly tried. They honestly disclosed all the facts which were necessary for the trial of the case. They made Rabsa Kunwar a defendant, and they had notice served upon her. It was beyond their power to make her *contest* the suit and she did not do so because she, as a sub-mortgagee, had no valid defence against them, and there is nothing on the record, and nothing is now put forward, to show that she had any good defence which she neglected to put forward against the plaintiffs. In these circumstances we are of opinion that the decree which the plaintiffs obtained was obtained fairly and properly and was binding on the reversioner, and the mere fact that the widow did not contest the suit is no reason to render the decree ineffectual against the reversioner. There is no provision in the law of British India under which a plaintiff can force a widow to *contest* his claim, and, in the absence of such provision, to hold that a decree properly and honestly obtained by a plaintiff against a Hindu widow is not binding on a reversioner unless the suit has been actually *contested* by the widow is to cast upon the plaintiff a duty which it is impossible for him to perform. The reversioners have their remedy, if any, against their own mortgagors. The result is that we dismiss the appeal with costs.

Appeal dismissed.

(1) (1867) 8 W. R. P. C. 17.
(2) (1886) I. L. R. 8 All. 865.
(3) (1886) I. L. R. 8 All. 429.
(4) (1908) 5 Bom. L. R. 885.

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APPELLATE CIVIL.

34 A. 388=9 A. L. J. 381 =14 I. C. 240.

34 A. 388 (=9 A. L. J. 381=14 I. C. 240.)

[388] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

HET SINGH AND OTHERS (*Judgment-Debtors*) *v.* TIKA RAM (*Decree-halder*).*

[1st March, 1912.]

Civil Procedure Code (1908), *section* 148 ; *order XXXIV, rule* 8—*Mortgage—Redemption —Mortgage money not paid within time limited by decree—Power of Court to extend time.*

Section 148 of the Code of Civil Procedure applies to cases in which the time fixed by the Code of Civil Procedure for the doing of some act is extended and not to the extending of the time fixed by a mortgage decree for the payment of a prior mortgage.

The plaintiff, in a suit for redemption of a mortgage obtained a decree which provided in the event of non-payment, not that he should be debarred from all right to redeem the mortgaged property, but that his suit should be dismissed. Owing to a *bona fide* mistake, the plaintiff paid into court within the time limited less than the sum actually due.

Held that the Court had power under order XXXIV, rule 8, of the Code of Civil Procedure to extend the time limited for payment of the full decretal amount.

[Fol. 39 Mad. 876=31 I. C. 240.]

IN this case one Khushal Singh mortgaged the property in suit to Bhagwant Singh on the 19th of November, 1889. He again mortgaged it to Tika Ram on the 2nd of January, 1894. Bhagwan Singh brought a suit on his mortgage without impleading Tika Ram and got a decree on the 23rd of June, 1900. In execution of which he bought the property on the 15th of August, 1904. Tika Ram, on the 7th of February, 1910, got a decree to redeem the motgage of Bhagwant Singh on payment of Rs. 462 with interest. The decree was in general terms and did not set out the amount of interest which Tika Ram had to pay. It provided that if Tika Ram failed to pay up to the 15th of *August*, 1904, his suit was to be dismissed. The date is presumably wrong. The 15th of August, 1910, was the date fixed. The date of the mortgage in favour of Bhagwant Singh is also wrongly shown as *November*, 1899, instead of the 19th of November, 1889. On the 2nd of August, 1910, Tika Ram paid into the court Rs. 2,278, calculating interest from *November*, 1890. The sum was less than the full amount due on the mortgage if calculated from the 19th of November 1889. The judgment-debtors taking advantage of the mistake applied on the 21st of November, 1910, that Tika Ram's claim be dismissed on the ground of the [389] provision in the decree, and that costs be awarded to the applicants. The court of first instance acting under section 148, Civil Procedure Code, enlarged the time for payment up to the 15th of February, 1911, and rejected the application.

In appeal two points were considered :—

(1) Could the time for the payment of the money due on the mortgage of Bhagwant Singh be extended under section 148, Civil Procedure Code ?

(2) Was good cause shown for extending the time ?

The lower appellate court found that the time for the payment of money under a mortgage decree could be extended under section 148,

* Second Appeal No. 758 of 1911 from a decree of A. Sabonadiere, District Judge of Aligarh, dated the 2nd of May 1911, confirming a decree of Jagat Narain, Additional Subordinate Judge of Aligarh, dated the 10th of January, 1911.

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34 A. 388=9 A. L. J. 381 =14 I. C. 240.

Civil Procedure Code, and that good cause was shown for the extension. On the above findings the lower appellate court upheld the order of the first court.

The defendants appealed to the High Court.

Munshi *Gulzari Lal*, for the appellants.

Mr. *G. W. Dillon*, for the respondent.

KARAMAT HUSAIN and TUDBALL, JJ :—One Khushal Singh mortgaged the property in suit to Bhagwant Singh on the 19th of November, 1889. He again mortgaged it to Tika Ram on the 2nd of January, 1894. Bhagwant Singh brought a suit on his mortgage without impleading Tika Ram and got a decree on the 23rd of June, 1900 in execution of which he bought the property on the 15th of August, 1904. Tika Ram, on the 7th of February, 1910, got a decree to redeem the mortgage of Bhagwant Singh on payment of Rs. 462 with interest. The decree was in general terms and did not set out the amount of interest which Tika Ram had to pay. It provided that if Tika Ram failed to pay up to the 15th of August, 1904, his suit was to be dismissed. The date is presumably wrong. The 15th of August, 1910, was the date fixed. The date of the mortgage in favour of Bhagwant Singh is also wrongly shown as November, 1890, instead of the 19th of November, 1889. On the 2nd of August, 1910, Tika Ram paid into the court Rs. 2,278 calculating interest from November, 1890. The sum was less than the full amount due on the mortgage if calculated from the 19th of November, 1889. The judgment-debtors taking advantage of the mistake applied on the 21st of November, 1910, that Tika Ram's claim be dismissed on the ground of the [390] provision in the decree and that costs be awarded to the applicants. The Court of first instance acting under section 148, Civil Procedure Code, enlarged the time for payment up to the 15th of February, 1911, and rejected the application.

In appeal two points were considered:—

(1) Could the time for the payment of the money due on the mortgage of Bhagwant Singh be extended under section 148, Civil Procedure Code?

(2) Was good cause shown for extending the time?

The lower appellate Court found that the time for the payment of money under a mortgage decree could be extended under section 148, Civil Procedure Code, and that good cause was shown for the extension. On the above findings the lower appellate court upheld the order of the first court.

In second appeal it is urged that section 148, Civil Procedure Code has no application; that an executing court has no power to extend the time fixed by the mortgage decree for the payment of a prior mortgagee, and that no good cause was shown for the extension of the time for the payment. We are of opinion that section 148, Civil Procedure Code, applies to cases in which is extended the time fixed by the Code of Civil Procedure for the doing of some act and not to the extending of the time fixed by a mortgage decree for the payment of a prior mortgage.

In the decree in a redemption suit "the court may, under order XXXIV, rule 8, upon good cause shown and upon such terms, if any, as it thinks fit from time to time postpone the day fixed for payment." The learned vakil for the appellants concedes this, but urges that time can be extended when the decree in a redemption suit is drawn up in the form prescribed by law, but that if it provides that in case of failure to pay within the period fixed by the decree, the suit shall stand dismissed, no execution

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can be granted in contravention of the provision in the decree. We are unable to accept the contention. The decree in the case before us was a decree in a redemption suit, and the provision therein that in case of failure to pay the plaintiff's suit shall stand dismissed was carelessly put in for the provision that the plaintiff shall be debarred from all right to redeem the mortgaged property, inasmuch as the suit was for redemption and the dismissal of such a [391] suit had the effect of debarring the plaintiff from all right to redeem.

We are satisfied that Tika Ram in calculating the interest from November, 1890, made a *bona fide* mistake which constituted a good cause for the extension of the time for the payment of the prior mortgage of the 19th of November, 1889. We therefore uphold the decree of the lower appellate court, but not for the reasons set out by that court in its judgment. The result is that we dismiss the appeal with costs.

Appeal dismissed.

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34 A. 391 (=9 A. L. J. 383=14 I. C. 191).

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

GUR CHARAN DAS (*Defendant*) *v.* HAR SARUP (*Plaintiff*).*

[9th March, 1912.]

Act (Local) No. 1 of 1901 (General Clauses Act), section 23—Act (Local) No. 1 of 1900 (United Provinces Municipalities Act), section 187—Municipality—Powers of Government to frame rules—Rules as to Municipal elections—"Previous publication"—"Competent court."

Certain draft rules relating to municipal elections were published in the local Gazette These draft rules were then considered by the Government in connection with such criticisms as had been presented, and finally a set of rules was published in the Gazette as having been made under section 187 of the United Provinces Municipalities Act 1900.

Held that such rules were none the less validly passed because in some details they differed from the draft rules previously published.

The rules so made provided that a municipal election might be questioned by means of a petition presented to 'a competent court.'

Held that the expression 'competent court' so used meant a Civil Court of competent jurisdiction with reference to the valuation given by the petitioner in his petition.

[Ref. 35 All. 208.]

THIS was a suit instituted in the court of a Munsif praying for a declaration that a certain municipal election was invalid. The suit was thrown out by the Munsif upon the ground that he had no jurisdiction to entertain it. The plaintiff appealed, and the Additional District Judge of Meerut, coming to the conclusion that the Munsif had jurisdiction to try the suit, remanded it to his court for trial. From that order of remand the defendant appealed to the High Court, his principal plea being the invalidity of the rules framed by the local Government under which the right of questioning a municipal election by means of a petition presented to a "competent court" was granted.

[392] Mr. *C. Dillon* and Munshi *Girdhari Lal Agarwala*, for the appellant.

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* First Appeal No. 117 of 1911, from an order of C. E. Guiterman, Additional Judge of Meerut, dated the 31st of August, 1911.

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APPELLATE CIVIL.

34 A. 391=9 A. L. J. 383 =14 I. C. 191.

Munshi *Govind Prasad*, for the respondent.

KARAMAT HUSAIN and TUDBALL, JJ. :—This was a suit instituted in the court of a Munsif for a declaration that a certain municipal election was invalid. The learned Munsif decided that he had no jurisdiction to entertain the suit. There was an appeal to the learned Additional District Judge of Meerut, who came to the conclusion that the Munsif had jurisdiction to try the suit and remanded the case to his court for trial on the merits. An appeal is preferred to this Court from the order of remand, and the contention of the learned counsel for the appellant is that under section 187 of the Municipalities Act, No. 1 of 1900, a previous publication of the rules finally made by the local Government is a condition precedent to the validity of such rules. His contention is that the draft of these rules was published in the local Gazette of these provinces on the 27th of February, 1909, and that in that draft a rule No. 39 ran as follows :—"The validity of an election may be questioned by a petition to the District Magistrate on the ground, etc." that when that rule was published in the official Gazette of these provinces on July the 30th, 1910, it assumed the following form :—" Rule 42, clause 1. The validity of an election made in accordance with these rules shall not be questioned except by a petition presented to a competent court within fifteen days after the date on which the election was held by a person or persons enrolled," &c. and that as there was no second publication of the amended rule wherein the expression "District Magistrate" was replaced by the expression "competent court," the rules as published on July the 30th, 1910, are not validly published rules. The term "previous publication" has been defined in the General Clauses Act (Local), No. 1 of 1904, section 23. The last clause of that section is in the following terms :—" The publication in the Gazette of a rule or bye-law purporting to have been made in the exercise of a power to make rules or bye-laws after previous publication shall be conclusive proof that the rule or bye-law has been duly made." This section defines what is meant by " previous publication." In the case before us the draft rules were published in the official local Gazette of 27th February, [393] 1909, and notice was given to the public that the rules would be taken into consideration by the local Government on or after the 15th of May, 1909, and in pursuance of that notice after considering all criticism the rules as already mentioned were published in the official Gazette of these provinces on the 30th of July, 1910, which gave the power of hearing the petitions questioning the validity of an election to a competent court. The publication, therefore, was a valid publication of the rules, and the rules published in the official Gazette of these provinces on the 30th of July, 1910, no doubt, have the force of law.

The second question is as to which court is a competent court within the meaning of rule 42, published on the 30th of July, 1910. We have no doubt that the expression " competent court " within the meaning of that rule means a Civil Court of competent jurisdiction with reference to the valuation given by the petitioner on his petition.

The question of the validity of the election is purely a civil question and the words " District Magistrate " have been intentionally replaced by the words "competent court."

The result is that we dismiss the appeal with costs.

Appeal dismissed.

34 A. 393 (=9 A. L. J. 481=14 I. C. 766=13 Cr. L. J. 302).

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REVISIONAL CIVIL.

REVISIONAL CIVIL.

Before Mr. Justice Banerji.

34 A. 393=9 A. L. J. 481 =13 Cr. L. J. 302.

IN THE MATTER OF THE PETITION OF NAWAL SINGH.*

[11th March, 1912.]

Criminal Procedure Code, section 476—"Court"—Civil Procedure Code (1908), *section* 115—*Revision—Inexpediency of order no ground for revision on the civil side.*

The word "court" in section 476 of the Code of Criminal Procedure includes the successor of the Judge before whom the alleged offence was committed. *Bahadur* v. *Eradatullah Mallick* (1) followed.

Whether a particular order is expedient or not is not a ground on which the High Court can interfere in revision under section 115 of the Civil Procedure Code.

[Ref. 27 I. C. 145=12 A. L. J. 1003=16 C. L. J. 97 ; 20 Cr. L. J. 226=49 I. C. 850 ; 56 I. C. 859=1920 Pat. 205 ; Fol 37 All. 344=29 I. C 97 ; 82 I. C. 285=22 A. L. J. 772; Ref 78 I. C. 969; Rel. 71 I. C. 596=4 Lah. 58.]

One Sumat Prasad brought a suit against Nawal Singh and others on two promissory notes. This was suit No. 200 of 1906. In answer to the claim Nawal Singh denied the genuineness of one of the promissory notes and pleaded payment of the other and produced a receipt. As regards both the promissory notes the [394] court of first instance held the defendant's pleas to be false and found in favour of the plaintiff. The decree of the first court was made on the 15th of April, 1908. On the 15th of May, 1908, the plaintiff applied to the court for sanction to prosecute the defendants to the suit for falsely verifying their written statement and for committing forgery in respect of the receipt produced. Meanwhile the defendants preferred an appeal to the High Court on the 12th of May, 1908. Thereupon, it appears, the Subordinate Judge refused to take action and directed the application to be shelved, giving leave to the plaintiff to renew his application after the decision of the appeal. The appeal was dismissed on the 19th of January, 1910. The plaintiff thereupon asked the Court to take his application for sanction into consideration. The application was rejected on the 13th of February, 1911 ; but on that date the successor of the Subordinate Judge who had originally tried the suit made an order directing an inquiry to be held under section 476 of the Code of Criminal Procedure. This Subordinate Judge was in turn transferred, and the case was heard by his successor, who, on the 16th of November, 1911, ordered the prosecution of Nawal Singh for offences under sections 193 and 471 of the Indian Penal Code. Nawal Singh thereupon applied to the High Court for revision of this order.

Mr. *A. H. C. Hamilton* and Mr. *W. Wallach*, for the petitioner.

Mr. *A. E. Ryves*, for the Crown (opposite party).

BANERJI, J.—This is an application for the revision of an order made by the Subordinate Judge of Saharanpur, directing the prosecution of the applicant for the offences mentioned in that order. It appears that one Sumat Prasad brought a suit against the applicant and others on two promissory notes. This was suit No. 200 of 1906. In answer to the claim, the applicant denied the genuineness of one of the promissory notes and pleaded payment of the amount of the other and produced a receipt. As regards both the promissory notes the court of first

* Civil Revision No. 145 of 1911.

(1) (1910) I. L. R. 37 Cal. 642.

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REVISIONAL CIVIL.

34 A. 393 = 9 A. L. J. 331 = 13 Cr. L. J. 302.

instance held the defendant's pleas to be false and found in favour of the plaintiff. The decree of that court was made on the 15th of April, 1908. On the 25th of May, 1908, the plaintiff, Sumat Prasad, made an application to the court for sanction to prosecute the defendants to the suit for **[395]** falsely verifying their written statement and for committing forgery in respect of the receipt produced. Meanwhile the defendants preferred an appeal to this court on the 12th of May, 1908. Thereupon, it appears, the Subordinate Judge refused to take action and directed the application to be shelved, giving leave to the plaintiff to renew his application after the decision of the appeal by this court. The appeal was dismissed by this court on the 19th of January, 1910. The plaintiff thereupon asked the court to revive the application for sanction and to grant him the sanction he had applied for. The application was rejected on the 13th of February, 1911. But on that date the successor of the Subordinate Judge, who had originally tried the suit, made an order directing an inquiry to be made under section 476 of the Code of Criminal Procedure. Unfortunately this Subordinate Judge was transferred from the district and the case was heard by his successor, who, on the 16th of November, 1911, ordered the prosecution of the applicant for offences under section 193 and 471, Indian Penal Code. It is the correctness of this order which is challenged in the application before me. One of the grounds of the application is that the Subordinate Judge had no jurisdiction to make the order passed by him. This ground is, in my opinion, untenable. The word " court " in section 476, includes, as was held by a recent Full Bench of the Calcutta High Court in *Bahadur* v. *Eradatullah Mallick* (1), the successor of the Judge before whom the alleged offence was committed. The learned Subordinate Judge, therefore, had jurisdiction to make an inquiry under section 476 and to pass an order under that section. It is next urged that on the ground of expediency and in view of the delay which has taken place in making the order, this Court ought to interfere. I am of opinion that this Court is unable to interfere with the order of the court below. In accordance with the rulings of this Court, the present application could only be preferred under section 115 of the Code of Civil Procedure. The case does not come within the purview of that section. The Court had jurisdiction to make the order and committed no illegality in passing it. Whether the order was expedient or not is not a ground on which this Court can interfere under the provisions of the section mentioned above. No doubt, action should be taken under section 476 as promptly as possible **[396]** But there were circumstances in this case which might have justified the delay. However, I do not wish to go into that question inasmuch as, in my opinion, this Court cannot interfere in the matter. I dismiss the application but make no order as to costs.

Application dismissed.

(1) (1910) I. L. R. 37 Cal. 642.

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34 A. 396=
14 I. C. 172=
9 A. L. J. 385.

34 A. 393 (=14 I. C. 172=9 A. L. J. 385).

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

KHETPAL (*Decree-holder*) v. TIKAM SINGH (*Judgment-debtor*).*
[11th March, 1912].

Civil Procedure Code (1882), *section 230—Execution of decree—Limitation—Application for transfer of decree—Subsequent application for execution not in continuation of application for transfer.*

Held that an application for execution can in no sense of the words be regarded as an application in continuation of an application for transfer of a decree from one court to another. In order that an application may be a continuation of another application, it is necessary that the two applications be of the same nature, and the application for transfer being an application of an entirely different nature from that for execution of a decree does not suspend the operation of section 230 of the Code of Civil Procedure, 1882. *Sundar Singh* v. *Doru Shankar* (1) applied. *Ram Sahai* v. *Nanni* (2) dissented from.

The facts of this case were briefly as follows :—

One Khetpal obtained a decree against the respondent on the 19th of December, 1896, at Agra. On the 15th of December, 1908, he applied for transfer of the decree for execution to Aligarh. On the 24th of February, 1909, an order was made granting this application. On the 23rd of March, 1909, an application was made for execution at Aligarh. The judgment-debtor objected that it was barred by limitation, as more than 12 years had elapsed since the passing of the decree. The Court of first instance held that the present application was an application in continuation of the application for transfer, which was within time, and it dismissed the objection. The lower appellate court reversed this order on the ground that an application for transfer could not be said to be an actual demand for execution, though it might be a step in aid of execution. The decree-holder appealed.

Munshi *Benode Bihari* (with him Munshi *Gobind Prasad*), for the appellant, submitted that the application was within time, being merely in continuation of the application for transfer. He relied on *Ram Sahai* v. *Nanni* (2).

[397] Babu *Sital Prasad Ghosh*, for the respondent, contended that the application was time-barred. He cited *Sundar Singh* v. *Doru Shankar* (1).

Benode Behari was heard in reply.

KARAMAT HUSAIN and TUDBALL, JJ. :—In this case the decree-holder obtained a simple money decree against the judgment-debtor on the 19th of December, 1896. Various infructuous applications were made for execution of the decree, and the decree-holder, on the 15th of December, 1908, applied for the transfer of the decree from the court at Agra, to that at Aligarh. The application was granted on the 24th of February, 1909. He, then, on the 23rd March, 1909, applied to the Court at Aligarh for execution. The court came to the conclusion that the application, dated the 23rd of March, 1909, was barred by the 12 years' rule of limitation. The decree-holder has preferred an appeal to this Court, and his learned vakil argues that the application in question is an applica-

* Second Appeal No. 974 of 1911 from a decree of A. Sahonadiere, District Judge of Aligarh, dated the 19th of May, 1911, reversing a decree of Banke Behari Lal, Subordinate Judge of Aligarh, dated the 4th of January, 1910.

(1) (1897) I. L. R. 20 All. 78.

(2) Weekly Notes, 1886, p. 137.

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34 A. 396=14 I. C. 172=9 A. L. J. 365.

tion in continuation of the application for transfer, dated the 15th of December, 1908, and is thus not barred by limitation. In support of this contention reliance is placed upon *Ram Sahai* v. *Nanni* (1). It lays down in substance that an application for transfer is tantamount to an application for execution. The learned vakil for the judgment-debtor relies upon *Sundar Singh* v. *Doru Shankar* (2) in which a Bench of this Court was of opinion that an application for transfer was not an application for execution of a decree, though they rejected the application for revision on another ground. We are of opinion that an application for execution can in no sense of the words be regarded as an application in continuation of an application for transfer of a decree from one court to another. In order that an application may be a continuation of another application, it is necessary that the two applications be of the same nature, and the application for transfer being an application of an entirely different nature from that for execution of a decree, we agree with the view taken by the learned Judges in *Sundar Singh* v. *Doru Shankar* in preference to that expressed in *Ram Sahai* v. *Nanni*. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

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34 A. 398 (=16 C. W. N. 675=12 M. L. T. 95=15 I. C. 673=39 I. A. 142=9 A. L. J. 730=14 Bom. L. R. 485=1912 M. W. N. 641=16 C. L. J. 60=23 M. L. J. 200.)

[398] PRIVY COUNCIL.

DHARAM KUNWAR (*Plaintiff*) *v.* BALWANT SINGH (*Defendant*).

[30th, 31st January and 23rd April, 1912.]

[*On appeal from the High Court at Allahabad.*]

Estoppel—Estoppel by conduct—Hindu Law—Adoption by Hindu widow under authority of her husband—Subsequent suit to set aside adoption as invalid—Denial of any valid authority to adopt—Adopted son having on faith of representations by widow married, performed shradh of adoptive father and incurred heavy liabilities in maintaining his change of status and privileges.

In this case, which was an appeal from the decision of the High Court in *Dharam Kunwar* v. *Balwant Singh*, I. L. R., 30 All. 549, their Lordships of the Judicial Committee, while expressing their opinion that the question in the case might well be decided as one of fact on the appellant's own statements without recourse to the doctrine of estoppel, did not differ from the view of the High Court as to the applicability of that doctrine. The appellant, they held, had asserted her authority to adopt in the most solemn manner under her hand and seal, and her conduct both before and after that assertion had been of a like unequivocal character. She could not now be allowed to change her story without grave injustice ensuing to the respondent, who had acted in reliance upon her deliberate and repeated representations. The estoppel, however, their Lordships said, must be taken as being purely personal, and did not bind any one claiming by an independent title.

[**Ref**: 38 Mad. 1105=24 I. C. 999; **Dist**: 60 I. C. 246=1920 M. W. N. 721; **Fol**: 77 I. C. 214=33 M. L. T. 191=46 M. L. J. 52=19 L. W. 83=1924 Mad. 308.]

APPEAL from a decree (4th August, 1908) of the High Court at Allahabad, which affirmed a decree (26th February, 1906) of the Subordinate Judge of Saharanpur dismissing the appellant's suit.

The suit was brought to obtain a declaration that the plaintiff had no power to adopt the defendant (respondent), and that in fact she never did

Present.—Lord SHAW, LORD ROBSON, Sir JOHN EDGE and Mr. AMEER ALI.

(1) Weekly Notes, 1886, p. 187.

(2) (1897) I. L. R. 20 All. 78.

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34 A. 398=16 C. W. N. 675=12 M. L. T. 95=15 I. C. 673=39 I. A. 147=9 A. L. J 730=14 Bom. L. R. 435=1912 M. W. N. 641=16 C. L. J. 60=23 M. L. J. 200.

adopt him, and that a document, called a deed of adoption, was null and void. The main question for determination in this appeal was whether the appellant was, or was not, estopped from questioning the validity of the adoption, and both the Courts below decided that question against the appellant.

The facts of the case will be found sufficiently stated in the judgment of the High Court (*Sir John Stanley C. J.*, and Mr. *Justice Banerji*) which is reported in I. L. R. 30 All. 549.

On this appeal :—

Sir R. Finlay, *K. C.*, and *Ross*, for the appellant, contended that the Courts in India had erred in holding that the appellant was estopped from questioning the validity of the adoption ; and that even if the evidence of the respondent as to the adoption were true, it did not establish an adoption according to the requirements of [399] Hindu law. Reference was made to the Evidence Act (I of 1872) section 115 ; *Sarat Chunder Dey* v. *Gopal Chunder Laha* (1) ; *Parvatibayamma* v. *Ramakrisnna Rau* (2) ; *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (3) ; which was distinguished ; *Gurulingaswami* v. *Ramalakshmamma* (4) ; *Durga* v. *Kushalo* (5) ; *Oomrao Singh* v. *Mahtab Koonwer* (6) ; *Sukhbasi Lal* v. *Guman Singh* (7) which was distinguished; *Gopee Lall* v. *Chuntraolee Buhoojee* (8) [*De Gruyther*, *K C.*, referred to *Suryanarayana* v. *Venkataramana* (9) ; as to the authority of the appellant to adopt] *Tulshi Ram* v. *Behari Lal* (10) [*De Gruyther*, *K. C.*, referred on the question of estoppel to *Sarat Chunder Dey* v. *Gopal Chunder Laha* (11).] The respondent would not suffer materially in any way by the setting aside of the adoption ; there was no evidence to show any prospective loss.

De Gruyther, *K. C.*, and *B. Dube*, for the respondents, were not called upon.

1912, *April 23rd* :—The judgment of their Lordships was delivered by Lord ROBSON : —

The appellant is the widow of one Raja Raghubir Singh, and she sued the defendant in the Court of the Subordinate Judge of Saharanpur to obtain a declaration that she had not adopted him as a son to her deceased husband, and that if, in fact, any ceremony of adoption had been performed, it was invalid, owing to the absence of authority on her part from her husband to make such adoption. She further prayed that a document purporting to be a deed of adoption, dated the 13th of January, 1859, should be declared void as being executed by her without such authority as aforesaid.

The Subordinate Judge dismissed the suit with costs and the High Court of Allahabad confirmed his decree.

[400] Raja Ragbubir Singh was the owner of the extensive Landhaura estate or raj in the district of Saharanpur, in the United Provinces. He died on the 23rd of April, 1868, at the age of 20 years, leaving the appellant, the Rani, his widow and sole heir. She was then only 14 years old, and *enceinte*. Raghubir Singh was a religious man and was desirous of

(1) (1892) I. L. R. 20 Cal. 296 : L. R. 19 I. A. 203.
(2) (1894) I. L. R. 18 Mad. 145.
(3) (1887) I. L. R. 11 Bom. 381 (396).
(4) (1894) I. L. R. 18 Mad. 53.
(5) Weekly Notes, 1882, p. 97.
(6) (1868) 3 Agra, 103 *a*.
(7) (1879) I. L. R. 2 All. 366.
(8) (1872) L. R I. A Sup. Vol. 131 : 11 B. L. R. 391 : 19 W. R. P. C. 12.
(9) (1906) I. L. R. 29 Mad. 382 : L. R. 33 I. A. 145.
(10) (1839) I. L. R. 12 All. 328 (338).
(11) (1892) I L. R. 20 Cal. 296 (313, 314) : L. R. 19 I. A. 203 (218).

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34 A. 398=16 C. W. N. 673=12 M. L. T. 95=15 I. C. 673=39 I A. 152=9 A. L. J 730 =14 Bom. L. R. 436=1912 M. W N. 641 =16 C L J. 60=23 M. L. J. 200.

leaving behind him a son who should perform his *shradh* ceremonies and transmit to future generations the name and prestige of the Raj. When, during his last illness, he became hopeless of recovery, recognising the possibility that the child about to be born to his wife might be a girl, or might not survive, he gave formal and emphatic directions to his wife in regard to the adoption of a son. The Rani herself has pledged her word as to the nature and scope of those directions on more than one public and important occasion. She did so particularly in the deed of the 13th of January, 1899, and in her defence to the action of one Baldeo Singh, which will be hereafter referred to. In the deed, which she undoubtedly executed with full appreciation of its contents, she says :—

"He made this will to me by way of precaution. If (God forbid) you give birth to a daughter, or if a son be born but die after his birth, I strictly order you to adopt some boy to me so that he might perform my *shradh* ceremony and yours, and perpetuate my name, and after your death become the absolute owner and possessor of the whole of my estate. If (God forbid) the son who might be adopted under this authority should die in your life-time, you will have power to adopt another boy."

In her defence to Baldeo Singh's action she informed the Court that she had full oral authority from her husband, and that he had not limited her to one, two, three, or four sons.

The Rani gave birth to a son on the 16th of December, 1868. He died on the 31st of August, 1870, leaving the Rani owner of the Raj. In 1877 she adopted a boy named Tohfa Singh, declaring by deed that she did so in accordance with the will of her husband. Tohfa Singh died two years after, and the Rani thereupon, in 1883, adopted a boy named Ram Sarup, still purporting to act in accordance with her husband's will. Ram Sarup died in 1885, and in 1893 the Rani made arrangements with a view to adopting a third boy. She executed an agreement in 1893 with one Lada Singh whereby he agreed to give her his son "to comply with the will of her husband," but before the adoption was formally carried out this boy unfortunately died in 1896.

[401] These successive deaths seriously impressed the mind of the Rani, and she consulted her priests as to how the evil spirits might best be propitiated and appeased. Acting on priestly advice she went on pilgrimages to Gaya and other places, and after making religious sacrifices she proceeded to arrange for another adoption. On the 2nd June, 1898, she entered into a written agreement with Ram Niwas, the father of the respondent, whereby he made over to her his two sons, Balwant Singh (respondent), aged 14 years, and Tungal Singh, aged 12 years :—

"In order that she may adopt any one of them she pleases having regard to their capability and her choice. Now the sons of me, the executant, shall live under the protection and custody of the said Rani Sahiba subject to the fulfilment of the further conditions necessary for the validity of the adoption, the enforcement of which depends upon a particular time which may be considered suitable according to the rules of astrology. I shall have no claim as to their protection and guardianship."

The Rani ultimately selected the respondent, Balwant Singh, and preparations were made for his adoption on an imposing scale. The 13th of January, 1899, was appointed for the ceremony, and on that day a great entertainment was given by the Rani. The European and Indian officials of the district, together with hundreds of friends, relations, and caste-fellows, were present at the invitation of the Rani, and were hospitably regaled by her. The religious ceremonies proper to an adoption were all carried out and the newly adopted son was conducted to the *gaddi*, or throne, where he was formally installed.

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34 A. 398=16 C. W. N. 675=12 M. L. T 95=15 I. C. 673=39 I. A. 142=9 A. L. J. 730 =13 Bom. L. R. 488=1912 M. W. N. 641 =16 C. L. J. 60=23 M. L. J. 200.

The Rani next proceeded to bring about the marriage of the respondent, and that ceremony was celebrated at her expense and in a manner befitting his new rank. In fact the respondent was thenceforth treated as a member of the Rani's family and cut off altogether from the family of his natural father.

In the following year Baldeo Singh, claiming as reversionary heir, instituted a suit against the Rani and the respondent, in which he sought to have it declared that he was entitled to the property on the death of the Rani, and that the adoption of Balwant Singh was invalid. The Rani defended that suit, and, acting upon her instruction, her pleader made the statement as to her authority before mentioned and she herself executed and filed a written statement alleging that she had in fact adopted the respondent, and that the adoption was valid in every respect. [402] Baldeo Singh failed in that suit on the ground that he was not a reversioner and had no *locus standi* to impeach the adoption in question, but the allegations of fact by the Rani in regard to the adoption are now very properly pressed against her.

The adopted son and the Rani have since quarrelled, and in this action she seek to get rid of the adoption altogether.

At one time she stated that the seal affixed to the deed of adoption was not her seal, but she did not attempt to support this allegation by production of the seal regularly used by her, saying that she had mislaid it somewhere. However, documents admittedly executed by her and bearing seal impressions identical with that in dispute were produced and the genuineness of the seal on the deed of adoption was placed beyond doubt.

The learned Subordinate Judge stated the issue or questions arising in the case as follows :—

"1. Whether the plaintiff had knowledge of the contents of the deed of adoption when she executed it and got it registered or whether she had no knowledge of them?

"2. Was or was not the defendant adopted by the plaintiff ?

"3. Had or had not the plaintiff any authority from her husband to adopt the defendant ?

"4. If the first and second issues be decided against the plaintiff, how will it affect the claim? "

With regard to the first of these questions, the Rani pleaded that she was a *parda nashin* lady, and had never understood the contents of the document, or had even known what it was ; but the learned Subordinate Judge formed the opinion that the long examinations to which she had, on different occasions been subjected, and the extreme shrewdness which she displayed in dealing with the questions, showed that she was an acute and intelligent lady, and that her only difficulties arose from the impossibility of making her statements fit with undoubted facts. The deed was executed by her under circumstances of the greatest publicity, and with the assistance of competent and independent advice from many quarters. It was attested by no less than 28 witnesses. It was subsequently registered (on her own admission of execution) and was frequently and openly referred to by the Rani as a deed of adoption. The Trial Judge therefore found that she executed the deed with full knowledge and understanding of its contents, and the High Court agreed with him.

[403] The Rani next denies that the adoption was in fact carried out. The great entertainment of the 13th January, 1899, was, according to her, only an intimation to the public that she meant at some further time to carry

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the adoption into effect. On this point, except for the allegations of the Rani herself, the only evidence worth considering was practically all one way, and as to the Rani's testimony, the learned Judge says, in plain terms, that she had made so many untrue statements that it was impossible to believe her, while the evidence produced on her behalf was utterly unreliable and untrue. The High Court agree with this finding, as to the justice of which there can be no doubt.

The third question, viz. as to whether the Rani had authority from her husband to adopt the defendant, gives rise to the point which has been argued before their Lordships. The Rani contends that the authority conferred upon her by her husband did not extend, according to its strict wording, beyond the adoption of a second boy in case the first adopted son should die, and that such authority was therefore exhausted by the adoption of Ram Sarup. Their Lordships are of opinion that this was not the true effect of the authority, in fact, conferred upon the Rani. She may not have remembered with precision the words used by her husband on his death-bed, but whatever the exact words may have been, undoubtedly the effect they then produced on her mind, and on the minds of those about her, was that which she set forth in her statement in Baldeo Singh's action, viz. "that her husband had not limited the authority to make such adoption to one, two, three, or four sons."

That is the meaning on which she has consistently acted until her quarrel with the respondent, and the words ascribed to her husband, according to her recollection, in the deed of adoption, have always, until this litigation, been regarded by her and her advisers, as intended to express a general authority. What the deceased Raja intended was that, if necessary, "some boy" should be adopted to him "so that he might perform my *shradh* ceremony, and yours, and perpetuate my name, and after your death become the absolute owner and possessor of the whole of my estate;" but in expressing this intention he saw that it might be defeated by death if construed in a restrictive sense as meaning some [404] "one" boy, so he went on to deal with that contingency by directing, in substance, that effect was, in any event, to be given to the general intention, and if one boy died another boy was to be adopted. The Trial Judge did not expressly decide this question of fact. He found, as did the High Court, that in the circumstances of this case the Rani was estopped from alleging want of authority.

Their Lordships, in reviewing the facts of the case, are of opinion that the question may well be decided as one of fact on the Rani's own statements without recourse to the doctrine of estoppel. In their view she was speaking the truth in Baldeo Singh's action when she was pleading as to her authority. Their Lordships, however, do not differ from the Courts below in the view they have taken as to the applicability of the doctrine of estoppel in this case. Of course, the estoppel pleaded against the Rani must be taken as purely personal. It does not bind any one who claims by an independent title, but, in view of the decision now given, that the respondent was, in fact, duly adopted, further litigation on the point may be taken as happily out of the question. So far as the Rani herself is concerned it would indeed be difficult to have a stronger case of estoppel. She has asserted her authority in the most solemn manner under her hand and seal, and her conduct both before and after that assertion has been of a like unequivocal character. She could not now be allowed to change her story without grave injustice ensuing to those who have acted in

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34 A. 398=16 C. W. N. 675=12 M. L. T. 98=16 I. C. 673=39 I. A. 142=9 A. L. J. 730=14 Bom. L. R. 485=1912 M. W. N. 641=16 C. L. J. 60=23 M. L. J. 200.

reliance upon her deliberate and repeated representations. The respondent is now severed from his natural family; he has undergone a change of social status which may or may not be beneficial to him, but which has certainly so altered his mode of life as to make a relapse into his former condition a grievous hardship upon him. He and his friends have been driven to expenses in the maintenance of the privileges with which the Rani purported to endow him. He married on the faith of his adoptive mother's word, and no doubt has creditors who have sold him goods or lent him money in like reliance on her good faith.

Under these circumstances the Rani's argument that the doctrine of estoppel does not apply because the defendant could show no loss or detriment, is without any substance whatever and she must be held to her word and to the results of her conduct.

[406] Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant:—*T. L. Wilson & Co.*

Solicitors for the respondent:—*Barrow, Rogers and Nevill.*

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34 A. 406 (=16 I. C. 92=16 C. L. J. 47=16 C. W. N. 745=39 I. A. 150=9 A. L. J. 802=1912 M. W. N. 646=12 M. L. T. 101=14 Bom. L. R. 827=23 M. L. J. 38.)

PRIVY COUNCIL.

BRIJ LAL AND ANOTHER (*Decree-holders*) *v.* SURAJ BIKRAM SINGH (REPRESENTATIVE OF DEBI BAKHSH SINGH), (*Judgment-debtor*) *and another appeal consolidated.**

[2nd May, 1912.]

[*On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow.*]

Hindu Law—Will—Construction of will—Bequest to testator's daughter-in-law after death of wife—Whether it conferred an absolute or only a life estate in the property.

The will of a Hindu testator after reciting that he had no male heir, and had already provided for his widowed daughter, stated:—"I have resolved that after my death my wife, legatee No. 1, shall remain in possession and enjoyment of all my property with all powers or authority like myself; and that after the death of my wife my daughter-in-law, widow of Raghuraj Singh, legatee No. 2, shall remain in possession and enjoyment of all the properties aforesaid like myself and legatee No 1 * * * * I therefore execute a will in favour of my daughter-in-law, so that on the demise of myself and my wife the estate and name of my ancestors may continue as before, and she in place of Raghuraj Singh shall perform my funeral ceremonies and those of my wife according to the *shashtras* and the custom of the family, and then she shall have power to nominate any one whom she may think fit as 'heir,' so that the name of the family may continue as formerly and now with honour."

Held, (affirming the decision of the Court of the Judicial Commissioner) that on the true construction of the will the word "'heir" meant heir to the testator, and the daughter-in-law took (as did the wife) not an absolute interest, but only a life estate in the testator's property, which was therefore on her death not liable to attachment and sale under decrees against her representative.

[Dist. 42 Cal. 561=16 I. C. 798; Ref: 32 I. C. 569.]

TWO consolidated appeals from the judgments and decrees (7th August, 1907) of the Court of the Judicial Commissioner of Oudh which

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* *Present*:—Lord MACNAGHTEN, LORD ATKINSON, LORD SHAW, Sir JOHN EDGE and Mr. AMEER ALI.

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reversed two decrees (12th February, 1907) of the Subordinate Judge of tahsil Biswan in the district of Sitapur.

The question for decision in these appeals was whether upon the true construction of the will of one Narpat Singh, dated the 11th of July, 1893 an absolute, or merely a life, estate passed to Rani Brij Nath Kunwar (since deceased) in the village of Intgaon, which had been attached in execution of decrees.

[406] The facts were that on the 26th of June, 1906, the present appellants obtained decrees for Rs. 8,325-4-0 and Rs. 4,599 with interest in two suits (4 and 5 of 1906) in the Court of the Subordinate Judge of tahsil Biswan, against one Debi Bakhsh Singh as representing the said Rani Brij Nath Kunwar deceased, and the amounts of the decrees were to be realized from the assets of the said deceased. On the 25th of July, 1906, the appellants applied for execution of the decrees by attachment and sale of the village Intgaon as being an asset of the estate of the deceased then in possession of the respondent.

On the 25th of August, 1906, Debi Bakhsh Singh filed objections to the attachment and sale, on the ground that the deceased had only been entitled to a Hindu widow's interest in the property, which terminated on her death; and to those objections the appellants filed a reply maintaining that the deceased had an absolute interest in the property under the will of the 11th of July, 1893.

Narpat Singh died on the 2nd of February, 1894. The following pedigree shows the relationship between the parties to this litigation :—

CHANDRIKA BAKHSH SINGH.

Ram Narain Singh.	Gur Bakhsh Singh.
Rana Beni Madho.	Narpat Singh, (widow Sheolagan Kunwar).
Rana Raghuraj Singh, (widow Rani Brij Nath Kunwar).	Jugraj Singh.
	Hanuman Bakhsh.
Sheogopal Singh.	Debi Bakhsh Singh, Judgment-debtor.
	Bijai Bahadur, deceased.

The testator in his will recited that he had no male heir, but a widowed daughter Bachchi Sahiba, to whom he had given for "life maintenance" a village called Lilauli, and that as she was unwilling to have possession of it, he had in lieu thereof executed and registered a deed of agreement for Rs 700 annually in her favour; and stated that as regards the remaining villages and other movable and immovable property 'I have resolved that after my death my wife Sheolagan Kunwar, legatee No. 1, shall remain in possession and enjoyment (*qabiz-o-mutsarrif rahe*) of all the property aforesaid with all powers (or authority) like myself (*mai jami ikhtiarat misl mere*) and that after the death of my wife, my daughter-in-law Rani Brij Nath Kunwar, widow of Rana Raghuraj **[407]** Singh, legatee No. 2, shall remain in possession and enjoyment (*qabiz-o-mutsarrif dakhil rahe*) of all the property aforesaid like myself (*misl mere*) and legatee No. 1."

The testator then referred to other wills which he had made and subsequently revoked, among them one in favour of Suraj Bikram Singh, son of Babu Debi Bakhsh Singh, and, after giving his reasons (mainly the bad conduct of the boy) for cancelling that will, he said :—" I, therefore,

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having cancelled the will in favour of Suraj Bikram Singh again execute a will in favour of my daughter-in-law Rani Brij Nath Kunwar, and get it registered, having compelled her to consent to it, so that on the demise of myself and my wife, the estate and name of my ancestors may continue as before, and she in place of Raghuraj Singh shall perform my funeral ceremonies, and those of my wife according to the *shashtras* and the custom of the family, and then she shall have power to nominate any one whom she may think fit as 'heir' so that the name of the family may continue as formerly and now with honour (*sath nek nami*)."

On the 12th of February, 1907, the Subordinate Judge held in the matter of the execution of the decrees that Rani Brij Nath Kunwar took an absolute interest in the property under the will of Narpat Singh and that the property was consequently liable to attachment and sale in execution of the decrees.

From that decision Debi Bakhsh Singh appealed to the Court of the Judicial Commissioner in the more highly valued case, and to the District Judge of Sitapur in the other case, and the latter was transferred for hearing to the Court of the Judicial Commissioner. The appeal was heard by Mr. *E. Chamier*, Judicial Commissioner, and Mr. *J. Sanders*, First Additional Judicial Commissioner, who held in separate judgments that Rani Brij Nath Kunwar took only a life interest in the property in dispute, and not an absolute estate, and that it was therefore not liable to attachment and sale in execution of the decrees.

MR. CHAMIER in his judgment said :—

"Rani Brij Nath Kunwar was the widow of the testator's nephew, not the widow of his son, but the testator would according to the custom of his class call her his daughter-in-law. The point is of no importance.

"It appears to me that the decree-holders are on the horns of the dilemma. The testator uses the same words to describe the estate conferred upon Brij Nath Kunwar as he does to describe the estate conferred upon Sheolagan Kunwar. [403] This Court held in a previous case that Sheolagan Kunwar took only a life estate. If that decision was wrong then Sheolagan Kunwar took an absolute estate and Brij Nath Kunwar took nothing, for she was not the heir of Sheolagan Kunwar and she did not acquire title by long possession. If Sheolagan Kunwar took only a life estate then (the same language being employed) Brij Nath Kunwar took a life estate also. There is a good deal in the will which supports this conclusion. The testator confers upon Brij Nath Kunwar a power to nominate an heir (*waris*). The passage cannot possibly mean that she should nominate an heir to herself, the word *waris* obviously means an heir to the testator. This power could not have been required if Brij Nath Kunwar was to take a heritable estate and to have power to nominate an heir to herself.

"The words used with reference to both the women (*qabiz-o-mutsarrif*) (one who possesses and one who spends or enjoys) do not by any means indicate an intention to confer a transferable estate. The notion that a woman should have a transferable estate and be able to divert the estate to her own family is positively repugnant to the Hindu mind and the soundness of the decisions which lay strees upon this is to my mind beyond question.

"It is unnecessary to observe that the word *dakhil* used with reference to Brij Nath Kunwar means no more than *qabiz*. It denotes possession only.

"Counsel for the decree holders laid stress upon the words '*mai jami ikhtiarat*' (with all power or authority). In the first place they are used with reference to Sheolagan Kunwar, so that if they denote a transferable estate there was nothing left for Brij Nath Kunwar. Next, full effect can be given to these words without construing them as imparting a transferable estate, and lastly this must be read with the context. It is noticeable that the testator does not say that either of the ladies is the 'malik' (proprietor). The whole will seems to work up to the nomination of an heir, obviously a male heir, by Brij Nath Kunwar who, he assumed, would survive both Sheolagan Kunwar and himself.

"In my opinion there can be very little doubt that the testator did not intend to confer a heritable estate upon either of the ladies.

"I would allow the appeal and dismiss the decree-holders' application with costs in both Courts."

MR. SANDERS said :—

"Rani Brij Nath Kunwar held the property for less than 12 years and nominated no heir before she died.

" The learned Subordinate Judge referred to former litigation between Babu Debi Bakhsh Singh and Bijai Bahadur Singh on the one hand and Musammat Brij Nath Kunwar and Suraj Bikram Singh on the other, in which the construction of the will was in question, and to the judgment of Mr Spankie, Additional Judicial Commissioner, with which that litigation ended. The judgment is dated the 18th of January, 1901, and it decides only the nature of the estate conferred on Musammat Sheolagan Kunwar. In it Mr. Spankie has considered the nature of the interest that Babu Narpat Singh's widow Sheolagan Kunwar took. The plaintiffs in that suit contended that the will conferred an absolute estate on the widow and that it contained no subsequent words indicating an intention on the testator's part to cut that estate down to a life interest. The defendants on the other hand contended that by the will an absolute estate was conferred [09] on both the widows. Mr. Spankie held that for the construction of a will the intention of the testator, as found from the whole instrument, is to be the guide ; that his intention, as gathered from the will, was that the widow should succeed and on her death Musammat Brij Nath Kunwar was to succeed ; that if the will could be construed so as to give effect to such an intention, such a construction should be placed on it ; and he concluded that a widow's estate only was given to Sheolagan Kunwar and that there were no subsequent words evidencing the testor's intention to give a larger estate to her.

" The learned Subordinate Judge, after discussing the terms of the will, proceeded to hold that the similarity in the words of the will conveying an estate to each of the widows furnishes no reason why the same construction should be put on the words of both bequests ; that because the bequest to Sheolagan Kunwar was that of a limited estate, the words conveying the estate to Brij Nath Kunwar should not be similarly construed ; that the document should be construed so as to meet the wishes of the person who made it; that it is quite possible that a word (probably meaning a phrase) might have been used by him in two different senses ; and that in order to arrive at a conclusion that the words (or phrases) were so used it was necessary to look into 'all the circumstances.' He then went on to draw an inference from Mr. Spankie's judgment, that as the gift to Sheolagan Kunwar was followed by another to Brij Nath Kunwar the former was necessarily held to be a gift for life for otherwise the gift in favour of Brij Nath Kunwar could not be given effect to ; and he concluded that because there are no words limiting the latter gift to the term of her life only and because a power was conferred on her of nominating an heir, therefore the gift to Brij Nath Kunwar was one of an absolute estate. The Subordinate Judge considered that this conclusion was in conformity with the decision of their Lordships of the Privy Council in *Mohomed Shums-ool-Hooda* v. *Shewukram* (1).

After referring to the cases cited on the construction of such documents as that under consideration, and referring to the principles laid down by their Lordships of the Privy Council in the above case as to the construction of wills, the judgment continued :

" In order to ascertain the intention of the testator former wills cannot be looked at ; and in the light of the principles laid down in the Privy Council ruling *Mahomed Shums-ool-Hooda* v *Shewukram* (1), I hold that in the case of Narpat Singh it may be assumed that the testator, a Hindu gentleman of advanced age, had some knowledge of Hindu law. That he was aware of the distinction between an estate for life and absolute estate may be inferred from the words in the preamble that he made over the village Dilauli for ' life maintenance ' to his daughter.

" It was argued by the Hon'ble Rai Sri Ram Bahadur for the decree-holders that the absence of express words limiting the gift to a life estate in favour of Rani Brij Nath Kunwar indicated the testator's intention that her interest in the estate should be absolute. I would draw a contrary inference. It was held by the Additional Judicial Commissioner, Mr. Spankie, that the testator's intention

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(1) (1874) L. R. 2 I. A. 7 : 14 B. L. R. 326.

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[410] was to confer a limited estate on Musammat Sheolagan Kunwar. Rai Sri Ram Bahadur was at first disposed to dispute the correctness of this finding but he afterwards acknowledged it. Inasmuch, therefore, as the gift to Sheolagan Kunwar was for life only, the intention of the testator must have been to confer a similar estate on Rani Brij Nath Kunwar.

"I cannot agree with the learned Subordinate Judge's opinion that the similarity of the words conferring the estate on the two ladies is no reason for the placing of the same construction on them. On the contrary I think that it is a very good reason and that it was intended.

"The only 'circumstances' that he refers to are the absence of words limiting the estate to Brij Nath Kunwar for life and the power given to her of nominating an heir. But if it were the intention of the testator to confer an absolute estate on Rani Brij Nath Kunwar then the grant of the power to nominate an heir would have been superfluous. I think that the grant of that power is another indication of his intention to confer a limited estate In the will the testator has expressed his anxiety that the estate and the name of the family may continue to exist as heretofore. It may be implied from these words that the testator wanted an heir from his own family to be nominated, for he was aware that there were reversioners in it. There are other circumstances which appear to me to help towards the conclusion that the testator's intention was to confer a limited estate on Brij Nath Kunwar, in addition to his knowledge that women do not as a rule take absolute estates by inheritance

"The will contains no indications that he had any extraordinary affection for Brij Nath Kunwar. It says that she was childless and past the hope of bearing children, that she was already well provided for It does not show that he was at feud with his kinsmen; while in two places it expresses his wish that the estate should remain as heretofore.

"My conclusion therefore, as drawn from the whole tenor of the will and these circumstances, is that the testator intended to confer the same estate on both the ladies; that if he had wished to give an absolute estate to Brij Nath Kunwar he would have used express words indicating that intention, and that the power he gave to her of nominating an heir do not indicate any such intention. No inference as to such an intention can be drawn from the fact that Sheolagan Kunwar in her life-time made over the estate to Rani Brij Nath Kunwar."

Pending the appeals to the Privy Council Suraj Bikram Singh was put on the record in place of his father Debi Bakhsh Singh deceased.

Kenworthy Brown, for the appellants, contended that on the true construction of the will, Rani Brij Nath Kunwar took an absolute estate, and not a limited or life estate in the property; and that consequently the property was liable to attachment and sale in execution of the decrees of 26th June, 1906. Reference was made to *Mahomed Shums-ool-Hooda* v. *Shewukram* (1) and the principles [411] there laid down by their Lordships of the Judicial Committee as to the construction of wills, which it was submitted were applicable to the document now under consideration. *Hoy* v. *Master* (2) was also referred to.

De Gruyther, K. C., and *Ross*, for the respondent, were not called upon.

1912, *May 2nd*:—The judgment of their Lordships was delivered by LORD MACNAGHTEN:—

This is a very simple case. The only question is whether the daughter took an absolute estate or an estate for life?

In the first place, there is no estate at all given to the lady, in terms. The only direction is that she is to remain in possession and occupation of the property, and then she is invested with the power of appointing an heir either in her life-time or by will. It seems to their Lordships that the word "heir" in that clause means heir to the testator and that the judgment of the Judicial Commissioners is perfectly right.

(1) (1874) L. R. 2 I. A. 7: 14 B. L. R. 226. (2) (1834) 6 Sim. 568.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed, and with costs.

Appeal dismissed.

Solicitors for the appellants :—*T. L. Wilson & Co.*
Solicitors for the respondent :—*Barrow, Rogers & Nevill.*

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34 A. 405=16 I. C. 82=16 C. L. J. 47=16 C W. N. 745=39 I. A. 150=9 A. L. J. 802=1912 M. W. N 646=12 M. L. T. 101=14 Bom L. R. 827=23 M. L. J. 38.

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34 A. 412 (=16 I. C. 125=9 A. L. J. 785).

[412] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

AYESHA AND OTHERS (*Defendants*) *v.* FAIYAZ HUSAIN (*Plaintiff*) AND MUSSAMMAT KULSUM (*Defendant*).*

[24th February, 1912.]

Act No. IX of 1908 (*Indian Limitation Act*), *section* 29—*Act No. XV of* 1877 (*Indian Limitation Act*), *section* 2; *schedule II, article* 35—*Suit for restitution of conjugal rights—Limitation.*

The plaintiff in a suit for restitution of conjugal rights filed in 1910, alleged that his wife had been taken away by two of the defendants under a promise that she should return to him shortly, but subsequently they denied all knowledge of her whereabouts. In 1909, he alleged, he was informed that she was living at a certain place with one of the defendants.

Held that the plaintiff's suit was not barred by limitation. *Binda* v. *Kaunsilia* (1) referred to.

THE facts of this case were as follows :—

Faiyaz Husain, the plaintiff, brought a suit on the 5th of February, 1910, for restitution of conjugal rights and an injunction against his wife, his mother-in-law, brother-in-law and one Chhida Khan. His allegations were that his wife, whom he had married in 1906, after having lived with him for two months in Agra, was taken away to Bulandshahr by her mother and brother in connection with a marriage ceremony in their family with a promise to send her back to her husband at Agra after two months ; that this they failed to do ; that he went to Bulandshahr but could not get any information about his wife from the mother-in-law or the brother-in-law, and that, on subsequently coming to know that she was living with one Chhidda Khan, he instituted the present suit, stating that the cause of action arose in 1906 when his mother-in-law and brother-in-law failed to send back his wife to him after the expiry of two months, as promised by them. The defence was that the suit was barred by limitation under article 35 of the Limitation Act of 1877, and that the plaint did not disclose any cause of action against the present appellants. Both courts decreed the plaintiff's suit.

The defendants appealed.

Babu *Balram Chandra Mukerji*, for the appellants:—

The sole point in this case is, whether the suit was barred by article 35 of the Limitation Act of 1877, which provided a period [413] of two years for a suit for restitution of conjugal rights. In 1906, when the cause of action arose, the Act of 1877 was in force. Before the new Act of 1908 came into force, the right to bring such a suit was barred.

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* Second Appeal No. 580 of 1911, from a decree of H. W Lyle, District Judge of Agra, dated the 18th of February, 1911, confirming a decree of Sheo Prasad, Subordinate Judge of Agra, dated the 21st of June, 1910.

(1) (1899) I. L. R. 18 All. 227.

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34 A. 412=16 I. C. 124=9 A. L. J. 784.

The High Court in the case of *Binda* v. *Kaunsilia* (1) were of opinion that that article could not apply on the ground that "the Legislature could not by a side wind introduce the system of divorce into the Hindu law," but they failed to see that the extinction of the right to bring a suit did not necessarily amount to a complete dissolution of the marital tie. Moreover, in that case the parties were Hindus, and the observations of their Lordships as regards the applicability of the principles enunciated in that ruling to Muhammadans were merely *obiter dicta*. On the other hand, it has been held by the other High Courts that articles 34 and 35 of the Limitation Act applied both to Hindus and Muhammadans; *Bai Sari* v. *Sankla Hirachand* (2), *Fakirgauda* v. *Gangi* (3), *Dhanjibhoy Bomanji* v. *Hirabai* (4), *Asir-un-nessa Khatun* v. *Buzloo Meah* (5) and *Saravanai Perumal Pillai* v. *Poovayi* (6).

It does not matter for what reason the Legislature removed articles 34 and 35 from the new Act, as the cause of action arose under the old Act and was barred by the same Act, there can be no question that the right was gone. Moreover, the plaint as it stands does not disclose a cause of action against the defendants appellants. In the absence of any allegation to the effect, that these defendants were preventing or withholding the wife from returning to her husband, the mere non-fulfilment of a promise to send back the wife did not surely give rise to the alleged cause of action.

Babu *Piari Lal Banerji* (for Munshi *Binode Behari*) for the respondents:—

The first point to be considered is which Limitation Act applies. The suit was filed in 1910, and therefore the Act for 1908 should apply. The present Act does not provide of limitation for suits for restitution of conjugal rights, and therefore the suit is not barred under the new Act. Moreover, the present Act does not enact that any right to sue barred under the previous Act cannot be enforced [414] under the present Act. In the Act of 1577, section 2 provided that no right to sue which had become barred under the previous Act could be enforced under that Act. This proviso does not find place in the Act of 1908, and in the absence of such a provision it is quite clear that the law of limitation does not extinguish rights. The law of prescription in India has been codified in section 29 of the Limitation Act, and it only provides that the right to sue for possession of property would be extinguished after the period of limitation prescribed for its enforcement expired. The law of limitation is not a law of prescription so far as other rights are concerned. The right to enforce restitution of conjugal rights might have been *not enforceable* under the Act of 1877, but immediately the Act of 1908 was enacted, the right became enforceable. It was never extinguished. The principle laid down in *Binda* v. *Kaunsilia* (1) is good law and should be followed as it has received legislative recognition.

Babu *Balram Chandra Mukerji*, in reply:—

The present suit would not be governed by the Limitation Act of 1908 as the right came to an end before the Act came into force.

KARAMAT HUSAIN and TUDBALL, JJ.:—This was a suit by Faiyaz Husain against his wife, her mother and brother and a fourth party, for restitution of conjugal rights and for a perpetual injunction against defendants Nos. 2, 3 and 4 restraining them from offering any interference as might prevent Musammat Kulsum, defendant No. 1, from going to the

(1) (1890) I. L. R. 13 All 126.
(2) (1892) I. L. R. 16 Bom 714.
(3) (1898) I. L. R. 23 Bom. 397.
(4) (1901) I. L. R. 25 Bom. 644.
(5) (1907) I. L. R. 34 Cal. 79.
(6) (1905) I. L. R. 28 Mad. 496.

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34 A 412=16 I. C. 124=9 A. L. J. 784.

plaintiff's house. The substance of the plaint is, that on the 7th of May, 1906, defendants Nos. 2 and 3 took away defendant No. 1 from the plaintiff's house on the promise that they would send her back after the wedding of defendant No 3 that when she did not return, he went to defendants Nos. 2 and 3 and made an inquiry, but was told by them that they had no knowledge of her whereabouts, that, in November, 1909, he learnt that defendant No. 1 had contracted some connection with defendant No. 4 and was at Hasanpur where he resides, and that he (plaintiff) prosecuted him criminally under section 498, Indian Penal Code. The defence set up by Chhida Khan was, that the plaintiff had divorsed defendant No. 1, and he had married her after the divorce, and that no cause of action arose within the limits [415] of the jurisdiction of the court of first instance. That Court decreed the claim. That decree was affirmed by the lower appellate court. In Second appeal three points are taken : (1) that there is no cause of action ; (2) that it did not arise within the jurisdiction of the court of first instance ; and (3) that the suit is barred by limitation. The facts disclosed by the plaint beyond doubt gave the plaintiff a cause of action. We agree with the lower court that at least a portion of the cause of action did arise within the jurisdiction of the court of first instance. In view of the decision of this Court in *Binda* v. *Kaunsilla* (1), and in view of the fact that articles 34 and 35 have been removed from the present Limitation Act, we are of opinion that the suit is not barred by limitation. Moreover, there is the fact that a right to restitution of conjugal rights is not one which is extinguished under section 28 of the Act of 1877 or of 1908. The result of the expiry of the period of limitation in respect of such a right under the Indian Limitation Act, 1877, is that the remedy only is barred, and the portion of section 2 of the same Act which enacts that " nothing herein or in that Act contained shall be deemed to affect any title acquired, or *to revive any right to sue barred under that Act* or under any enactment thereby repealed," has not been reproduced in section 29 of the Limitation Act of 1908. The plaintiff's remedy under the present Limitation Act therefore subsists. For these reasons we dismiss the appeal with costs.

Appeal dismissed.

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34 A. 416 (=15 I. C. 907).

[416] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

KALLA AND OTHERS (*Plaintiffs*) *v.* HARGIAN AND ANOTHER (*Defendants*).*

[11th March, 1912.]

Pre-mortgage—Joint usufructuary mortgagee—Further simple mortgage on share of one mortgagor in favour of same mortgagee—What amount the claimants of the right to pre-mortgage are liable to pay.

Certain persons made a joint usufructuary mortgage of their property. On the same day one of them executed a deed by way of a further charge, or simple mortgage, of his share in favour of the same mortgagee In a suit for pre-mortgage of the share of this second mortgagor it was *held* that the plaintiffs

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* Second Appeal No. 389 of 1911 from a decree of Muhammad Mubarak Husain, Subordinate Judge of Agra, dated the 13th of February, 1911, confirming a decree of Shambhu Nath Dube, Munsif of Agra, dated the 14th of July, 1910.

(1) (1890) I. L. R. 13 All. 126.

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were not liable to pay the sum secured by the deed of further charge, which was a separate and independent transaction, but were entitled to pre-mortgage upon paying such amount of the mortgage debt as was proportionate to the share of the said mortgagor.

THE facts of this case were briefly as follows :—

On the 29th of January, 1909, Hargian, Bhogi Ram, Pran Sukh and Kachera executed a usufructuary mortgage of certain zamindari shares in favour of one Manik for Rs. 1,500. On the same day, Hargian executed a *mashrut-ul-rehan* bond in favour of the aforesaid Manik for a sum of Rs. 99. The present suit was brought by the plaintiffs to pre-empt Hargian's share in the usufructuary mortgage on payment of a proportionate amount of the mortgage money. The mortgagee, Manik, contended in defending the suit that the plaintiff must pay a quarter of the mortgage money as the share of Hargian and must also redeem the *mashrut-ul-rehan* bond. The court of first instance decreed the suit for pre-emption on payment of the price demanded by the mortgagee. The lower appellate court confirmed this decree, save as far as it related to costs. The plaintiffs appealed.

Pandit *Shiam Krishna Dar*, for the appellants :—

The plaintiffs are only bound to pay a price proportionate to Hargian's share of the property mortgaged (4 bighas, 18 biswas out of 26 bighas, 5 biswas). They cannot be called on to pay a quarter share of the mortgage money. The measure of payment must depend on the value of the share, and not on the number of mortgagors. The *mashrut-ul-rehan* bond is a separate transaction. The plaintiffs are not bound to pre-empt it. All the incidents of a contract of mortgage do not apply in the case of a pre-mortgagor a pre-emptor. The only requisite condition in his case is the [417] payment of price. The doctrine of clogging also applies, and the bond is illegal, being contemporaneous and not subsequent. He cited *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Limited* (1).

The doctrine of clogging has been repeatedly applied in our courts. The one-day rule is a very wholesome one, though it is difficult to see what is exactly the reason underlying it. It was doubtless meant for the protection of debtors, otherwise why should not a deed of sale be executed in place of a deed of mortgage followed by a transfer of the equity of redemption. The deed is invalid, as it is contemporaneous. He cited *Sita Ram* v. *Nand Ram* (2).

Dr. *Tej Bahadur Sapru*, for the respondent :—

The nature of the suit is one for pre-emption. The pre-emptor must take the property on the terms taken by the vendee. This follows from the nature of his right, which is a right of substitution. He referred to *Govind Dayal* v. *Inayat-ullah* (3). Both the documents constitute one and the same transaction. There is nothing in law to prevent the creation of a simple as well as a usufructuary mortgage by the same deed. Therefore they can also be created by separate deeds at the same time. The mortgage contemplated a joint and several liability. In this case, Hargian undertook all further liability, and made himself responsible for both the debts. It is not the identity of instruments or that of parties which matters. There may be a covenant by one of the debtors as regards the whole liability, even though it may not affect all.

Pandit *Shiam Krishna Dar* was not called on to reply.

(1) (1904) A C 323.
(2) Weekly Notes, (1881) p. 80.
(3) (1885) I. L. R. 7 All 775 (799, 808).

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KARAMAT HUSAIN and TUDBALL, JJ.:—On the 29th of January, 1909, Hargian, Bhogi Ram, Paran Sukh and Kachera executed a mortgage with possession in favour of Manik to secure a sum of Rs. 1,500. The entire property mortgaged was 26 bighas, 5 biswas. The share of Hargian in that was 4 bighas, 18 biswas, that of Bhogi Ram, 1 bigha, 12 biswas, and the remaining 19 bighas, 15 biswas belonged to Paran Sukh and Kachera. The mortgagors undertook a liability joint as well as several to pay the mortgage debt. On the same day Hargian executed a deed by way of *moshrut-ul-rehan* (a further charge) in favour of Manik, in which he mortgaged his own share amounting to 4 bighas 18 biswas, for a sum of Rs. 99. **[418]** In this separate deed by way of *mashrut-ul-rehan*, he stipulated that at the time of redeeming the mortgage executed jointly by him and three other persons, he would pay the money due under this separate deed. There is a recital in the mortgage deed that a sum of Rs. 150 was due by Hargian to Kalla and others. The plaintiffs then brought a suit for the pre-mortgage of the share of Hargian under the mortgage deed, dated the 29th of January, 1909, executed by the four persons already mentioned. The plaintiffs in their plaint alleged that the share of Hargian in the mortgage debt was only a sum of Rs. 153, out of which the plaintiffs were, according to the recital in the deed, entitled to a sum of Rs. 150, and that, therefore, they were entitled to pre-mortgage on payment of Rs. 3. The court of first instance decreed the claim, and the decree of that court was affirmed by the lower appellate court except as to costs. That court directed that the plaintiffs, in order to succeed in their suit, were bound to pay a sum of Rs. 356-8-0, over and above the sum of Rs. 150, which was due upon their own mortgage. The plaintiffs have preferred a second appeal to this Court, and it is contended by their learned vakil that the transaction by way of *mashrut-ul-rehan* being a separate and independent transaction, the plaintiffs are entitled to pre-mortgage the prior transaction alone, and that the mode adopted by the courts below of determining the amount which the plaintiffs are bound to pay under the mortgage is wrong. Both these pleas in our opinion are well founded. We have no doubt that the mortgage of 29th January, 1909, is a transaction quite separate from the transaction evidenced by the deed of *mashrut-ul-rehan* of the same date. The mortgagors under the mortgage are four persons, and every one of them has undertaken a liability joint and several. The mortgaged property is 26 bighas, 5 biswas. The mortgage is a mortgage with possession. In the deed of *mashrut-ul-rehan* Hargian only is the mortgagor. The mortgaged property is his share only, amounting to 4 bighas, 18 biswas. The consideration for the *mashrut-ul-rehan* is quite distinct from the consideration for the joint mortgage. The mortgage under the *mashrut-ul-rehan* is strictly speaking, a simple mortgage, while the mortgage under the deed executed by Hargian and the three others, is a usufructuary mortgage. That being so, the plaintiffs in their suit for pre-mortgage are not liable to pay the sum of Rs. 99, secured by the *mashrut-ul-rehan* deed. The share **[419]** of Hargian in the property mortgaged by him along with three other persons, is 4 bighas, 18 biswas, and the entire sum of Rs. 1,500 is a charge upon the entire property amounting to 26 bighas, 5 biswas. The charge on the share of Hargian is, therefore, in the proportion of the value of 4 bighas, 18 biswas to the value of 26 bighas, 5 biswas. We are supported in this view by the ruling of this Court in *Sita Ram* v. *Nand Ram* (1).

(1) Weekly Notes, 1881, p. 80.

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As the lower appellate court has not come to any finding regarding the value of the share of Hargian and the value of the entire property mortgaged on the 29th January, 1909, we refer the following issue to that court for a finding :—What are the proportionate values of the share of Hargian and of the entire mortgaged property? The court will be at liberty to take such additional evidence as the parties may adduce. Ten days will be allowed for objections on return of the finding.

Issues remitted.

34 A. 419 (=9 A. L. J. 488=14 I. C. 181).

APPELLATE CIVIL.

Before Mr. Justice Sir Henry Griffin and Mr. Justice Chamier.

ALI BAKHSH AND OTHERS (*Defendants*) *v.* BARKAT-ULLAH AND OTHERS (*Plaintiffs*).*

[15th March, 1912.]

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 22—*Succession—Special rule of succession exclusive of personal law of parties.*

Held, that the rule of succession which is laid down by section 22 of the Agra Tenancy Act, 1901, is independent and exclusive of the personal law of the parties to whom the section applies. Consequently the grandsons of a deceased occupancy tenant, as his male lineal descendants, would be entitled to share in the tenancy jointly with the sons of the late tenant. *Bhura* v. *Shahab-ud-din* (1) followed.

[Dist : 37 All. 7=27 I. C. 34.]

The facts of the case are as follows :—

One Chidda, a Muhammadan occupancy tenant, left four sons, the defendants appellants, and three grandsons by a pre-deceased son, the plaintiffs respondents. The revenue court entered, on the basis of possession, the names of the defendants to the exclusion of the plaintiffs. Hence the plaintiffs sued for joint possession. The Munsif decreed the claim for joint possession over one-fifth of the holding. Both parties appealed. The District Judge practically upheld the decree of the Munsif, modifying it as regards the payment of costs. The defendants appealed.

[420] The case came up for hearing before KNOX, J., who referred it to a Division Bench by the following order :

"The question raised in this appeal appears to be *res integra*. The only authority quoted to me is *Bhura* v. *Shahab-ud-din* (1). I think it expendient that the case should be laid before a Bench of two Judges.

Mr *A. H. C. Hamilton*, for the appellants :—

According to the personal law of the Muhammadans the plaintiffs would have got nothing. It was never the intention of the Legislature to alter completely the Muhammadan law of succession by the enactment of section 22 of the Tenancy Act. Although it does to a certain extent override the personal law, the courts should carry out the provisions of that section in a way so as to harmonize them with the personal law of the parties. When among "the male lineal descendants" the sons are alive, the sons of a pre-deceased son can have no right whatever to the

* Second Appeal No. 506 of 1911 from a decree of S. R. Daniels, First Additional Judge of Moradabad, dated the 14th of February, 1911, modifying a decree of Sarup Narain, Munsif of Sambhal, dated the 23rd of September, 1910.

(1) (1907) I. L. R. 30 All. 128.

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occupancy of the holding. When the statute law has superseded the personal law of the parties, the former is to be followed, but where the statute is silent, the personal law applicable to the parties should, so far as possible, be followed. The operation of the section is to be considered as subject to the personal law of the parties so far as the latter is not inconsistent with the former. The law of succession of the Hindus and Muhammadans has not been wholly abrogated by the provisions of section 22. In several cases, decided by this Court the principle of the right of survivorship among joint tenants has been recognized. It follows from this that the personal law of the parties is to be taken into consideration so far as it can consistently be done in interpreting clause (*a*) of section 22 of the Tenancy Act. It is submitted that the "male lineal descendants" are to succeed first, as provided by section 22, but that they are entitled to preference in the order of succession, according to the personal law to which they are subject.

Pandit *Mohan Lal Sandal*, for the respondents :—

The main question in dispute is, whether the plaintiffs took equally with the defendants, in which case the plaintiffs' share would be three-sevenths of the holding and not one-fifth, over which the lower courts have given a decree in favour of the plaintiffs. [421] The parties are entitled to share in the occupancy holding, *per capita* and not *per stirpes*. Although this point was not pressed in the lower appellate court, the respondents can raise this point here by filing cross-objections ; *Shankar Lal* v. *Sarup Lal* (1) The personal law of the parties had nothing to do with the order of succession provided by section 22 of the Tenancy Act, and there is no warrant for holding that the nearer "male lineal descendant" would exclude the more remote ; *Bhura* v. *Shahab-ud-din* (2).

Mr. *A. H. C. Hamilton* was heard in reply.

GRIFFIN and CHAMIER, JJ.:—One Chhidda, a Muhammadan, was an occupancy tenant of a holding. He died, leaving four sons and three grandsons, the sons of a deceased son. The latter brought the suit out of which this appeal has risen, claiming possession of a 3/7th share of the occupancy holding. The court of first instance gave the plaintiffs a decree for a 1/5th share in the holding *i.e.*, the extent of the share which their father would have been entitled to, if he had been alive on the death of Chhidda. Both parties appealed to the lower appellate court. The plaintiffs' appeal was dismissed. The defendants' appeal was succesful so far that the decree of the first court was modified and in lieu of a decree for possession a decree was given declaring the plaintiffs to be joint sharers in the holding to the extent of 1/5th. The defendant's appeal against the decree of the lower appellate court and the plaintiffs have filed cross-objections. We are asked in this appeal to read the personal law of the parties into section 22 of the Tenancy Act. In our opinion the personal law of the parties has nothing to do with the rule of succession which is laid down by section 22 of the Tenancy Act. It was so held by this court in *Bhura* v. *Shahab-ud-din* (2). In that case the son of a Muhammadan occupancy tenant tried to oust the grandson of the last holder of the tenancy, and he was unsuccessful. Under section 22, the tenancy devolved on the male lineal descendants of the last holder of the tenancy. The plaintiffs are male lineal descendants of Chhidda and therefore entitled to share in the tenancy.

(1) (1911) I. L. R. 34 All. 140.

(2) (1907) I. L. R. 30 All. 128.

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The court of first instance held that the plaintiffs were entitled to a 1/5th share only. The plaintiffs' appeal to the lower appellate court was dismissed. They have not appealed to this Court. [422] Therefore the decision that they were entitled to a one-fifth share only has become final.

The cross-objection of the plaintiffs that they were entitled to possession must be sustained. There is nothing to prohibit the granting of a decree for joint possession. We dismiss the appeal with costs. We allow the objection so far that we restore the decree of the court of first instance. The plaintiffs will obtain their costs of the objection.

Appeal dismissed.

34 A. 422 (=14 I. C. 803=9 A. L. J. 492).

REVISIONAL CIVIL.

Before Mr. Justice Banrji.

GREAT INDIAN PENINSULA RAILWAY (*Defendant*) *v.* SHAM MANOHAR AND ANOTHER (*Plaintiffs*).*

[19th March, 1912.]

Act No. IX of 1890 (*Indian Railways Act*), *sections* 80, 75—*Suit for compensation for loss of through-booked goods—Short delivery—Uninsured goods.*

Held that where goods are booked for conveyance over more than one railway system the owner can only claim compensation for loss against a railway company other than the company with which they were booked, if it is shown that the loss occurred on the system of the company sued.

Held also that if goods, the insurance of which is obligatory, are packed uninsured with other goods, the insurance of which is not obligatory, no compensation is obtainable for the loss of either class of goods. *Pandlik Udaji Jadhav* v. *S. M. Railway Company* (1) followed.

THE facts of the case are as follows:—

The plaintiff booked six packages containing various kinds of goods from the Etawah station on the East Indian Railway, to be delivered at Jhansi, a station on the Great Indian Peninsula Railway. Out of the six packages three were not delivered at Jhansi. The plaintiffs sued the East Indian, the Oudh and Rohilkhand and the Great Indian Peninsula Railways. The claim against the Oudh and Rohilkhand Railway was withdrawn by the plaintiffs.

The lower court dismissed the plaintiffs' claim against the East Indian Railway on the ground that no notice under section 77 of the Indian Railways Act was given to that Company, but it decreed part of the claim against the Great Indian Peninsula Railway deducting from the claim the value of those articles which [423] under the second schedule of the Act, ought to have been declared and insured and which one of the plaintiffs had admitted formed part of the contents of each of the three packages lost.

The defendant company applied for revision.

Pandit *Ladli Prasad Zutshi*, for the applicants:—

Section 80 of the Railways Act provides that a suit for compensation for loss of goods can be brought either against the railway administration to which the goods were booked or against the railway administration on whose railway the loss of the goods occurred. In the present case the

* Civil Revision No. 6 of 1912.

(1) (1909) 11 Bom. L. R. 827.

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34 A. 422=14 I. C 503=9 A. L. J. 492.

goods were admittedly delivered to the East Indian Railway, and there is nothing to show that the loss occurred on the Great Indian Peninsula Railway. Therefore no decree could be passed against the applicants.

Secondly, the lower court was clearly wrong in not dismissing the whole claim against the applicants as the plaintiff had admitted that the contents of each of the three packages were composed partly of goods, which under schedule 2 of the Railways Act ought to have been declared and insured. Because section 75 of that Act clearly exempts a railway company from the responsibility of loss of packages containing such articles. It was not necessary that the package or parcel should have contained nothing but such excepted articles as were mentioned in the second schedule ; *Pandlik Utaji Jadhav* v. *S. M. Railway Company* (1), *Nanku Ram* v. *The Indian Midland Railway Company* (2), *Chunni Lal* v. *The Nizam's Guaranteed State Railway Company, Limited* (3).

Babu *Sital Prasad Ghose*, for the oppsite party :—

The lower court had before it section 80 of the Railways Act, as it refers to it in the judgment. In spite of this, it has held the applicants liable for the loss of the packages. That being so, it must be taken that the court was satisfied that the loss occurred on that railway, although it referred to nothing on the record in support of this. A Small Cause Court Judge was not bound to record all the evidence. As regards the other point, it was certainly not the intention of the Legislature in enacting section 75 of the Railways Act to free the railway company from any risk whatever, if the packages consigned to its care by the merest chance contained any articles which ought to have been declared [424] and insured. By neglecting to insure and declare such articles all that the plaintiffs were liable for was, that they could not claim the price of those articles. It would be preposterous to hold that the plaintiffs forfeited all claims to the entire packages or parcels by reason of the mere fact that each of the three parcels contained in a very small quantity articles mentioned in schedule 2 of the Act and which, as such, ought to have been declared and insured.

Pandit *Ladli Prasad Zutshi* was not called upon to reply.

BANERJI, J.— This was a suit for damages for non-delivery of three packages consigned by the plaintiff at the Etawah Railway Station for despatch to Jhansi. On the 23rd of May, 1910, the plaintiff booked six packages for despatch from Etawah station to Jhansi. Three of these were delivered and the other three were not delivered. In respect of the articles contained in the packages not delivered, the present suit was brought. The defendants to the suit were the East Indian Railway, the Oudh and Rohilkhand Railway and the Great Indian Peninsula Railway. The suit was withdrawn against the Oudh and Rohilkhand Railway; it was dismissed against the East Indian Railway, but a part of the claim has been decreed against the Great Indian Peninsula Railway. This application for revision has been filed on behalf of that railway. The first contention of the applicants is, that having regard to the provisions of section 80 of the Indian Railways Act (Act IX of 1890), the claim could not be decreed against this railway unless it was proved that the goods were lost on that railway. This contention appears to be well founded. Section 80 provides that a suit for compensation—among other things—for loss of goods booked through or over the railways of two or more

(1) (1909) 11 Bom. L. R. 827.
(2) (1900) I. L. R. 22 All. 361.
(3) (1907) I. L. R. 29 All. 288.

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railway administrations may be brought either against the railway administration to which the goods were delivered by the consignor or against the railway administration on whose railway the loss occurred. In the present case, the goods were delivered by the plaintiff to the East Indian Railway. Therefore, in accordance with the provisions of that section, the Great Indian Peninsula Railway would not be liable unless the loss occurred on that railway. It was denied by that railway that the goods ever came to its possession. The plaintiffs, therefore, were bound to prove that the goods came into the possession of the Great Indian Peninsula Railway and that the loss occurred on that railway. No evidence was [425] given on the point and the court below does not find that the loss occurred on that railway. I fail to understand, how, in view of the provisions of section 80 to which the learned Small Cause Court Judge has referred, he could make a decree against the Great Indian Peninsula Railway without finding whether the loss had occurred on that railway. On this ground alone the applicants are entitled to have the suit dismissed. It is also urged, that in view of the provisions of section 75, of the same Act no compensation could be allowed, in respect of any of the articles contained in the lost packages, inasmuch as a part of the goods contained in those packages were articles, which, under the second schedule to the Act ought to have been insured. The court below has excluded from the claim the value of those articles only which contained gold and silver tissue and lace. But the section clearly shows that the protection afforded by the section extends not only to the articles containing tissue and lace (which ought to have been insured), but also to all the other articles contained in the parcels in which the articles first mentioned were placed. This was held by the Bombay High Court in *Pandlik Udaji Jadhav* v. *S. M. Railway Company* (1) and is justified by the language of the section. The plaintiff in his deposition admitted that the three parcels not delivered to him contained the articles of which he gave details in the court below. Therefore, on both these grounds mentioned above, the suit ought to have been dismissed against the Great Indian Peninsula Railway. I allow this application, set aside the decree of the court below and dismiss the claim as against the applicants with costs in both courts.

Application allowed.

34 A. 426 =9 A. L. J. 666=14 I. C. 987).

[426] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

LALTA PRASAD AND ANOTHER (*Plaintiffs*) *v.* RAMKARAN (*Defendant*).*

[20th March, 1912.]

Civil Procedure Code (1908), *order IX. rules* 8 *and* 9, *section* 151—*Dismissal of suit for default—Restoration—Sufficient cause—Court's inherent power to restore.*

Order IX, rule 9, of the Code of Civil Procedure, 1908, makes it compulsory on a court to set aside a dismissal under rule 8 where the plaintiff satisfies the court that there was sufficient cause for non-appearance. It, however, cannot take away the court's power to restore the case for any other valid reasons.

[Not fol: 19 C. W. N. 25=27 I. C. 492; Ref: 53 I. C. 252=21 Bom. L. R. 952=44 Bom. 82; 45 Bom. 648=60 I. C. 919; 53 I. C. 847=37 M. L. J. 599=10 L. W. 606 (F. B.); 63 I. C. 737=19 A. L. J. 547; 63 I. C. 131=25 C. W. N. 756; 1924 Pat. 180; Fol: 71 I. C. 283; Rel: 72 I. C. 668=4 Pat. L. T. 647.]

* First Appeal No. 123 of 1911 from an order of Austin Kendall, District Judge of Cawnpore, dated the 30th of May, 1911.

(1) (1909) 11 Bom. L. R. p. 627.

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APPELLATE CIVIL.

34 A. 426=9 A. L. J. 666 =14 I. C. 187.

The facts of this case were briefly as follows :—

Lalta Prasad and another filed a suit against the defendant respondent under the Religious Endowment Act. The District Judge examined one plaintiff at the first hearing, and ordered Lalta Prasad to be present in person on a subsequent date to which he adjourned the suit. He mentioned to the plaintiff's pleaders, Rai Debi Prasad and B. Munna Lal, that the case would be taken up at 12 o'clock on the day of hearing, but none of the plaintiff's pleaders put in an appearance, nor did the plaintiff, Lalta Prasad, himself. The defendant was present. It was said that the plaintiff's pleader, Rai Debi Prasad, as well as the defendant's pleader, Babu Vikramajit Singh, were absent at a late municipal meeting. The Judge waited for twenty minutes, and then dismissed the suit under order IX, rule 8, of the Code of Civil Procedure. The plaintiff applied for restoration, filing an affidavit that he was lying, on the day of hearing, in the chamber of his pleader, Babu Munna Lal, with a bad leg, waiting to be informed of his case having come up. Babu Munna Lal also filed an affidavit to the effect that he had conceived the Judge to have fixed two o'clock for this case and so had started another in the court of the Additional Subordinate Judge. The Judge held that the plaintiff had another pleader besides Babu Munna Lal, and he could have been informed by any of his pleader's clerks within the twenty minutes the court was waiting. He accordingly rejected the application. The plaintiff appealed.

Dr. *Tej Bahadur Sapru*, for the appellant :—

The case is one of misapprehension. The plaintiff's negligence was due to the common and natural reluctance of parties to appear [427] unrepresented in a court. The affidavits filed disclose a sufficient cause for setting aside the order under order IX, rule 8. The plaintiff should not be made to suffer too much for his own folly or for the abstention of his pleaders. He cited *Somayya* v. *Subbamma* (1). Restoration is obligatory on courts if sufficient cause is shown. There is no negative proposition that such applications can be granted unless sufficient cause is shown.

Dr. *Satish Chandra Banerji* (with him Lala *Purushottam Das Tandan*) for the respondent :—

The ruling in 26 Madras 599, has not been followed in this Court ; *Lala Prasad* v. *Nand Kishore* (2). I submit there is no other rule which can help the appellant. He has not made out sufficient cause for an interference. The lower court exercised sufficient discretion in the matter. The plaintiff cannot claim anything as a matter of right.

Dr. *Tej Bahadur Sapru*, in reply, referred to the provisions of section 151 of the Code of Civil Procedure.

KARAMAT HUSAIN and TUDBALL, JJ. : This is an appeal from an order refusing to re-instate a suit dismissed for default of appearance by the plaintiffs under order IX, rule 8. The suit is one in respect to a trust by certain trustees against a co-trustee who is charged with the management of the property.

The lower court rejected the application for rehearing on the ground that sufficient cause had not been shown. The facts briefly are as follows. The suit was partly heard. One of the plaintiffs had been examined and the suit adjourned to enable the other plaintiff to appear for examination. Two of the leading pleaders were appearing for them. One of these gentlemen and also the pleader for the opposite party are members of the Municipal Board of Cawnpore and on the date fixed were late in attending court

(1) (1903) I. L. R. 26 Mad. 599. (2) (1899) I. L. R. 22 Cal. 66.

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owing to a meeting of the Board. The other pleader for the plaintiff represented this to the Court early in the day and the Judge consented to taking the case at 12 o'clock. The pleader, however, misunderstood what the Judge said and thought that the case would be taken up at 2 o'clock. He informed the plaintiffs accordingly, and the same information was conveyed to their other pleader on his arrival. As a result, when the case was called at 12 o'clock, both pleaders were engaged in other cases [428] in other courts. The case was called repeatedly and the court waited for 20 minutes. One of the plaintiffs was waiting in his pleader's room. It is inconceivable that he did not hear the case called. Finally at 12-20 p.m., when no one appeared, the Court dismissed the suit under order IX, rule 8.

On their application for restoration the plaintiffs pleaded that they had not heard the calling of the case and placed before the court the misunderstanding into which their pleader had fallen. As a matter of fact it is admitted that the calling was heard, but too late, to enable the plaintiffs to appear in person. They arrived just after the case had been dismissed.

It is highly probable that, like most litigants in these provinces, they were unwilling to enter the court without their pleaders both of whom were at that time unable to leave the cases in which they were engaged.

The lower court has held that there was not sufficient cause for non-appearance and has rejected the application for restoration. In the course of his order the learned Judge made comments on the plaintiffs' case so far as it had been placed before him.

On appeal, we are asked to hold that there was sufficient cause. While we think that it might be difficult to hold that there was sufficient cause in view of the fact that the case was actually called and repeatedly called for 20 minutes in the manner in which cases are called in Mofussil courts both within the court room and outside the court room, so that persons in attendance in the court compound were sure to hear, we are of opinion that the case is one of those in which the court may exercise its inherent powers of passing orders necessary for the ends of justice. Nothing in the Code of Civil Procedure can limit or otherwise affect such powers under which, in our opinion, a court can restore such a case as this on grounds other than sufficient cause for non-appearance. Order IX, rule 9, makes it compulsory on a court to set aside a dismissal under order IX, rule 8, where the plaintiff satisfies the court that there was sufficient cause for non-appearance. It, however, cannot take away the court's power to restore the case for any other valid reason.

In the present case, it was no doubt foolish of the appellants not to have gone into court and asked for more time to enable them to secure the attendance of their pleaders, but at the same [429] time it is clear that they were pressing their suit and had attended court for that purpose, and the court might well have acceded to their request, passing a suitable order as to costs.

We, therefore, allow this appeal and set aside the order of dismissal of the suit, which the lower court will restore to its file and proceed to take up again at the point to which it had arrived when the order of dismissal was passed. The appellants will, however, whatever the result of their suit, bear their own costs of the application under order IX, rule 9, and of this appeal. In no case will these be recoverable from the respondent. The costs of the latter in this matter will abide the result of the suit.

Appeal allowed.

34 A. 429 (=14 I. C. 245=9 A. L. J. 534).

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APPELLATE CIVIL.

34 A. 429=
14 I. C. 244=
9 A L. J. 534.

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

RAGHUBAR RAI AND OTHERS (*Defendants*) *v.* JAIJ RAJ AND ANOTHER (*Plaintiffs*) AND MUSAMMAT CHINA (*Defendant*).*

[21st March, 1912.]

Contract—Covenant in sale-deed to discharge a debt due to a third party—Suit for compensation for breach—Actual damage not necessary to support suit—Cause of action—Limitation—Act No. XV of 1877 *(Indian Limitation Act), schedule II, article* 116.

On a sale of immoveable property the vendees covenanted with the vendors to pay a certain sum of money on account of a mortgage debt due by the vendors. They did not pay in accordance with the coven nt, and the mortgagee thereupon brought a suit upon his mortgage and obtained a decree.

Held on suit by the vendors for compensation for breach of the convenant, that it was not necessary that the vendors shou'd have suffered any loss before they could bring their suit; and that, as no time was specified in the sal--deed for the payment of the mortgage money, limitation began to run from the date of the execution of the deed. *Lethbridge* v. *Mytton* (1), *Carr* v. *Roberts* (2), *Loosemore* v. *Radford* (3), *Ashdown* v *Ingamells* 4), *Dorasinga Tevar* v. *Arunachalam Chetti* (5), *Raghunath Rai* v. *Brijmohan Singh* (6), *Kumar Nath Bhuttacharjee* v. *Nobo Kumar Bhuttacharjee* (7) and *Battley* v. *Faulkner* (8) referred to.

[Ref. 63 I. C. 87]

The facts of this case were as follows :—

On the 20th of April, 1895 the plaintiffs sold certain landed property to some of the defendants and left a sum of Rs. 708 with [430] the vendees for payment to one Sanchi Ram, who was the mortgagee of some other property of the vendors. The ven lees failed to pay, and Sanchi's heirs sued on the mortgage and obtained a decree, dated the 14th of January, 1910, for Rs. 1,769-4-8. The plaintiffs did not pay any money under the decree. They, however, on the 6th of June, 1910, brought an action against the defendants for the recovery of the money covered by the decree. The court of first instance treated the claim as one for the unpaid purchase money and held it to be barred by time. The lower appellate court took the suit to be one for damages for the breach of the covenant to pay Rs. 708 to Sanchi, found that it was not barred by time, and reversed the decree of the first court. The defendants appealed to the High Court.

Mr. *Abdul Raoof*, for the appellants.

Babu *Surendra Nath Sen* and Munshi *Parmeshar Dayal*, for the respondents :—

KARAMAT HUSSAIN and TUDBALL, J J.—The suit out of which this appeal arose was one for recovery of money. The plaintiffs' case was as follows :—

On the 20th of April, 1895, the plaintiffs sold certain landed property to some of the defendants and left a sum of Rs. 708 with the vendees for

* Second Appeal No. 414 of 1911 from a decree of E R Neave, Additional Judge of Gorakhpur, dated the 9th of February 1911, reversing a decree of Gokal Prasad, Subordinate Judge of Gorakhpur, dated the 22nd of August, 1910.

(1) (1831) 2 B. & Ad. 772.
(2) (1833) 5 B. & Ad. 78.
(3) (1842) 9 M. & W. 657.
(4) (1880) L. R. 5 Exch. D. 280.
(5) (1899) I. L. R. 23 Mad. 441.
(6) Weekly Notes, 1901, p. 14.
(7) (1908) I. L. R. 26 Cal. 241.
(8) (1820) 3 Barn. & Ald. 288 ; 22 R. R. 390.

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payment to one Sanchi Ram, who was the mortgagee of some other property of the vendors. The vendees failed to pay, and Sanchi's heirs sued on the mortgage and obtained a decree, dated the 14th of January, 1910, for Rs. 1,769 4-8. It is admitted that the plaintiffs have not yet paid any money under the decree. They, however, on the 6th of June, 1910, brought an action against the de endants for the recovery of the money covered by decree. The Court of first instance treated the claim as one for the unpaid purchase money and held it to be barred by time. The lower appellate court took the suit to be one for damages for the breach of the convenant to pay Rs. 708 to Sanchi, found that it was not barred by time and reversed the decree of the first Court. In second appeal it is urged that the plaintiffs have no cause of action, and that if they have, the suit is barred by time. Notwithstanding the fact that the pleadings of the parties do not clearly disclose the nature of the suit, the learned counsel for the appellants and the learned vakil for the respondents are agreed that the suit is for damages consequent on the breach [431] of the covenant to pay Rs. 708 to Sanchi Ram. Such being admittedly the nature of the suit, the 1st point for determination is whether, in the absence of an actual loss, the plaintiffs have a cause of action on the breach of the covenant. The contention of the learned counsel for the appellant is that so far only a decree has been obtained against the plaintiffs; that they have paid no money under it, and that, as they have suffered no actual loss, their suit is premature.

The reply of the learned vakil for the respondents is that the breach of a covenant is sufficient to create a cause of action and that an actual loss is unnecessary. He refers us to the following cases; —*Leithbridge* v. *Mytton* (1), *Carr* v. *Roberts* (2), *Loosemore* v. *Radford* (3), *Ashdown* v. *Ingamells* (4); *Dorasinga Tevar* v. *Arunachalam Chetti* (5), and *Raghunath Rai* v. *Brijmohun Singh* (6). The cases cited by the learned vakil for the respondents fully support the proposition that the breach of a covenant without any actual loss gives a sufficient cause of action. Following the above-mentioned cases we hold that the plaintiffs, notwithstanding the fact that they have not paid any money under the decree, dated the 14th of January, 1910, have a cause of action in consequence of the breach of the covenant to pay Rs. 708 to Sanchi Ram. The next question is as to the date on which the said cause of action arose. In the registered sale deed, dated the 20th of April, 1895, no time for the payment of Rs. 708 to Sanchi Ram was fixed, and the cause of action, therefore, arose on the date of the sale, *i. e.*, the 20th of April, 1895. It arises on the date of the breach if a date is fixed for the performance of a contract, but when no date is fixed for the ferformance the dates of the breach and the promise coincide.

The sale-deed being a registered document, article 116 of the Limitation Act applies and limitation began to run when the contract was broken on the 20th of April 1895. There are no successive breaches, for they happen in those cases only in which there is a promise to perform periodically, such as payment of rent or of annuity; nor is there any continuing breach, which, in the words of Mr. Shephard, applies only to "contracts obliging one of the parties to adopt some given *course* of action during [432] the continuance of the contractual relation." (Mitra on Limitation, Vol. I, p. 304, 7th Ed.). Hence it was held in *Mansab Ali* v. *Gulab*

(1) (1831) 2 B. & Ad. 772.
(2) (1833) 5 B. & Ad. 78.
(3) (1842) 9 M. & W. 657.
(4) (1880) L. R. 5 Ex. D. 280.
(5) (1899) I. L. R. 23 Mad. 441.
(6) Weekly Notes, 1901, p. 14.

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Chand (1) that upon failure to pay the principal and interest secured by a bond upon the day appointed for such payment breach of the contract to pay is committed, and there is no "continuing breach" within the meaning of section 23 nor " successive breaches " within the meaning of Article 115 of the Limitation Act (Act XV of 1877).

The breach in the case before us occurred on the 20th of April, 1895 and the action for compensation was brought on the 6th of June, 1910, and it was, therefore, barred by six years' limitation under Article 116 of the Limitation Act. There is no substance in the suggestion that the obtainment of the decree of the 14th of January, 1910, gives the plaintiffs a fresh starting point of limitation. The law of limitation has prescribed certain modes which give a fresh starting point of limitation and the obtainment of a decree is not one of those.

In *Kumar Nath Bhuttacharjee* v. *Nobo Kumar Bhuttacharjee* (2), which was regarded as a suit for compensation for the breach of a covenant and which was defended on the plea of limitation, a Bench of the Calcutta High Court, after discussing the cases of *Loosemore* v. *Radford* (3) and *Lethbridge* v. *Mytton* (4), remarked :—" These cases, therefore, show that in a certain class of cases, even before an injury is done or damage takes place, the plaintiff may bring an action in order that the person making the covenant may place him in a position to meet the liability he has taken on the latter's behalf. No authority has been shown to the effect that such a suit may not be brought for damages subsequent to injury sustained. The causes of action in the two classes of cases are different. In the one there is a right to bring an action to have the plaintiff put in a position to meet the liability cast upon him, in the latter to be indemnified after the plaintiff has met the liability. We think, therefore, that the plaintiffs were not bound to bring their action within six years from the date of the mortgage ; that their cause of action arose when they were damnified, that is, when they paid the mortgage debt to Srinath Roy in 1893....."

[433] With great respect to the learned Judges the rule laid down by them cannot be defended on principle. One breach of a contract can only furnish one cause of action and no more. Actual loss when it occurs is only one of the results of the breach, and is not an act of the party who breaks a contract and can, therefore, create no second cause of action. It is a pity that the case of *Battley* v. *Faulkner* (5) was not brought to the notice of the learned Judges. That case is a clear authority for the proposition that consequential damage arising from the breach gives no new cause of action. The claim in that case was for compensation for a breach of contract brought within six years from the date on which damages occurred, but beyond six years from the breach. The suit was held to be barred by time. BAYLEY, J., said :—" If the plaintiff in this case had released the defendant from the breaches of contract, that release would have been a bar to the present action for the special damages subsequently occurring, and this shows that the foundation of the action is the breach of contract. It was, therefore, from the period when the contract was broken that the cause of action accrued, and as that happened more than six years before the commencement of the present action, I think the non-suit was right." HOLROYD, J., said :—" It is said, however,

(1) (1887) I. L. R. 10 All. 85 (92).
(2) (1898) I. L. R. 26 Cal 241.
(3) (1842) 9 M. & W. 557.
(4) (1831) 2 B. & Ad. 772.
(5) (1820) 3 Barn. & Ald. 288; 22 R. R, 390.

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that although the action might be maintained upon the breach of promise, yet the damage sustained forms a substantive ground of action, but cannot be so considered in this form of action."

The point, that the date on which actual damage was sustained gave the plaintiffs a second cause of action, does not arise inasmuch as the plaintiffs have not yet paid any money to the heirs of Sanchi Ram.

To sum up. The suit is one for compensation for the breach of contract. The breach took place on the 20th of April, 18 5, and a cause of action arose on that day. The suit is, therefore, barred by limitation under Article 116 of the Limitation Act.

The point that a second cause of action will arise when the plaintiffs will sustain actual loss, is not before us.

The result is that we allow the appeal, set aside the decree of the lower appellate court and dismiss the plaintiffs' suit with costs.

Appeal allowed.

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34 A. 434 (=14 I. C. 278 =9 A. L. J. 670).

[434] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

MAWASI (*Plaintiff*) *v.* MUL CHAND AND OTHERS (*Defendants*).*

[22nd March, 1912.]

Pre-emption—Custom—Wajib-ul-arz—Owner of isolated revenue-free plots—Evidence of custom.

The pre-emptive clause of a wajib-ul-arz contained the following provision :—"If the owner of a share wish to sell it, he shall do so first to his near relation who may be a co-sharer in the zamindari, and in case of his refusal to anyone he likes."

Held that this by itself was not sufficient evidence of a custom giving owners of isolated revenue-free plots of land in the village a right to pre-empt.

[Ref. 82 I. C. 197.]

THIS was a suit for pre-emption based upon an alleged custom, which was thus described in the wajib-ul-arz of the mahal concerned :—"If the owner of a share wish to sell it, he shall do so, first, to his near relation who may be a co-sharer in the zamindari, and in case of his refusal to anyone he likes." The plaintiff was the owner of two revenue-free plots of land in the mahal, and it was held by the court of first instance that this qualification was not sufficient to give him a right to pre empt within the meaning of the wajib-ul-arz. The court accordingly dismissed the suit. The plaintiff appealed to the High Court.

The Hon'ble Dr. *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the appellant :—

Babu *Jogindro Nath Chaudhri* and Pandit *Baldeo Ram Dave*, for the respondents :—

RICHARDS, C. J., and TUDBALL, J.:—This appeal arises out of a suit for pre-emption. The plaintiff is the owner of two small plots of land which are not assessed for Government revenue. The plots held by the plaintiff appear in the same *khewat* as the land which goes to make up a 20 biswas mahal. To this extent and no further can it be said that the plaintiff is a proprietor in the mahal in which the property sold is situate The 20 bighas, 3 biswas and 7 biswansis do not go to make up the 20 biswas share set

* First Appeal No. 365 of 1910, from a decree of Kalka Singh, Additional Subordinate Judge of Agra, dated the 9th of August, 1910.

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forth in the *khewat*. The only evidence adduced by the plaintiff in support of the existence of a custom of pre-emption is the wajib-ul-arz. The wajib-ul-arz for mahal Chhidu is as follow : —" In this mahal if the owner of a share wish to sell it, he shall do so first to his near relation, who may be a co-sharer in the zamindri, and in case of his refusal to anyone he likes." [435] The wajib-ul-arz for mahal Roti Ram is in similar terms. Now the custom which the plaintiff attempts to set up is a custom giving a right of pre-emption to a person who is only a co-sharer in the very limited sense which we have already stated, namely, he merely holds two revenue-free plots entered in the same *khewat* as the property which is sold, is situated. The probability of such a custom existing is very slight. In the Full Bench case of *Dalganjan Singh* v. *Kalka Singh* (1), the learned Chief Justice said :—" The most essential feature of the co-parcenary body is the joint and several responsibility of the co-sharers for the payment of the Government revenue assessed on the mahal, coupled in cases of zamindari tenure with the holding and management of the whole of the lands of the mahal by all the co-sharers in common. It is for the mahal, for the " local area held under a separate engagement for the payment of the land revenue," not for a village or other local area, not being a mahal, that the Settlement Officer frames the wajib-ul-arz. It is meant as a record of the contracts or the customs of the co-sharers of the mahal. This being its object, it is *prima facie* unlikely to include any contract or custom which is absolutely independent of the continuance of the mahal as a fiscal and proprietary unit, or of the co-parcenary body for which it is framed. It seems to us that in considering the question of the existence or non-existence of a custom of pre-emption the principle involved in the foregoing remarks fully apply to the present case. The plaintiff is in no way liable for the payment of Government revenue in conjunction with the vendor. He has no right to have any voice in the management of the mahal in which the vendor's property is situate. In all probability he would not be consulted or have any right to be heard when the wajib-ul-arz was being framed. It is in all probability a mere accident that the plots of land which he holds came to be put into the *khewat* in which they are found. There is in short no community of interest. These are all matters which the court in considering the question of the existence or non-existence of a custom of pre-emption is entitled and bound to take into consideration. The wajib-ul-arz is not the custom. It is merely a piece of evidence to be given due consideration to in the course of the inquiry. The question is, whether by [436] production of the wajib-ul-arz in question, without the support of a single instance in which the right has been claimed or exercised, the plaintiff has discharged the onus of proving the existence of a custom of pre-emption giving him as a proprietor of an isolated plot a right to pre-empt.

In our opinion, the evidence falls altogether short of anything of the kind, and the decision of the court below was quite correct. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1899) I. L. R. 22 All. 1.

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34 A. 436 (=9 A. L. J. 540=14 I. C. 343).

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Sir Henry Griffin.

GHULAM NASIR-UD-DIN AND ANOTHER (*Judgment-debtor*) *v.* HARDEO PRASAD (*Purchasers of the decree*).*

[26th March, 1912.]

Act No. XV of 1877 (*Indian Limitation Act*), *schedule II, article* 781—*Act No IX of* 1908 (*Indian Limitation Act*), *section* 15 *Execution of decree—Limitation—Execution stayed by injunction.*

In execution of a decree certain property was attached by the decree-holder by means of an application made on the 8th of July 1904. Objection was taken to the attachment, which was disallowed on the 10th of March, 1908. This was followed up on the 5th of April, 1905, by a declaratory suit against the decree-holder. An injunction was also granted on the 6th of April, 1905, whereby the sale of the property in suit was stayed. The suit terminated on the 26th of June, 1907, but the injunction lasted until January, 1909. The next application for execution was made on the 14th of April, 1910.

Held, that this last application was within time whether the Limitation Act of 1877 or that of 1908 applied. It was not relevant that the decree-holder might possibly have obtained execution of the decree against other property of his judgment-debtor. *Behari Lal Misir* v. *Jagannath Prasad* (1) followed.

[Ref. 27 M. L. J. 734=26 I. C. 267.]

THE facts of this case were as follows:—

The North-Western Bank, Limited, of Meerut, obtained a decree against the appellants and others on the 24th of December 1897. This was confirmed in appeal by the High Court on the 7th of February, 1900.

On the 8th of July, 1904, the decree-holders made an application for execution against the judgment-debtors in the court of the Subordinate Judge at Delhi, and attached certain property. Two persons, Hafiz Khairati and Hafiz Ahmad Husain, objected to the attachment under order XXI, rule 58 (old section 278) of the Code of Civil Procedure, but their objections were disallowed. [437] They then brought a declaratory suit against the Bank on the 5th of April, 1905, and on the next day obtained an injunction restraining the decree-holders from proceeding further against the property. On the 29th of June, 1907, this suit was decided in favour of the plaintiffs, and the decree was confirmed in appeal by the Punjab Chief Court on the 26th of January, 1909. On the 19th of July, 1907, the Bank made an application that the case be shelved for the time being, as the property attached had been released, stating that it would try and find out other properties which could be attached. Proceedings were shelved accordingly.

On the 13th of April, 1910, the decree-holders made the present application for execution. Nasir-ud-din objected that it was barred by limitation, as more than three years had elapsed since the date of the last application of the 8th of July, 1904. He also contended that in any case as against him the present application was filed more than twelve years after the sale of the decree, the final decree, in the case being, as regards himself, the decree of the 24th of December, 1897.

The court of first instance held that the application was not time-barred, inasmuch as the application of 1904 was pending all the time its

*First Appeal No. 179 of 1911, from a decree of Soti Raghubans Lal, Subordinate Judge of Meerut, dated the 26th of January, 1911.

(1) (1906) I. L. R. 28 All. 651.

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execution was staved by the order of injunction, *i.e.*, till the date of the decree the 29th of June, 1907, from which date the present application was within time. As regards the second point, it held that limitation was saved by the fact that a warrant of arrest was issued against Nasir-ud-din in 1898, but as he avoided arrest, his avoidance amounted to fraud. The judgment-debtors appealed.

Maulvi *Muhammad Rahmat-ul-lah* (with him Maulvi *Ghulam Mujtaba*), for the appellants :—

Where execution has been staved on account of any obstacle, the application cannot be revived unless and until such obstruction is decided in favour of the decree-holder ; *Thakur Prasad* v. *Abdul Hasan* (1); *Sunpa Reddiar* v. *Avudai Ammal* (2). The latter case cites all the rulings on the point, and follows all the other High Courts. The application of 1904 cannot be said therefore, to have continued down to 1907. Section 15 of the new Limitation Act, IX of 1908, cannot benefit the decree-holder. The new Act came into force on the 1st of January 1909, when **[438]** the decree was already time-barred. Section 15 of the old Act applied only to suits and not to execution applications. Retrospective effect also cannot be given to the now amended section, unless expressly provided. The final decree in the case as against Nasir-ud-din was that of the 24th of December, 1897. The present application is, therefore, barred by the twelve years' rule contained in section 48 of the Code of Civil Procedure; *Ganga Kuar* v. *Kesar Kuar* (3); *Mashiat-un-nissa* v. *Rani* (4). No evidince has been produced to prove any such fraud or force as is required by section 48, clause 2 (1) of the Code of Civil Procedure. The application for arrest was made on the 4th of March, 1898. That was not within twelve years immediately before the date of the present application. Again, a subsequent application was made in 1904 after the application for arrest. That shows there was no fraud. The present application cannot be said to revive the application of 1904. It seeks different reliefs : is filed in a different court, and concerns different properties. He also referred to *Beni Prasad* v. *Kashi Nath* (5) and *Rahim Ali Khan* v. *Phul Chand* (6).

He cited, *Shivram Chintaman* v. *Sarasvati'ai* (7) also *Raghunandan Pershad* v. *Phuoon Lall* (8).

The Hon'ble Dr. *Sundar Lal*, for the respondents :—

We applied for execution on the 8th of July, 1904. An injunction was issued staving execution on the 6th of April, 1905 An application was, therefore, kept pending till the suit in which the injunction was granted was decided which was on the 29th of June, 1907, or rather when the decree was finally confirmed on appeal on the 19th of July, 1909. The present application is within three years from both these dates. The ruling in *Basant Lal* v. *Batul Bibi* (9) is exactly in point.

The decree-holder might have proceeded against other property of the judgment debtors, but the whole question is whether he was bound to do so He had attached sufficient property to cover his claim, and he was not compelled to give it up and seek somethingelse merely because somebody had put up a claim concerning it. The case in 6 All. is exactly parallel. It **[439]** is not stated expressly in the report whether the matter there was

(1) (1900) I. L. R. 28 All. 13.
(2) (1904) I. L. R. 28 Mad. 50 (52).
(3) (1904) 1 A. L. J. 409.
(4) (1889) I. L. R. 13 All. 1.
(5) (1909) 6 A. L. J. 401.
(6) (1896) I. L. R. 18 All. 482.
(7) (1894) I. L. R. 20 Bom. 175 (178).
(8) (1869) I. L. R. 17 Cal. 268.
(9) (1883) I. L. R. 6 All. 23.

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decided in favour of the decree-holder, but it must have been so as otherwise he would have applied for execution of the same property. An inspection of the record of that case shows that the property attached was also released there by a suit. The decree-holder there could have also gone against other property, had he chosen. The ruling in 6 All. follows an earlier case, which is also in my favour; *Paras Ram* v. *Gardner* (1). It has been repeatedly held that where execution proceedings cannot be continued on stay or other order obtained by some party, article 178 of the old Limitation Act applies. The application is, therefore, within time. It is not barred by the twelve years' rule of section 48, Civil Procedure Code, as against Nasir-ud-din. The latter was a party to a cross-appeal filed in the High Court in 1898. The final decree in the case was that of the 7th of February, 1900. It confirmed the decree as against Nasir-ud-din and awarded some further sums as against two other defendants.

Maulvi *Muhammad Rahmat-ullah*, in reply:—

The ruling in 6 All. is not contrary to that in 23 All., 13. Again, this question was not considered in 6 All. A revival of execution proceedings cannot be said to be the same thing as the revival of an application on execution.

KNOX and GRIFFIN, JJ.:—The North-Western Bank Company, Limited obtained, a decree against four persons—Hamza Ali Khan, Khwaja Ghulam Nasir-ud-din Khan, Musammat Aghai Begam and Mogal Jan, judgment-debtors, on the 24th of December, 1897. Hamza Ali Khan died and Faiz-ud-din, Aftab Ali and the three remaining original debtors have been put on the record as his heirs. An appeal was filed to this Court and that appeal was decided on the 7th February, 1900. The decree passed by the Subordinate Judge of Meerut was to a certain extent modified. Execution appears to have been first taken out on the 15th of January, 1898. Several other applications in execution followed. Oneof these was an application for execution made in the court of the District Judge of Delhi on the 8th of July, 1904. This application was made within time, and, as a result, some property situated in Delhi was attached as the property of Aghai Begam, judgment-debtor. Upon attachment, two persons, Hafiz Khairati and Hafiz [440] Ahmad Husain, objected. The objection filed by them was rejected on the 10th of March, 1905. They followed up the objection by a declaratory suit against the Bank, decree-holder. They also applied for an injunction. This was granted by the District Judge of Delhi, and under this injunction the sale of the property in suit was stayed until the decision of the suit. On the 29th of June, 1907, the Delhi court gave its decision in the declaratory suit, and on the 9th of July, 1907, the pleader for the Bank, decree-holder, put in an application in this Court, stating that as the attached property has now been released, the Bank will find out new property and then apply for execution, and meanwhile the case might be shelved, and an order was passed sending it to the record-room. On the 14th of April, 1910, Hardeo Prasad, who had in the interim purchased the decree from the Bank and had not his name entered on the record as decree holder, instituted proceedings for attachment and sale of certain movable and immovable property said to belong to the judgment debtors. Khwaja Ghulam Nasir ud-din Khan and Musammat Aghai Begam, judgment-debtors, took objections. They urged, that as no application had been made by the decree-holder since the 8th of July, 1904, the present application must be considered as out of time and barred by

(1) (1877) I. L. R. 1 All. 355.

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imitation. They also took objection that section 15 of Act No IX of 1908 could not be utilized by the decree-holder in computing the period of limitation. They raised other objections, but it is unnecessary to go into them so far as the present appeal is concerned. The lower court held that if the Act of 1877 applied to the case, (1) the decree-holder's application for execution made to the court of Delhi and the injunction which was issued by that court brought the case within article 178 of the Limitation Act of 1877, and (2), as the present application was within three years from the date of the final decision of that suit, it was within time. If the new Act governed the case, then the Court held that the period from the 6th of April, 1905, to the 26th of January, 1909, must be excluded from computation. In either case the present application was well within time. The Subordinate Judge rejected the objections of the judgment-debtors. The judgment-debtors have now come in appeal to this Court, and they contend that the application is time-barred and that the court was wrong **[441]** in holding that the injunction issued on the 6th of April, 1905, could be utilized by the decree-holder in saving limitation.

We are of opinion that the application for execution instituted on the 14th of April, 1910, may justly be reckoned as within time. The date of the decree sought to be executed and the time from which the period of limitation began to run in this case was the 7th of February, 1900. At that time Act XV of 1887 was the Act governing limitation of suits and applications, and the article applying to the present proceeding would be article 179 of the second schedule of that Act. No question has ever arisen regarding the application made to the court of Delhi on the 8th of July, 1904, as being an application which was time-barred. The flow of limitation was obstructed by the objection decided on the 3rd of December, 1904. It is true that that objection was rejected on the 10th of March, 1905, but the objection was followed up by a declaratory suit, also the act of Hafiz Khairati and Hafiz Ahmad Husain. Next in order came the injunction which was granted on the 6th of April, 1905. This was also an act of the persons above mentioned and not an act of the decree-holder. It was not until the 29th of June, 1907, that the obstructions thus caused were removed and the period of limitation began to run freely again. This Court, in *Behari Lal Misir* v. *Jagannath Prasad* (1), under similar circumstances, held that the article which in such a case applies is article 178 of the second schedule of the Limitation Act, and that the decree-holder's right to apply accrued, when by the decree the sale of a share of two villages in that case was set aside. "The present appeal," the learned Judges went on to say, "having been made within three years from that day was therefore within time." Following the precedent therein laid down, the present proceeding instituted on the 14th of April, 1910, was well within three years of the 29th of June, 1907. On the 1st of January, 1909, Act No. IX of 1908 came into force, *vide* section 1, clause 3 of Act No. IX of 1908, and it has been contended that the present case should be governed by article 182 of the first schedule of the Act. Even if so, it appears to us that the lower court was quite right in holding that section 15 of the act saves the decree-holder from limitation being set up against him under Act No. IX of 1908. Section 14, which corresponded with section 15 **[442]** of the present Act, made provisions for suits only, and the present Act in computing the period of limitation prescribed for either suits or applications for execution of a decree where execution has been stayed by

(1) (1906) I. L. R., 28 All. 651.

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injunction, the time of the continuance of the injunction shall be excluded in favour of the decree-holder. It will be remembered that in this case, an injunction was granted on the 6th of April, 1905, and lasted until the 26th of January, 1909. If this period be excluded in computing the period of limitation, the present application is well within the time granted by article 182 of Act IX of 1908. It was contended that the injunction issued by the Delhi court simply prohibited the sale of the property by Hafiz Mahammad Khairati and Hafiz Ahmad Husain, that it did not stay the execution of the decree altogether. In our opinion there is no force in this contention. A decree-holder is not bound to search out and to proceed against all property of which his judgment-debtor may stand possessed. This would only encourage the setting up of 60 years' claim to each property as attached. If he is executing his decree against property which he *bona fide* believed to be the property of his judgment-debtor, he is executing his decree within the meaning of the law. For this reason we hold that the application made by the decree-holder is not time-barred. It is unnecessary to consider the other pleas taken in this appeal, and we dismiss this appeal with costs.

Appeal dismissed.

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34 A. 442 (=14 I. C. 589=9 A. L. J. 577).

REVISIONAL CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

THE ALLAHABAD BANK, LIMITED, CAWNPORE (*Applicant*) *v.* MURLIDHAR AND OTHERS (*Opposite-parties*).*

[3rd April, 1912.]

Act No. III of 1907 (*Provincial Insolvency Act*), *sections* 24 *and* 28—*Insolvency—Application by a creditor to have his name entered in the schedule of creditors—Right of the scheduled creditors to make objections—Revision.*

Creditors whose names are already in the schedule prepared under section 24 of the Provincial Insolvency Act, 1907, are entitled to be heard before the debt of a creditor who comes in at the last minute under section 24 (3) of the Act is entered in the schedule.

THE facts of this case were as follows:—

Harish Chandar and others, proprietors of a shop called Sukhdeo Das Lachmi Narain, applied to be adjudicated insolvent, to [443] the Judge of the Court of Small Causes, Cawnpore, who was also invested with powers under Act III of 1907. The applicants were in due course adjudicated insolvent, a receiver was appointed and the 5th of September, 1908, was fixed for the proof of debts by the creditors in accordance with the provisions of section 25 of the Act. On proof of such claims as were filed, a schedule of creditors was prepared on the 12th of December, 1908, under section 24 of the Act. On the 19th of November, 1909, one Murlidhar, the party opposing this application here, applied that his name might be entered in the schedule of creditors claiming that his debts amounted to Rs. 53,614-7-8. On this, the Small Cause Court Judge issued notices to the insolvent, the receiver and the other creditors. After hearing the objections of the receiver and the other creditors and considering the proof filed by Murlidhar, he rejected the application of Murlidhar, on the 3rd of September, 1910. Murlidhar appealed against this order to

* Civil Revision No. 78 of 1911.

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34 A. 442=14 I. C. 589=9 A. L. J. 577.

the District Judge of Cawnpore. In this appeal Murlidhar impleaded only the insolvent and the receiver as respondents and did not make the other creditors parties to the appeal. The District Judge refused to hear the objections of the other creditors, set aside the order of the Small Cause Court Judge and ordered Murlidhar's name to be entered in the schedule of creditors. Against this order the Allahabad Bank, Limited, one of the opposing creditors, applied in revision to the High Court.

The Hon'ble Dr. *Sundar Lal*, for the applicant :—

The lower appellate court was clearly wrong in holding that the opposing creditors had no right to be heard. For section 24, clause (3) of the Provincial Insolvency Act expressly gives a right of hearing to the creditors in opposing an application by a third person that his name might be entered in the schedule of creditors. Moreover, the order of the first court could not be set aside without making parties every one affected by that order.

Munshi *Gokul Prasad* (with him Babu *Satya Chandra Mukerji*), for the opposite party :—

The District Judge was perfectly right in setting aside the order of the first court, inasmuch as Murlidhar had proved his debts in accordance with the provisions of section 25 of the Act. Nor did he act in contravention of any provision of law in setting **[444]** aside that order, because the receiver, after his appointment, represented all the creditors whose names were entered in the schedule, and there was no need of making the creditors parties to the appeal before the District Judge. In fact, the creditors had no *locus standi* to oppose the application of Murlidhar, who also was one of the creditors. The matter was between the petitioning creditor and the Court, and not between the different creditors. The proper course for the opposing creditors was to move the Court under section 26 of the Provincial Insolvency Act.

The Hon'ble Dr. *Sundar Lal* was not heard in reply.

KARAMAT HUSAIN and CHAMIER, JJ.—This is an application for revision of an order of the District Judge of Cawnpore, setting aside an order of the Judge of the Small Cause Court of Cawnpore under the Provincial Insolvency Act. Harish Chandar and others applied to the Small Cause Court to be declared insolvent. In due course, an order of adjudication was made, a receiver was appointed and the 5th of September, 1908, was fixed for the proof of their debts by the creditors. A large number of creditors put in proofs, and in December, 1908, a schedule was prepared in the ordinary way under section 24 of the Act. Nearly a year later, on the 19th of November, 1909, Murlidhar presented a petition to the Court, praying that his name might be entered in the schedule of creditors. He put in an affidavit showing that his claim amounted to over Rs. 53,000. The court caused notices of the application to be served on the receiver, and the creditors, whose names were already in the schedule and after lengthy proceedings, which it is unnecessary to detail, came to the conclusion that the proof of the debt was insufficient. It accordingly rejected Murlidhar's petition. Murlidhar then appealed to the District Judge making as respondents to his appeal the insolvent and the receiver, but he did not make any of the creditors respondents. The District Judge allowed the appeal on the ground that the proceedings in the Court of Small Causes, held upon the petition of Murlidhar, were irregular and contrary to law. He set aside the order of the Judge of the Court of Small Causes, and directed him to take up the petition of Murlidhar again and to dispose of it

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with reference to the remarks made in his (the learned Judge's judgment. This is an application for revision by the Allahabad Bank, Limited, which [445] has a claim against the insolvent for over Rs. 10,000. It is urged on behalf of the Bank that it was entitled to be heard in the court of the District Judge in support of the order of the Small Cause Court and that the learned District Judge's view of the law is incorrect. The learned Judge has held that when an application is made, as in this case, under section 24, sub-section (3) of the Provincial Insolvency Act, the creditors whose names are already in the schedule are not entitled to be heard in opposition to the petition; that the question arising upon such a petition is one between the petitioning creditor and the court; that all other creditors must stand aside at that stage, and that if the petition is accepted, the other creditors may move the receiver to take action or may themselves take action under section 26 of the Act.

Section 24, sub-section 3, distinctly provides that when a petition is put in under that sub-section, notices shall be served on the insolvent and the other creditors, and that the court shall hear their objections, if any. In the face of the language of the sub-section it is impossible to hold with the learned District Judge that the other creditors were not entitled to be heard upon the petition of Murlidar. It is unnecessary to point out how deeply they are interested in the matter. The Act evidently contemplates that the other creditors shall be heard before the debt of a creditor who comes in at the last moment is entered in the schedule. In our opinion, the Judge of the Small Cause Court was perfectly right in hearing the objections put in by the other creditors. The Judge of the Small Cause Court disposed of the petition of Murlidhar on the merits. There has been no decision on the merits in the court of the District Judge. In our opinion the District Judge should under the circumstances of the case have caused notices of this appeal to be given to all the creditors and have heard any of them who chose to appear, to resist the appeal and the learned Judge should, in our opinion, have disposed of the appeal on the merits. Under section 46, sub-section 1 of the Insolvency Act, we set aside the order of the District Judge and direct that the appeal be restored to the pending file of his court and be disposed of according to law. Costs in this Court will be costs in the cause, and be disposed of by the District Judge.

Application allowed.

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34 A. 446 (=9 A. L. J. 510=15 I. C. 435).

[446] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

DALIP SINGH AND OTHERS (*Defendants*) *v.* BAHADUR RAM (*Plaintiff*).*

[10th April, 1912.]

Mortgage—Construction of document—"Muakhiza"—Act No. IV of 1882 (*Transfer of Property Act*), *sections* 58, 100.

A deed, the basis of a suit for sale as on a mortgage opened with a recital that the executant had borrowed a sum of money, followed by a promise to pay the amount with interest at 2 per cent. per month within a certain time, and then provided: "*muakhiza aslo sud ta yom-ul-wasul upar* (description of the share) *haqiyat min muqir.....qaim rahega.....likaza.....butarik tamassuk muakhiza-i-jaidad ka likhdya.*"

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* First Appeal No 5 of 1912 from an order of Kanhaya Lal, District Judge of Azamgarh, dated the 18th of September, 1911.

Held that this deed could not be construed as a mortgage. The word *muakhiza* did not necessarily imply a power of sale, and there was nothing else in the deed from which an intention to give a power of sale could be inferred.

[**Fol** : 1 Pat. L. J. 563=38 I. C. 37; **Ref** : 70 I. C. 24=1 Pat. 387 ;]

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APPELLATE CIVIL.

34 A. 446=9 A. L. J. 550 =16 I. C. 435.

THE facts of this case were as follows :—

The plaintiff brought a suit for the recovery of Rs. 563-14-0, due on a bond, dated the 31st of March, 1892, executed by one Moghal Singh in favour of Bahadur Ram. The bond provided for the payment of the money secured by the end of Jeth, 1301 Fasli, corresponding to June, 1894. The defendants denied execution of the bond and said that as the bond did not amount to a mortgage, the suit was beyond time, having been brought more than 12 years after the money became payable. The Munsif held that the bond created only a charge on the property and that the suit was barred by limitation. The District Judge, on appeal, held that the bond created a mortgage, that section 31 of the Limitation Act of 1908 extended the period of limitation for mortgages, as well as charges, and remanded the suit to the first court for decision on its merits. The word used in the bond to connote hypothecation was *muakhiza*.

Maulvi *Muhammad Ishaq*, for the appellants :—

The only question in this appeal is whether the words used in the bond created a simple mortgage as defined in section 58 of the Transfer of Property Act, or whether they only amounted to a charge on the property specified in the deed. The words generally used in mortgage-deeds are *rehan*, *arh mustaghraq*, *makful*, *kifalat* and the use of the word *muakhiza* which finds a place in section 100 in the authorized Urdu translation of the Transfer of [447] Property Act—to the exclusion of any of those words, shows that the intention of the parties was to create only a charge on the property for the repayment of the loan ; *Kishan Lal* v. *Ganga Ram* (1); *Gour's "Law of Transfer,"* pp. 633, 655; *Ghose's Mortgage*, p. 1043; *Moti Ram* v. *Vitai* (2); *Gobinda Chundra Pal* v. *Dwarka Nath Pal* (3); *Janardan Vishnu Kulkarni* v. *Anant Lakshmanshet* (4).

Mr. *M. L. Agarwala*, for the respondents :—

The mere use of the word *muakhiza* in the deed does not necessarily imply that the bond in question was not a mortgage bond. The intention of the parties has to be gathered from the document read as a whole. Charge, as defined in section 100 of the Act, includes every burden on property which does not amount to a mortgage as defined in section 58 ; and it has to be seen whether the stipulations in the present bond amount to a mortgage. The bond provides that the principal and interest due upon it shall be charged upon immovable property specifically described therein. It is not very easy to draw a sharp line of demarcation between a mortgage and a charge ; but the real difference is that the latter is a much wider term than the former. A mortgage involves the transfer of an interest in 'specific immovable property' while a charge does not necessarily, and, while by a charge a title is not transferred and only the repayment of the money is secured out of a particular fund, the property hypothecated remains charged in the other, with the liability to repay that debt; *Royzuddi Sheik* v. *Kali Nath Mookerjee* (5). There is another distinction between the two. A bond creating a charge need not be attested by at least two witnesses, which is absolutely necessary to create a valid mortgage. The deed in question is attested by more than two

(1) (1891) I. L. R. 13 All. 28.
(2) (1889) I L. R. 13 Bom. 90.
(3) (1908) I. L. R. 35 Cal. 887.
(4) (1908) I. L. R. 32 Bom. 386.
(5) (1906) I. L. R. 3 Cal. 985.

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34 A. 446=9 A. L. J. 550 =15 I. C. 435.

witnesses. All the elements necessary to constitute a valid simple mortgage exist in the present case, and as the document created an interest in specific immovable property, there can be no doubt that the intention of the parties was to create a simple mortgage, though the deed does not contain any of those ordinary words connoting hypothecation.

[448] Maulvi *Muhammad Ishaq*, was heard in reply.

KARAMAT HUSAIN and CHAMIER, JJ.:—This appeal arises out of a suit brought by the respondent for the recovery of Rs. 562 odd by the sale of a share in a village. The suit is based upon a document, dated the 31st of March, 1891, which, according to the respondent, effected a mortgage of the share, but which according to the appellants effected only a charge on the share. If there was a mortgage the suit is maintainable, and the order of the lower appellate court remanding the suit for trial on the merits is correct. If there was only a charge, the suit is barred by limitation, as was held by the court of first instance, and this appeal must be allowed.

The deed opens with a recital that the executant has borrowed Rs. 991; then follows a promise by him to pay that amount with interest at the rate of 2 per cent. per mensem within a certain time, and after that there are the following words:—

Muakhiza asi o sud to yam-ul-wasul upar [description of the share] *hagiyat min muqir.....qaim rahega..... tihuza.....batarik tamassuk muakhiza-i-jaiaad ka ikhaya.*

If it is a mortgage at all, it is a simple mortgage. In order that there may be a simple mortgage, there must be (*a*) a transfer of an interest in specific immoveable property, (*b*) a personal undertaking by the mortgagor to pay the mortgage money, and (*c*) an agreement, express or implied, that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold. The second requirement is satisfied. There is no express transfer of an interest in property, and there is no express agreement that in case of default the mortgagee may bring the property to sale. But in a simple mortgage the interest transferred is the right to have the property sold, and this need not necessarily be provided for in the deed in so many words; it may be inferred from the language used and where such an agreement can be inferred, the first and third requirements are satisfied. We are asked to infer such an agreement from the use of the word *muakhiza*. It is conceded that this is not a word commonly employed to denote a simple mortgage. The words commonly used are *rehn*, *kifalat* and *mustaghraq*, and their grammatical variations. The root meaning of *muakhiza* is "taking," and the word is generally used in the sense of taking [449] satisfaction or calling to account. Thus *muakhizadar* is a man who is responsible or called to account. There is nothing in the word which necessarily implies taking and selling. For what it may be worth we note that the word *muakhiza* is used in the authorized translation of section 100 of the Transfer of Property Act for the word *charge* in the original. The words ordinarily used to denote a mortgage were well known in 1891, when the deed in question was executed. The word *muakhiza* does not necessarily imply a power of sale, and there is nothing else in the deed from which an intention to give a power of sale can be inferred. We are unable to hold that the deed conferred upon the creditor a power to bring the property to sale. In our opinion the deed is not a mortgage. We allow the appeal, set aside the decree of the lower appellate court and restore the decree of the first court. The appellants must pay the respondent's costs in all the three courts.

Appeal decreed.

34 A. 449 (=15 I. C. 798=13 Cr. L. J. 526=9 A. L J. 582).

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REVISIONAL CRIMINAL.

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox.

34 A. 449= 15 I. C. 798= 13 Cr. L. J. 526=9 A. L. J. 582.

EMPEROR v. THAKUR PANDE.*

[11th April, 1912.]

Criminal Procedure Code, sections 107, 145—Security to keep the peace—Dispute concerning land likely to lead to a breach of the peace—Procedure.

Where there exists a dispute relating to immovable property which is likely to lead to a breach of the peace, the magistrate concerned is not necessarily bound to proceed under section 145, but can take action—and this may sometimes be the better course—equally under section 107 of the Code of Criminal Procedure. *Sheoraj Roy* v. *Chatter Roy* (1) and *Emperor* v. *Ram Baran Singh* (2) followed. *Mahadeo Kunwar* v. *Bisu* (3) distinguished. *Balajit Singh* v. *Bhoju Ghose* (4) not followed.

A magistrate of the first class found after taking evidence that there existed between two parties a serious dispute relating to certain immovable property which was likely to give rise to a breach of the peace. He also came to the conclusion that one party was attempting on their own authority to set aside a possession of long standing. The Magistrate, however, did not take action **[450]** under section 145 of the Criminal Procedure Code, but, under section 107, bound over the party which he considered to be in the wrong to keep the peace. Against this order an application for revision was made to the High Court.

Mr. *Ahmad Kareem*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

KNOX, J.—A magistrate of the first class, after taking evidence, came to the conclusion that there was great probability of a breach of the peace.

There is apparently between the parties a dispute relating to immovable property, and according to the Magistrate one party is trying to set aside a possession of long standing on their own authority, with the result, the learned Magistrate says, that a great riot will take place in pargana Duaba; he accordingly bound down the petitioners before me and required that they should give security for keeping the peace for one year.

I am asked to interfere with this order on the ground that the dispute being a dispute in regard to immovable property, the Magistrate should not have acted under section 107, and in support of this contention I am referred to the case of *Mahadeo Kanwar* v. *Bisu*. In that case an order had been passed under section 147 of the Code of Criminal Procedure, without any of the procedure prescribed by section 145 being adopted, and that order was set aside as an order passed without jurisdiction. The learned counsel relies upon certain dicta contained in the judgment, in which it was laid down that where a report was made by the police that a dispute likely to cause a breach of the peace existed between the parties concerned regarding certain land, the Magistrate should have proceeded in the manner prescribed in section 145 and not under section 107, but the learned Judge has been careful to add that "it was not necessary to decide, for the purposes of this case, whether the fact of the Magistrate

* Criminal Revision No. 60 of 1912, from an order of Sri Lal, Sessions Judge of Ghazipur, dated the 23rd of December, 1911.

(1) (1905) I. L. R. 32 Cal. 966.
(2) (1906) I. L. R. 28 All. 406.
(3) (1903) I. L. R. 25 All. 537.
(4) (1907) I. L. R. 35 Cal. 117.

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34 A. 449=15 I. C. 798=13 Cr. L. J. 526=9 A. L. J. 582.

having been informed that a dispute existed in regard to land, ousted his jurisdiction to take proceedings under section 107."

I was also referred to the case *Balajit Singh* v. *Bhoju Ghose* (1). The learned Judges in that case held that, as the language of section 145 was mandatory and that of section 107 contained [451] words which were discretionary, the order passed under section 107 of the Code of Criminal Procedure when there was a dispute relating to land was an order which should be set aside. I find, however, in the case of *Sheoraj Roy* v. *Chatter Roy* (2), the learned Judges of the same High Court held that, where a dispute relating to possession of land is likely to cause a breach of the peace, a magistrate has a discretion to proceed either under section 107 or under sections 144 and 145 of the Criminal Procedure Code.

In *Emperor* v. *Ram Baran Singh* (3) a learned Judge of this Court held that a magistrate under similar circumstances might legally take action under section 107 of the Code of Criminal Procedure. With that view I entirely concur.

It is a matter of experience that cases coming under section 145 are, as a rule, cases long drawn out, and in the interval it is more than probable that owing to the hot blood excited over the matter a breach of the peace might occur. The magistrate often does well to take action under section 107. It is open to the petitioners in the present case to move the magistrate having jurisdiction to take action under section 145 if they make out a proper case. I have no doubt that the magistrate will take the necessary steps.

I find no cause for interference and dismiss the application.

Application dismissed.

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34 A. 451 (=13 Cr. L. J. 575=9 A. L. J. 696=15 I. C. 991).

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox.

EMPEROR *v.* GANGA.*

[13th April, 1912.]

Criminal Procedure Code, section 177—Jurisdiction—Effect of place of commission of offence ceasing to be British territory

An offence was committed in March, 1910, at a place which was then part of the Mirzapur district. Subsequently one of the persons alleged to have taken part in the commission of such offence was arrested in Bengal and sent to Mirzapur, where he was committed by the Joint Magistrate to take his trial before the Court of Session. In the meanwhile the place where the offence was committed had ceased to be British territory. *Held* that this fact did not oust the jurisdiction of either the Magistrate or the District Judge of Mirzapur.

AN offence was committed on the 18th of March, 1910, at a place which was then within the jurisdiction of the courts of the [452] Mirzapur district, and two persons were tried and convicted in respect thereof. A man of the name of Ganga, said to have been concerned in the same offence, absconded. He was after some months arrested in Bengal, transferred to Mirzapur, and there charged before the Joint Magistrate, who committed him to the Court of Session. The Sessions Judge

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* Criminal Revision No. 140 of 1912 by the Local Government from an order of W. R. G. Moir, Sessions Judge of Mirzapur, dated the 15th of January, 1912.

(1) (1907) I. L. R. 35 Cal. 117.
(2) (1905) I. L. R. 32 Cal. 966.
(3) (1906) I. L. R. 28 All. 406.

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33 A. 451=13 Cr L J. 175=9 A. L. J. 696=15 I. C. 991.

referred the question of jurisdiction to the High Court, being of opinion that, inasmuch as the scene of the crime had since the 18th of March been transferred to the State of Benares and had ceased to be British territory, he had no jurisdiction to accept the commitment.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown.

The accused was not represented.

KNOX, J.—The attention of the Court has been called by the learned Government Advocate to the case of *King-Emperor* v. *Ganga*, charged with an offence under section 392, read with section 75 of the Indian Penal Code.

The offence is said to have been committed on the 18th of March, 1910. Two men have already been convicted as having been concerned in the offence. Ganga was said at the time to have absconded and the case proceeded without his appearance in court.

So far as I can learn from the papers which have accompanied the record, he was arrested within the Bengal Presidency as being a person without any ostensible means of livelihood. He found his way to prison at Mymensingh. From this prison he was sent for, it does not appear by what authority, and produced before the Joint Magistrate of Mirzapur. The Joint Magistrate inquired into the case falling under section 392 of the Indian Penal Code. The inquiry began on the 6th of November, 1911, and ended in the committal to the Court of Session for trial on the 4th of December, 1911.

The Sessions Judge of Mirzapur, holding that the Joint Magistrate had no jurisdiction to inquire into the case, and that his court had no jurisdiction to try the case, directed that Ganga be returned to the custody of the District Magistrate and treated for the purpose of this charge as a prisoner of the Benares state in custody in British territory. It is with this order that the learned Government Advocate asks this Court to interfere.

[453] The attention of the learned Judge was directed to the case of *Mahabir* v. *King-Emperor* (1), also to the case of *Ram Prasad* (2), and lastly, to the case of *King-Emperor* v. *Lakhmi* (3).

In all these cases this Court held that the British Court had jurisdiction to try the several cases concerned. The learned Judge, however, considered that those cases could be distinguished from the present on the ground that the cases above cited related to persons who had been committed to the Court of Session before the 1st of April, 1911, the date on which certain parganas of the district of Mirzapur were constituted a state and granted to the Raja of Benares. He doubts their force as precedents in the present case, where the accused was not arrested until the 8th of October, 1911, and the case was not instituted against him until same date. Section 177 of the Code of Criminal Procedure of 1898 enacts that every offence shall ordinarily be inquired into and tried by a court within the local limits of whose jurisdiction it was committed. The sections which follow, 178-189, do not take the present case out of section 177. At the time when the offence was committed by Ganga, it was an offence committed "within the local limits" of the jurisdiction of the Magistrate of the district of Mirzapur; and as a necessary result upon the arrest, the case would, in the ordinary course, have been committed to the Court of Session at Mirzapur. It matters little to what place the offender

(1) (1911) I. L. R. 33 All. 578.
(2) (1912) 9 A. L. J. 51
(3) Reference No. 333 of 1911, made by the Sessions Judge of Mirzapur, to this Court.

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34 A. 451 = 13 Cr. L. J. 575=9 A. L. J. 696=15 I. C. 991.

betakes himself after he has committed the crime. To take an ordinary instance, an accused commits an offence within the jurisdiction of the District Magistrate of Mirzapur, he absconds, remains in hiding for a year or more, passes through several districts in the course of his flight and is eventually arrested for that offence within the district—say, of the 24-Pergunahs. Upon his arrest he is, as a matter of course, upon proper request made, transferred to the court of Mirzapur, his case investigated there, and if it is committed to the Court of Session that court proceed to try and pronounce judgment in the case. No question can arise as to jurisdiction.

In the present case the offence was an offence against British Indian law committed by Ganga at a time when he was a British Indian subject at a place which, at the time when the crime was [454] committed, was within the local jurisdiction of the Mirzapur courts. It has never been said that Ganga has at any time, since he committed the crime, ceased to be a British Indian subject So far as the record goes, he has apparently since the crime resided in British territory up to the time he was produced before the courts of Mirzapur. The mere accident that from the 1st of April, 1911, the spot where he committed the crime has ceased to be British territory appears to me quite irrelevant.

Wheaton in his Elements of International Law says:—"The judicial power of every independent state extends to the punishment of all offences against the municipal laws of the state by whomsoever committed within the territory also to the punishment of all such offences by its subjects wheresoever committed " (Edition 1896, p. 179). To the same effect is Phillimore's International Law, 3rd Edition, Vol. I. p. 216. According to Mr. Mayne in his Criminal Law, 3 Ed., p. 956, " the jurisdiction of the *mofussil* courts depends upon the offence having been committed within their local limits.' See *Hursee Mahapatro* v. *Dinobundo Patro* (1).

To hold otherwise would lead, it seems to me, to endless complications and might result in very serious miscarriages of justice.

So far as the present case is concerned, the jurisdiction of the Mirzapur courts which may be said to have commenced with the commission of the offence has neither been suspended nor unbroken.

I, therefore, set aside, the order of the learned Sessions Judge of Mirzapur, and direct him to try at an early date the prisoner Ganga, who has been committed to him, for the offence for which he was committed.

Order set aside.

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34 A. 455 (=16 C. W. N. 889=10 A. L. J. 364=16 I C. 197=16 C. L. J. 613=14 Bom. L. R. 1055=38 I. A. 156=23 M. L. J. 210 =1912 M. W. N. 976.)

[455] PRIVY COUNCIL.

SAJJAD HUSAIN AND ANOTHER (*Plaintiffs*) *v.* WAZIR ALI KHAN AND OTHERS (*Defendants*).*

[8th, 9th and 10th May and 13th June, 1912]

[*On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.*]

Parda-nashin lady—Execution of deed depriving herself of nearly all her property—Burden of proof—Requisites to be proved—Concurrent findings on facts that burden

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*Present :—Lord SHAW, SIR JOHN EDGE, and Mr. AMEER ALI.

(1) (1882) I. L. R. 7 Cal. 523.

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MAY 8, 9, 10.
JUNE 13.

PRIVY COUNCIL.

34 A. 455=16 C. W. N. 889 =10 A. L. J. 364=16 I. C. 197=16 C. L. J. 613=14 Bom. L. R. 1055=39 I. A. 156=28 M. L. J. 210 =1912 M. W. N. 976.

had not been discharged—First court's decision on that point affirmed by appellate court—Finding sufficient to dispose of case.

A pardá-nashin lady, separated from her husband, unable to read or write, and without independent legal advice, created an endowment of practically her whole property by a deed of which she appointed the appellants (plaintiffs) trustees. In a suit for a declaration that the property was waqf and for possession of it,

Held that, as they relied upon the deed, the onus was on the appellants to show that the nature and effect of it had, at the time of its execution, been explained to and understood by the executant.

Shambati Koeri v *Jago Bibi* (1) followed.

Upon the question whether that onus had been discharged, the appellate court in India affirmed the decision of the first court to the effect that it had not; but nevertheless allowed an appeal to His Majesty in Council under section 596 of the Civil Procedure Code (XIV of 1882) on the ground that the judgment of the lower Court had not been *wholly* affirmed.

Held that the findings of the Courts below amounted to concurrent findings of fact which could not be disturbed on appeal, and there being no "substantial question of law" the appeal must be dismissed. *Kuruppanan Servai* v. *Srinivasan Chetti* (2) followed.

[Pardanashin lady—Onus of proof; **Fol.** 36 All. 81; 64 I. C 559=43 All. 526=15 L. W. 1 (P. C.); **Ref** 66 I. C. 694=25 C. W. N. 942=34 C L. J. 333; 68 I. C 577 =34 C. L J. 529=26 C. W. N. 177; 69 I. C. 476=34 C. L. J. 563; **Rel.** 78 I. C. 180=22 A. L. J. 205=46 All. 310.]

APPEAL from a judgment and decree (27th March 1907) of the Court of the Judicial Commissioner of Oudh, which varied a decree (30th March 1906) of the Subordinate Judge of Lucknow, by which the appellants' suit was wholly dismissed.

The suit was brought to obtain a declaration that the property specified in three deeds, dated respectively the 4th of December, 1886, the 7th of March, 1898, and the 13th of November, 1902, was waqf (endowed property), and for separate possession of all the properties as against the first defendant, Nawab Abid Husain Khan, or in the alternative, joint possession of the properties with him. The plaintiffs' claim was dismissed by the Subordinate judge, but the Court of the Judicial Commissioner, on appeal, while affirming the decree as regarded the deed of the 13th [456] of November, 1902 reversed it with respect to the property included in the deeds of the 4th of December, 1886, and the 7th of March, 1898. The plaintiffs obtained in India leave to appeal to His Majesty in Council against that portion of the judgment and decree of the Appellate Court which affirmed the decree of the Subordinate Judge. The present appeal therefore related only to the portion of the case with which the deed of the 13th of November, 1902, was concerned.

The facts, shortly stated, were that the deed of the 4th of December, 1886, was a waqf-nama, or deed of endowment, which was executed by one Madad Ali and dedicated the properties mentioned therein for the maintenance of a tomb erected by him in the city of Lucknow, and for other purposes. He appointed two ladies, Sardar Begam and Mehdi Begam, trustees of the properties, giving them power to nominate their successors. Sardar Begam died in December, 1889, and Mehdi Begam continued to manage the property alone. On the 7th of March, 1898, Mehdi Begam executed a deed by which she added property to the endowment, and appointed Mirza Sajjad Husain, the first plaintiff, and Nawab Abid Husain Khan, the first defendant, to be trustees of the whole of the endowed property.

(1) (1902) I. L. R. 29 Cal. 749; L. R. 29 I. A. 127.

(2) (1901) I. L. R. 25 Mad. 215; L. R. 29 I. A. 38.

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35 A. 455=16 C. W. N. 889=10 A. L. J. 364=16 I. C. 197=16 C. L. J. 613=14 Bom. L. R. 1055=39 I. A. 156=23 M. L. J. 210 =1912 M. W. N. 976.

On the 13th of November, 1902, Mehdi Begam executed another deed by which she added other property of the value of about Rs. 43,000 to that already endowed, and appointed herself Mirza Sajjad Husain and Nawab Wazir Ali Khan, and the second defendant Basti Begam to be the trustees.

Mehdi Begam died in February, 1903, and Nawab Abid Husain Khan succeeded, as the brother and heir of the deceased, in obtaining possession from the Revenue Court of all her property. On the 27th of April, 1904, Umrao Mirza, the second plaintiff, was appointed a trustee of the endowed property by Basti Begam, the second defendant, who retired from the trust.

The main defence to the suit was contained in the written statement of the first defendant, and so far as it related to the deed of the 13th of November, 1902, was to the effect that that deed was not executed by Mehdi Begam; and that she was, at the time of the alleged execution by her, infirm and incapable of understanding it, and that she had no independent advice.

[457] As to that the Subordinate Judge said:—

"There is on this record no evidence except that of Babu Salig Ram, and it is not specific and connected with the transaction in question, that Mehdi Begam took independent advice before she executed the deed of November, 1902. The evidence of Mathura Prasad and of the others who were present at the registration of the document also falls short of the required standard. It does not satisfy me that Mehdi Begam intelligently understood the deed on which she was placing her seal and knew at the time its effects upon her rights as owner of the property comprised in the deed.

"Although on the whole there is no sufficient ground for holding that Mehdi Begam did not execute the document, the original of exhibit No. 3, its intelligent execution by her has not been proved. In my opinion the document is not such as should be given effect to. Proof of a mere formal execution by an illeterate parda-nashin in favour of her mukhtar is wholly insufficient."

On appeal the Court of the Judicial Commissioner (MR. E. CHAMIER, First Additional Judicial Commissioner, and MR. J. SANDERS, Second Additional Judicial Commissioner) said:—

"I now come to the question whether intelligent execution of the deed of the 13th of November, 1902, was proved. Mehdi Begam was an illiterate parda nashin woman separated from her husband under circumstances which are stated in *Suleman Kadir* v. *Mehdi Begum Surreya Banu* (1). The effect of the deed of 1902, if valid, appears to have been to strip her of almost all her property, for it left her in possession of some movable property not shown to be of any great value, and a wasika and pension which brought her in less than Rs 40 per mensem. The deed was registered not at her house where she lived with her brother but at the *Rauza*. Under these circumstances any one who relies upon the deed must prove that she understood its effect upon her position and probably also that she had independent advice."

And after discussing the evidence, the judgment concluded thus:—

"The learned pleader for the plaintiffs frankly stated that he could not ask us on the oral evidence alone to hold that Mehdi Begam understood the waqf-nama. He relied on what he called the circumstantial evidence. He contended that Mehdi Begam had proved herself capable of managing the affairs of the *Rauza* for many years and he pointed out that it was admitted that she had executed the waqf nama of 1898, and it was not suggested that she had not understood it. But the deeds differ greatly from each other, one dealt with a small portion of her property, the other disposed of practically the whole of it. We know nothing of the management of the affairs of the *Rauza* by the Begam, and it is impossible to say how much was done for her by the first plaintiff. There is a provision in the deed of November, 1902, by which the first plaintiff and second defendant are authorized to appoint their successors, but this power is withheld from the first defendant, though he is the brother of the Begam.

"It has not been proved that when Mehdi Begam executed the waqf-nama she understood its provisions or its effect upon her interests. The deed of 1898 [458]

(1) (1893) I. L. R. 21 Cal. 135: L. R. 20 I. A. 144.

was revocable and she may well have understood that the deed of 1902 also was revocable, and it is impossible to say whether she would have executed it had she known that she was stripping herself irrevocably of practically the whole of her property.

"For the above reasons I would confirm the decree of the Court below as regards the waqf-nama of November, 1902."

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34 A. 455=16 C. W. N. 889=10 A. L. J. 3n4=16 I. C. 197=16 C. L. J 613=14 Bom. L. R. 1056=39 I. A. 1 6=13 M. L. J. 210 =1912 M. W. N. 976.

Leave to appeal from the above decision to His Majesty in Council was given by the Court of the Judicial Commissioner (MR. L. G. EVANS, First Additional Judicial Commissioner, and Mr H. D. GRIFFIN, Second Additional Judicial Commissioner) on the ground "that the decision of the Court below was not wholly affirmed by this Court, although the applicants only propose to appeal against that portion of the judgment which affirms the decision of the Court below."

On this appeal—

Sir *Erle Richards*, *K. C.*, and *Ross* for the appellants contended that the Court of the Judicial Commissioner had wrongly held that the intelligent and proper execution of the deed of 13th November, 1902, by Mehdi Begam had not been proved by the appellants, and that the deed was consequently invalid; and it was submitted that in the absence of any rebutting evidence on the part of the respondent, the evidence given by the appellants was sufficient to prove their case. Under the circumstances with regard to the position of the lady the onus was on the respondent to impeach the deed. Reference was made to *Suleman Kadr* v. *Mehdi Begum Surreya Bahu* (1); *Faiz ud-deen Tewarry* v. *Nawab Syed Ali Hossein Khan* (2); *Ashgar Ali* v. *Delroos Banoo Begum* (3); *Sudisht Lal* v. *Mussamut Sheobarat Koer* (4); *Mahomed Buksh Khan* v. *Hosseini Bibi* (5); *Hakim Muhammad Ikram-ud-din* v. *Najiban* (6); and *Shambati Koeri* v. *Jago Bibi* (7).

The finding of the Judicial Commissioner's Court was not a finding of fact, but a mere statement that the onus had not been discharged, and the onus had been placed on the wrong party.

[459] *De Gruyther*, *K. C.* and *Cowell* for the respondent Basti Begam contended that the onus was on the appellants and they had failed to discharge it. The case was in the nature of an action in ejectment in which the plaintiff had to prove his title. No case decided on facts could be an authority on another case on facts: each case must be decided on its own facts. Reference was made to *London Joint Stock Bank* v. *Simmons* (8), where the argument of Sir H. Davey to that effect was accepted by Lord Halsbury, L. C. and to *Shambati Koeri* v. *Jago Bibi* (9), where it was laid down, following the case of *Sudisht Lal* v. *Sheobarat Koer* (4), that in the matter of deeds executed by parda-nashin ladies it is requisite that those who rely upon them should satisfy the Court that they had been explained to and understood by those who execute them. The appellants were here relying on the deed, and the onus was on them. The question whether the Court was satisfied was a pure question of fact, namely, whether on the evidence given the party on whom the onus lay had discharged it or not. There was no evidence to show that the deed of 1902 was read out and explained to Mehdi Begam, and she had no independent legal advice before executing it, and yet the deed purported

(1) (1893) I. L. R. 21 Cal 135; L. R. 20 I. A. 144.
(2) (1871) L. R. 1 I. A. 192 (204).
(3) (1877) I. L. R. 3 Cal. 824 (828).
(4) (1881) I. L. R. 7 Cal 245 (250); L. R. 8 I. A. 39 (43).
(5) (1888) I. L. R. 15 Cal 684 (694, 698, 699); L. R. 15 I. A. 81 (83, 86, 90.)
(6) (1898) I. L. R. 20 All. 447; L. R. 25 I. A 137.
(7) (1902) I. L. R. 29 Cal. 749; L. R. 29 I. A. 127.
(8) (1892) L. R. A. C. 201 (203, 208.)
(9) (1902) I. L. R 29 Cal. 749 (757); L. R. 29 I. A. 127 (130, 131).

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to get rid of her whole property. There were, on the other hand, concurrent findings of fact that she did not understand the provisions of the deed, nor its effect upon her interests. The rule as not disturbing the concurrent findings of fact of the Courts below should be applied in this case. Reference was made to *Ram Anugra Narain Singh* v. *Chowahry Hanuman Sahai* (1), *Karuppanan Servai* v. *Srinivasan Chetti* (2) and *Allen* v. *Quebec Warehouse Company* (3). It was not necessary that the appellate Court should affirm the decision of the first Court on every question of fact, and there was no "substantial question of law" within the meaning of section 596 of the Civil Procedure Code, 1882.

Sir *Erle Richards*, *K.C.* in reply contended, that there had been an error in the way the facts had been dealt with by the first Court. **[460]** The Subordinate Judge ought to have considered the conduct of Mehdi Begam in relation to the trust created, and not having done so he had misdirected himself. In saying that the sole question was as to the execution of the deed the Court had also misdirected itself. The point of law here was that in considering the question of Mehdi Begam's understanding a document which she executed, the position, ability, knowledge and habits of the lady were not taken into consideration as should have been done. Reference was made to *Mahomed Buksh Khan* v. *Hosseini Bibi* (4) where the result of all the cases was summed up.

1912, *June* 13*th* :—The judgment of their Lordships was delivered by LORD SHAW :—

This is an appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh, dated the 27th March, 1907, modifying a decree of the Subordinate Judge of Lucknow, dated the 30th March, 1906. The suit was brought on the 1st April, 1905.

It prayed for a declaration that all the property comprised in three deeds of endowment was waqf, that is to say, was endowed property, and the plaintiffs (the present appellants) as trustees under these deeds prayed for possession. The claim in short was, as stated, a " claim for possession of waqf property by right of trusteeship."

The claim of the appellants was dismissed by the Subordinate Judge in its entirety. Upon appeal, the appellate Court upheld this decree with respect to the property comprised in one of the three deeds of endowment, *viz.*, that of the 13th of November, 1902, and reversed it with respect to the property included in the other two deeds. That is to say, the endowments under these two deeds were held good.

The only question raised in the present appeal has reference to the last endowment, *viz* , that constituted by the deed of 1902. The preceding deeds, one dated in 1886 and one in 1898, were somewhat limited in their character, and the defendants' contention under which these deeds were attacked is not now further insisted on.

Many years ago a tomb, or, more properly speaking—as their Lordships are informed—a mausoleum, was erected in the city of Lucknow by one Madad Ali, now dead ; and in 1886 he made a waqf of certain property for the upkeep of the mausoleum and the **[461]** performance of religious observances in connection therewith. By the deed of endowment, Mehdi Begam was appointed one of two trustees, and upon the

(1) (1902) I. L. R. 30 Cal. 303: L. R. 30 I. A. 41.
(2) (1901) I. L. R 25 Mad. 215 (219) L. R. 39 I. A. 38 (39).
(3) (1886) L. R. 12 A. C. 101 (104, 105).
(4) (1888) I. L. R. 15 Cal. 684 (698, 699) : L. R. 15 I. A. 81 (92, 93).

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death of her co-trustee in 1899 she continued to manage the property alone. In March, 1898, she executed a document whereby she purported to add to the endowment, and she appointed the first plaintiff and her brother, the first defendant, to be trustees of the original and added property. There appears to be no doubt that Mehdi Begam was much interested in the mausoleum and in its endowment, its upkeep and its services. She died on the 4th of February, 1903, having on the previous 13th day of November executed another deed—that with regard to which the parties are now in contention.

Mehdi Begam was a parda-nashin woman; she was separated from her husband; she was unable to read or write, and she was possessed at the date of the deed which is questioned of a fortune of about Rs. 50,000. It is not disputed that in the ordinary case of a deed granted by a parda-nashin lady, it rests upon those founding upon the document to establish that she understood its effect and that the deed was intelligently and properly executed by her.

The waqf is undoubtedly of a comprehensive character. It proceeds upon the following narrative:—

"Whereas this world is unstable and no reliance can be placed on this borrowed life, and after death there remains no trace either of soul or body, and whosoever has come to this world from non-existence will be completely annihilated one day according to the proverb 'all that lies over it is mortal"; but through good and charitable deeds, or from one's male issue, if he is good and obedient, the continuance or one's name is possible. I, the declarant, have no issue of any kind from whom I may hope for the endurance of my name, consequently it seems proper to incline myself to the performance of good deeds."

The deed thereupon proceeds to endow:—

"With possession in the name of the undermentioned places in my lifetime in connection with the *Rauza* and for its maintenance, stability, and expenses, and also for sending people to Karbala and other holy places, as detailed below my personal, movable and immovable property, as specified hereafter, valued at Rs. 50,000."

She constituted herself as *mutaualli*, that is, as the manager of the religious endowment, and she appointed her brother and her general agent as trustees. Among the succeeding clauses the following appears to be important:—

"That the trustees shall in my lifetime, as well as after my death, continue to manage the undermentioned things just like myself and the carrying out of [462] the undermentioned things and of the above conditions shall also be binding and incumbent on me, as it is incumbent according to the *Imamia* law. And for my livelihood my *wasika* and pension are sufficient."

That pension amounted, as is admitted, to somewhere under Rs. 40 per month. Power is given for collection of the income of all property conveyed, such collection to vest only in the general agent, who was one of the trustees.

The document may be described shortly as an *inter vivos* conveyance taking effect *de presenti* and stripping the lady of all her possessions, except to the extent of the reservation made to herself of her pension of Rs. 40 per month. It appears to their Lordships that the deed accordingly is of a character justifying a strict and careful application of the rule operating for the protection of *parda-nashin* women and demanding affirmative proof on the subject of their intelligent understanding and execution of deeds attributed to them. This view is strengthened by the marked contrast which exists between this document of 1902 and the previous deed of endowment of 1898, which was limited in its scope, was purely testamentary, and expressly reserved powers of management of all the

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34 A. 455=16 C. W. N. 889 =10 A. L. J. 864 =16 I. C. 197=16 C. L. J. 613=14 Bom. L. R. 1056=39 I A. 156=23 M. L. J. 210= 1912 M. W. N. 976.

affairs of the endowed property to the lady herself, with power of amending and cancelling the endowment.

"According to the principles which have always guided the Courts in dealing with sales or gifts made by ladies in such a position (*parda-nashin* ladies,) (the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them, that the transaction was a real and *bona fide* one and fully understood by the lady whose property is dealt with"

This is the language of Sir Montagu Smith in *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan* (1) and is still the law. In the words of Sir Andrew Scoble in *Shambati Koeri* v. *Jago Bibi* (2)—

"It is a well-known rule of this Committee that in the case of deeds and powers executed by *parda-nashin* ladies, it is requisite that those who rely upon them should satisfy the Court that they have been explained to and understood by those who executed them."

Accordingly, the one and only question in this case is:—the burden of proof being thus placed, has it been discharged by the party upon whom it rests? In their Lordships' opinion, Mr. *De Gruyther* was justified in founding upon the concurrent findings [463] on fact of the Courts below. The Subordinate Judge, having heard the evidence, says:—

"It does not satisfy me that Mehdi Begam intelligently understood the deed on which she was placing her seal, and knew at the time its effects upon her rights as owner of the property comprised in the deed."

It is unnecessary to go into the details as to the alleged execution of the document in the zenana, as to whether certain witnesses knew the voice of the executant, as to whether the deed in point of fact was read, or was read in circumstances giving any indication of its appreciation by the grantor. The finding of the Subordinate Judge is as stated. In the judgement passed by the Court of the Judicial Commissioner of Oudh the opinion expressed was as follows:—

"It has not been proved that when Mehdi Begam executed the waqf-nama she understood its provisions or its effects upon her interests."

By section 596 of the Civil Procedure Code (Act XIV of 1882) it is specifically provided as follows with reference to appeals to His Majesty the King in Council: —

"Where the decree appealed from affirms a decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law."

Their Lordships put to the learned counsel for the appellants what question of law was here involved, and it was replied that, while the findings of fact were concurrent, the judgment of the Subordinate Judge showed that he had misdirected himself. It turned out that this was rested upon the ground that in the course of a long judgment certain materials for arriving at a conclusion had not been set out in the narrative which the judgment contains. These materials were of the most elementary character and their Lordships are of opinion that there is no ground for the suggestion that the Subordinate Judge had not taken them into account. It would be to misconstrue entirely the provisions as to concurrent findings on fact if the Judges of India were to have impliedly the duty laid upon them of making their narrative of the circumstances minutely and completely exhaustive, under the penalty that if they failed to do so, the absence from their mind of elementary considerations might be presumed.

(1) (1874) L. R. 1 I. A. 192 (206) : 13 B. L. R. 427 (430, 431.)

(2) (1902) I. L R. 29 Cal. 749 (757) L. R. 29 I. A. 127 (131).

The Courts below accordingly having concurrently found that the facts which it lay upon the appellants to establish were not proved, it appears to their Lordships that this is to all intents and [464] purposes a concurrent finding on a matter of fact, and that accordingly such a finding cannot be disturbed. The rules so clearly laid down by Lord Macnaghten in *Karuppanan Servai* v. *Srinivasan Chetti* (1) should be followed.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants.—*W. W. Box & Co.*

Solicitors for the respondent, Basti Begam.—*T. L. Wilson & Co.*

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34 A. 455=16 C. W. N. 889 =10 A. L. J. 364=16 I. C. 197=16 C. L. J. 613=14 Bom. L. R. 1055=39 I. A. 156=23 M. L. J. 210=1912 M W. N. 976.

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34 A. 464 (=10 A. L. J. 1=16 I. C. 146.)

APPELLATE CIVIL.

Before Mr. Justice Sir Henry Griffin and Mr. Justice Chamier.

JAGGI LAL AND OTHERS (*Plaintiffs*) *v.* SRI RAM AND OTHERS (*Defendants*).*

[20th March, 1912.]

Act No. XV of 1877 (*Indian Limitation Act*), *schedule II, articles* 110, 116—*Suit to recover rent on a registered lease—Limitation.*

Held that a suit for the recovery of rent based upon a registered lease is governed as to limitation not by article 116, but by article 110, of the Indian Limitation Act, 1877. *Ram Narain* v. *Kamta Singh* (2) followed.

[Ref. 12 M. L. T. 458=23 M. L. J. 519=1912 M. W. N. 1179.]

THIS was a suit for recovery of arrears of rent based upon a registered lease executed on the 1st of December, 1883, and registered on the 31st of December of the same year. The plaintiffs claimed arrears for six years. The court of first intance gave them a decree for three years' arrears only, holding that as regards the remainder of the claim the suit was barred by limitation. The plaintiffs appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellants.

Mr. *M. L. Agarwala* and Munshi *Gokul Prasad*, for the respondents.

GRIFFIN and CHAMIER, JJ.—This appeal arises out of a suit for arrears of rent based on a registered lease executed on the 1st of December, 1883, and registered on the 31st of December, 1883. The plaintiffs claim six years' arrears. The court below has given them a decree for three years' arrears, holding that the claim for three years is barred by limitation.

[465] The plaintiffs appeal, and it is contended that the defendants have made an acknowledgment of their liabillty, which, under the provisions of section 19 of the Limitation Act, operates to save limitation. This acknowlegment is said to be found in the defendant's account books. Extracts of these account books are on the record. They contain certain entries relating to the rent of the land in suit. The plaintiffs, however,

* First Appeal No. 106 of 1911 from a decree of Hari Mohan Banerji, Additional Subordinate Judge of Cawnpore, dated the 23rd of January, 1911.

(1) (1901) I L. R. 25 Mad. 215 (219); L. R. 29 I. A. 38 (39). (2) (1903) I. L. R. 26 All. 138.

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10 A. L. J. 1
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have failed to show that these accounts bear the signature of the defendants or their authorized agent. In this respect they have failed to satisfy us that the entries in question operate as an acknowledgment within the meaning of section 19 of the Limitation Act.

If is further contended that the lease being a registered one, they are entitled to sue within six years under article 116. In a similar case decided by Mr. Justice BURKITT, *Ram Narain* v. *Kamta Singh* (1), it was decided that article 110 was applicable to a suit of this nature. The learned Judge observed:—"I do not understand why when the article (110) apparently plainly provides for the case now before me, I should go out of my way and hold that article 116 applies." We entirely agree with the view of Mr. Justice BURKITT in the case referred to. We are aware that the question has been decided differently elsewhere, but there has been no unanimity of opinion. Under these circumstances we prefer to follow the decision of our own Court. The appeal is dismissed with costs.

Appeal dismissed.

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34 A. 466 (=9 A. L. J. 555=14 I. C. 587).

APPELLATE CIVIL.

Before Mr. Jutice Banerji and Mr. Justice Piggott.

AHMAD-UD-DIN (*Plaintiff*) *v.* ILAHI BAKHSH AND OTHERS (*Defendants*).*

[13th April, 1912.]

Muhammadan Law—Gift of a fixed share of offerings made at a shrine—Validity of —Possession of subject of gift.

Held that a gift of the right to receive a certain share of the offerings which might be made at a particular shrine was a valid gift and not repugnant to the doctrines of the Muhammadan law. *Amtul Nissa Begam* v. *Mir Nurudin Hussein Khan* (2) distinguished.

THIS was a suit to recover possession of certain property as the heir of one Maksud-un-nissa. It was resisted mainly on the **[466]** ground that the property had been validly transferred by Maksud-un-nissa some years before her death to one Ilahi Bakhsh, the principal defendant. The court of first instance dismissed the suit, holding that the deed of gift executed on the 11th of January, 1900, in favour of Ilahi Bakhsh was a valid deed. The plaintiff appealed to the High Court where the main ground of contention was that a portion of the property the subject of the deed of gift was not according to the Muhammadan law susceptible of such transfer.

The Hon'ble Nawab *Muhammad Abdul Majid* (Maulvi *Ghulam Mujtaba* with him), for the appellant:—

A gift of a right to receive offerings is not valid under the Muhammadan law. The thing must be in existence at the time. A gift of future things is void. Ameer Ali's Muhammadan Law, Vol. I., p. 37. Baillie's Digest, p. 515. The donor cannot give possession of future things, *e.g.*, fruits to be borne by a tree and this could not be gifted; *Amtul Nissa Begam* v. *Mir Nurudin Hussein Khan* (2), *Sarkum Abu Torab Abdul Waheb* v. *Rahamon Buksh* (3). A pension is a kind of property and

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* First Appeal No. 260 of 1910 from a decree of Gauri Shankar, Subordinate Judge of Moradabad, dated the 21st of June, 1910.

(1) (1903) I. L. R. 26 All. 138.
(2) (1896) I. L. R. 22 Bom. 489.
(3) (1896) I. L. R. 24 Cal. 83.

possession can be given of it—but offerings are different. An "incorporeal thing" could not be the subject-matter of a gift; Fatwa Alamgiri, Chapter IV.

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34 A. 465=9 A. L. J. 555 =14 I. C. 587.

The Hon'ble Pandit *Moti Lal Nehru* (Munshi *Gulzari Lal* with him), for the respondents:—

The rule that the thing must be in existence was a corollary from the rule that possession of the thing gifted must be made over. But it only applied to things capable of being made over. Where the subject of a gift is not capable of being handed over, all that is necessary is that the owner should do all that he can to make it over. A gift of an allowance is valid —the test of the thing being in existence would not be satisfied there, because an allowance does not come into existence till it is due. The reason is that the right to recover it is there. Of course, its payment could be enforced. So here, it was not a right to recover offerings but a right to a share of them when made, that was the subject of the gift; Wilson's Muhammadan Law, section 306, p. 325.

A gift is valid if by any appropriate method of transfer all the control that the subject matter admits of is made over to the donee.

[467] The Hon'ble Nawab *Muhammad Abdul Majid* was heard in reply.

BANERJI and PIGGOTT, JJ.—The plaintiff appellant in this case is suing to recover possession, as the heir of one Musammat Maksud-un-nissa of certain property in the hands of the defendant, and the defence with which we are concerned is that the lady above mentioned had, on the 11th of January, 1900, that is to say, almost eight years prior to her death, transferred the property in suit by a registered deed of gift to the first defendant, Ilahi Bakhsh. In the court below the execution of this deed of the 11th of January, 1900, was put in issue and questions were also raised as to the mental capacity of the lady donor at the time of the gift, and as to the influence exercised over her by the defendant, Ilahi Bakhsh. In the memorandum of appeal now before us the question of the *factum* of execution is again raised. We think it sufficient to say that, after considering the evidence, we find no reason whatever to dissent from the conclusion arrived at by the lower court on this point. There is a mass of evidence as to the execution of this deed, and we do not think that it is in any way adequately rebutted by the inclusive evidence of the witness Muhammad Husain, who was called as an expert on the question of the thump impression. We have also examined the evidence of the two witnesses, Asad Ali and Sahib-ud-din, who were called on behalf of the plaintiff to give evidence regarding Musammat Maksud-un-nissa's mental capacity. On this point also, we think, that the evidence of the witnesses for the plaintiff is of very small value and is entirely outweighed by the evidence on the other side.

The main point argued before us relates to a portion only of the gifted property, although we are informed that it is the most important and valuable portion. The deed of the 11th of January, 1900, purports to transfer to Ilahi Bakhsh the right of Maksud-un-nissa to receive a specified share in the offerings made by pilgrims at a certain shrine in the town of Amroha. It is contended before us that such a gift is invalid under Muhammadan law, because it is a gift of a thing not in existence at the time and incapable of that actual seisin which the Muhammadan law requires in order to make a gift valid. We think that the thing gifted in this case must be regarded as being the right of the donor to receive a

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34 A. 465=9 A. L. J. 555 =14 I. C. 587.

fixed [468] share in the offerings after they have been made, and this is an enforceable right in the sense that it is enforceable in law as against other co-sharers in the same. Upon the analogy of a transfer by gift of shares in a trading company, it seems to us that the transaction in this case is a transfer of an enforceable right within the meaning of the principle laid down in Mr. Ameer Ali's Muhammadan Law, volume I, p. 27 of the 3rd edition. It is, moreover, a gift of a thing which had a marketable value at the time when the gift was made, because we find on the record abundant evidence that shares in the right to receive offerings at the shrine have been made the subject of transfer in the past by way of sale as well as by way of gift. In this view, the transfer in question is different from the making of a gift of what a particular tree might bear in a certain year as referred to in the Fatwa Alamgiri, vol. IV, p. 374 quoted at page 36 of Mr. Ameer Ali's book already referred to. On behalf of the appellant reliance was placed on the case of *Amtul Nissa Begam* v. *Mir Nuruddin Hussein Khan* (1). We think that that case is clearly distinguishable from the one now before us. We may add that we are quite satisfied on the evidence that there was in this case an effective transfer from the donor to the donee and that the latter obtained from the date of the deed of gift such possession as the thing transferred was in its nature capable of. This appeal, therefore, fails, and we dismiss it with costs.

Appeal dismissed.

34 A. 468 (=14 I. C. 698=9 A. L. J. 709.)

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

MAHANT PURAN ATAL (*Defendant*) *v.* DARSHAN DAS AND ANOTHER (*Plaintiffs*).*

[18th April, 1912.]

Civil Procedure Code (1882), *section 539—Trust—"Public charitable or religious purposes"—Trust for benefit chiefly of a particular sect not necessarily not a public trust.*

Where it was clearly established by evidence that certain property had been held for very many generations for the purpose of supporting and maintaining *fakirs* entertaining visitors and for the giving of alms, and there was no evidence that the property was ever held for any other purpose, it was *held* that the court ought to presume the existence of a charitable or religious trust within the meaning of section 539 of the Code of Civil Procedure, 1882. And the trust was none the less a trust for a public purpose if its main object [469] was in fact the support of *fakirs* of a particular sect and the propagation of the tenets of that sect.

[Rel. 73 I. C. 302.]

THE facts of this case were as follows:—

There was a Nanakshahi *math* in the village of Baksar. The defendant appellant was the *mahant* of the *math* and was the *gaddinashin*. A criminal charge under section 456 of the Indian Penal Code was brought against him and he was convicted of the charge by the lower court. During the pendency of an appeal by him against that order to the High Court, the *mahants* of the neighbouring *maths* assembled and deposed him from the *gadi* as an improper and unfit person. It was admitted that succession

* Appeal No. 84 of 1911, under section 10 of the Letters Patent.

(1) (1896) I. L. R. 22 Bom. 489.

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to the *gaddi* was by election. The High Court acquitted the defendant on appeal and quashed the sentence. He went back and took possession of the *gaddi*, turning out the plaintiff Darshan Das, whom the neighbouring *mahants* had installed on the *gaddi* in his place.

Darshan Das with certain other persons brought this suit under section 539 of the Code of Civil Procedure, 1882, for the deposition of the defendant. The defence was (1) that the endowed *math* was not in the nature of a public charity and the position of the defendant was not that of a trustee. (2) If the electoral college was competent to depose him, he ceased to be a trustee from the date of his deposition, and as a trespasser the suit was not maintainable against him. (3) There was no breach of trust. The plaintiff himself was not a fit and proper person to be put on the *gaddi*.

The suit was decreed by the court of first instance, and the defendant appealed to the High Court. The appeal came up originally before a bench of the Court, consisting of KARAMAT HUSAIN and CHAMIER, JJ. The former was for allowing the appeal and dismissing the plaintiffs' suit. The latter would have directed further inquiry by the lower court. The result was that the appeal was dismissed. The defendant thereupon appealed under section 10 of the Letters Patent from the judgment of Chamier, J.

Babu *Surendra Nath Sen*, for the appellant :—

Nothing is known about the origin of the *math*. It is not a public charity, but a private institution—the property being endowed in favour of the *mahant* and his successors in office. A *firman* from the Moghal Emperor, dated 1754, is on record. It [470] gave property to one Must Ram, the then *mahant* of the *math*, and his descendants. Descendants meant disciples. There is nothing to show that Must Ram created a trust. The *firman* is in favour of the *sajjada-nashin*. What that meant is explained in *Ishtiaq Ahmad* v. *Sayid Massaod Ahmad* (1). A Muhammadan Emperor could not have created a public charity in favour of a Nanakshahi *math*. He cited Lewin on Trusts, 12th ed. 18. His mistaken notion of his position is not of itself material ; *Annaji Raghunath Gosavi* v. *Narayan Sitaram* (2), *Sammantha Pandara* v. *Settappa Chetti* (3), *Konwar Dooranath Roy* v. *Ram Chunder Sen* (4).

The *mahant* of a *math* is not a trustee ; *Vidyapurna* v. *Vidyanidhi* (5). There is a distinction between the manager of a temple and the *mahant* of a *math*; Tagore Lectures for 1908, page 226. Defendant was deposed and ceased to be a trustee.

The Hon'ble Pandit *Madan Mohan Malaviya* (Pandit *Kamakant Malaviya* with him), for the respondents, was not called upon.

RICHARDS, C. J. and BANERJI, J.—This appeal arises out of a suit purporting to be brought under section 539 of Act No. XIV of 1882. The plaintiffs allege that there was a charitable trust for public purposes; that they were interested in that trust; that the defendant, Puran Atal, had for some time been a *mahant* and *gaddi-nashin* of the trust; that he had been deposed as being unfit for the office and the plaintiff, Darshan Das, had been duly installed in his place, and that the defendant, Puran Atal, had retaken possession of the trust property. Various reliefs of the nature provided for by section 539 were then prayed for.

(1) (1869) 6 a. L. J. 632.
(2) (1896) I L. R. 21 Bom. 556.
(3) (1879) I. L. R. 2 Mad. 175.
(4) (1876) I. L. R. 2 Cal. 341.
(5) (1903) I. L. R. 27 Mad. 435.

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The first question which arose was whether or not sanction had been given according to the provisions of section 539. The court held in favour of the plaintiffs and that question has not been argued here.

The next question, which is the most important question in the case, was the question whether or not a public charity existed within the meaning of section 539. The learned Judge held that such a trust did exist. He then went on to hold that the defend-[471]ant Puran Atal, was not a fit and proper person to be the *gaddinashin*, that he had been duly deposed, and that the plaintiff, Darshan Das, had been duly installed in his place and was a fit and proper person to hold the office. The learned Judge accordingly framed a decree removing the defendant, Puran Atal, from the management of the property and directing that the property should be placed under the management of the plaintiff, Darshan Das, who was to render an account, at certain periods, of the trust property.

From this decree the defendant, Puran Atal, appealed. On the case coming before a Bench of this Court the learned Judges were not agreed on the question whether or not a "public charitable trust" existed within the meaning of section 539 of Act XIV of 1882. Hence the present appeal under the Letters Patent.

Section 539 of Act XIV of 1882 is not very grammatically expressed. The words are :—"In the case of any alleged breach of any express or constructive trust created for public charitable or religious purposes." If we were to read these words according to the ordinary rules of construction it would mean "in the case of a breach of trust created for public purposes, or religious purposes." It would appear, however, that the section has been construed as if the word "public" qualified the word "charitable" and the word "religious." In the new Code the words have been altered as follows :—"In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature." We propose to assume for the purposes of this case that the trusts referred to in section 539 of the old Code are same as those referred to in section 92 of the new Code, and that accordingly it is necessary before the plaintiffs can claim the reliefs they seek, that they should show that a trust created for a public purpose of a charitable or religious nature exists. The evidence has been very fully gone into by the court of first instance and also in the judgments of our learned colleagues. It seems very clear that there exists a certain foundation which is called the "Baksar" foundation. This foundation owns a number of villages, including the village Baksar. For very many generations a *nanakshahi fakir* has occupied the *gaddi* and managed the property. The defendant, Puran Atal, has put [472] in evidence a document which purports to be a grant of one of the villages, namely, the village Kandaha. This document, assuming it to be genuine, is dated some time about the year 1754 A. D., and purports to be a grant from the Emperor Alamgir II in favour of one Must Ram, a *nanakshahi fakir*. With the exception of this document, the original grants, if such there were, are no longer forthcoming. The learned Judge has doubted the genuineness of the document of 1754, and there are grounds for such doubt. In the year 1818 or 1819, in a proceeding to which we shall more fully refer presently, a number of *sanads* connected with the property held by the Baksar *gaddi* are stated to have been filed, and this document was not amongst those *sanads*. A charitable trust might be created by a grant for the express purpose or a grant having

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been made in favour of an individual or class of individuals, that individual or class might, after obtaining the grant, create a charitable trust. In the present case no evidence of an original grant for a charitable purpose from a ruler, save as before mentioned, is forthcoming, nor is there in evidence any instrument expressly creating a charitable trust. We have it, however, clearly established by evidence that for very many generations the property belonging to the Baksar *gaddi* has been held for the purpose of supporting and maintaining *fakirs*, entertaining visitors and for the giving of alms. There, is no evidence that the property has ever been held for any other purpose. In addition to this we have the evidence afforded by the proceeding which took place about the year 1818 or 1819. The document relating to this proceeding is dated the 5th of July 1819. At that time the British Government, through the Collector, was considering what should be done in respect of the revenue and succession to the property belonging to this very *gaddi*. Questions were put to the *mahant* who claimed to be the *gaddi-nashin* at that time. His answers amount to express declarations that the property was held for the purpose of supporting and maintaining *fakirs* and visitors and for charitable purposes. It would appear that on the strength of such declarations as to the purposes for which the property was held, the latter has ever since been held as *muafi*, free from Government revenue. Again, in the year 1851, we have a deposition of the *mahant* for the time being, in which it is declared that the **[473]** property has always been held generation after generation for the purposes we have already mentioned. Questions connected with the succession to the property and the rights of *fakirs* have from time to time come before the court, and it has always been assumed that the property was the property of the *gaddi*, managed by the *gaddi-nashin* for the time being and held for charitable purposes.

In our opinion, the Court, on this clear and uncontradicted evidence, not only is entitled to presume, but ought to presume the existence of a charitable or religious trust. The next question is whether this trust was for a " public purpose " within the meaning of the Code. The property was held for the support of *fakirs*, entertaining visitors and giving alms and generally fot charitable purposes. Even if we assume that the main purpose of the trust was to support *Nanakshahi fakirs* and to spread the religion founded by *Nanak*, we think that the trust was for a " public purpose " within the meaning of the section. This was the opinion of the learned District Judge and also of one Judge of this Court. In our opinion the case was a case coming under section 539.

The next question which arises is whether or not on the evidence we ought to hold that the conduct of the defendant, Puran Atal, was such as to render him unfit to hold the office of *gaddi-nashin* and to entitle the plaintiffs to relief in this Court. A large amount of evidence was given which went to show that Puran Atal was a man of immoral character. Contrary to the rules of the priesthood, he kept a woman. He had also created a scandal by his intrigues with a *chamar* woman. There was also evidence to show that he had spent the income of the property in building houses for the members of his family and in giving ornaments to his mistress. There was evidence to show that he neglected to devote the income to charitable purposes. The court of first instance believed this evidence. This Court is always reluctant to overrule the decision of the court of first instance on a pure question of fact, particularly where that court has had (as in the present case) the advantage of seeing and hearing

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the witnesses upon both sides. In the present case there is a strong additional reason why we should hesitate to interfere with the decision of the court below upon this question. It would appear that Puran Atal had been deposed by a large number of the *fakirs* of the *Nanakshahi* sect—not only the [474] *fakirs* interested in his own particular *gaddi*, but also the *fakirs* of the neighbouring *gaddis* of the same sect. In our opinion we ought to accept the finding of the court of first instance on this question.

It is next said that the *mahants* who purported to depose Puran Atal from the *gaddi* had no power to do so. The learned District Judge was satisfied that there was a usage which entitled the *mahants* to depose a *gaddi-nashin* for misconduct, and that they were entitled in the same way to elect a successor. So far as the election of a successor is concerned, it would appear that Puran Atal owes his seat on the *gaddi* to selection carried out in the very same manner in which the plaintiff, Darshan Das, was selected in the present case, the only difference being that in the case of Puran Atal his immediate predecessor disappeared, it is supposed, in consequence of his being murdered.

Some slight effort has been made to show that Darshan Das is not a fit and proper person to be a *mahant*. This was no part of the defendant's original case. Darshan Das has been selected by the body of *fakirs* as a fit and proper person, and we agree with the learned District Judge that it is well, so far as possible, to accept the selection of the sect as to the person who ought to occupy the *gaddi*.

In our opinion the appeal altogether fails. We accordingly dismiss it with costs.

Appeal dismissed.

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34 A. 474 (=9 A. L. J. 738=16 I. C. 85).

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Chamier.

RASHID-UN-NISSA (*Defendant*) *v.* MUHAMMAD ISMAIL KHAN AND ANOTHER (*Plaintiffs*).*

[24th April, 1912.]

Mortgage—Decree on mortgage—Decree set aside as against one mortgagor—Second suit to recover proportionate share of the debt maintainable.

A mortgagor died leaving him surviving a brother, two daughters and an illegitimate son. The four sons of the brother took an assignment of the mortgage from the mortgagee, and subsequently brought a suit for sale of the mortgaged property against the children of the mortgagor, and, inasmuch as they were themselves owners of part of the mortgaged property, framed their suit as one [475] for the recovery of specific shares of the mortgage money from the portions of the property in the possession of each of the defendants. They obtained in this suit an *ex parte* decree, which, however, was set aside as against one of the daughters upon the ground that she was a minor and not properly represented therein.

Held that the plaintiffs were not precluded from maintaining a fresh suit against this defendant for the recovery of a share in the mortgage debt proportionate to her share in the property.

* First Appeal No. 330 of 1910 from a decree of Muhammad Husain, Additional Subordinate Judge of Meerut, dated the 16th of June, 1910.

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The facts of this case were as follows :—

One Sardar Khan mortgaged three biswas out of his ten biswas in the village Gessupur to one Achal Das on the 31st of January, 1882. He died sometime in May, 1888, leaving two daughters, Rashid-un-nissa and Ulfat-un-nissa, a brother, Mauladad Khan, and an illegitimate son called Abdul Majid. Before his death Sardar Khan executed a deed of gift in favour of his son on the 27th of March, 1888, of one biswa in the village. After his death there was an arbitration among his heirs, and in the distribution of the property Rashid-un-nissa, who was a minor at the time and was represented by her sister, got $2\frac{1}{4}$ biswas instead of 3 biswas, her share under the Muhammadan law, and her sister received an equal share. Mauladad Khan also got one biswa and odd, and Abdul Majid, who was no heir under the Muhammadan law, got 2 biswas and 12 biswansis. The award was dated the 12th of June, 1889. On the 8th of April, 1889, the bond of January, 1882, was assigned by Achal Das to Ismail Khan, Taj Muhammad Khan, Niaz Muhammad Khan and Dost Muhammad Khan, the four sons of Mauladad Khan. Niaz Muhammad was married to Rashid-un-nissa. The assignees brought a suit on the bond on the 4th of January, 1894, against the two daughters of Sardar Khan and against Abdul Majid, and got a decree on the 28th of August 1894. The decree was satisfied in part by Ulfat-un-nissa and Abdul Majid, who transfered their shares under the award to the four assignees by sale deeds bearing date August 1897. So far as Rashid-un-nissa's share of libility was concerned, the other 3 sons of Mauladad Khan sold their interests in the decree to Niaz Muhammad Khan, the husband of Rashid-un-nissa, and in consideration got a bond from him, dated the 19th of August, 1897. Rashid-un-nissa then brought a suit to set aside the award and the decree on the ground that she had not been properly represented in those proceedings, and her suit was finally decreed by the Privy Council in July, 1909, *cf. Rashid-un-nissa* v. *Muhammad Ismail Khan* (1). **[476]** and she was given her full share, *i.e.*, 3 biswas, in the property of her father, the award and the decree being declared not binding on her. In the meantime a suit was brought against Niaz Muhammad Khan on his bond of the 17th of August, 1897, but it was dismissed on the 29th of November, 1909, after the judgment of the Privy Council in Rashid-un-nissa's case on the ground that there was no consideration for the bond.

The present suit was brought by two of the brothers of Niaz Muhammad Khan against Rashid-un-nissa for the proportion of mortgage money due on bond of 1882, chargeable against her share of the property. The claim was minus the share of Niaz Muhammad Khan in the amount due. Out of the 3 biswas originally mortgaged, her share was 16 bigwansis and odd. Abdul Majid was also made party to the extent of ten biswansis.

The Hon'ble Nawab *Muhammad Abdul Majid*, for the appellant :—

The decree of 1894 was still subsisting. It was against the two sisters and Abdul Majid and was a joint decree. It was against the entire property mortgaged and could have been recovered from any one of them. The Privy Council did not set aside the decree but ouly declared that it was not binding on Rashid-un-nissa. The decretal money could be realized from the other two, and then they could come for contribution against Rashid-un-nissa. They have got a decree for Rs. 4,000 : they cannot get another decree. That the Privy Council did not set aside the entire decree is manifest from the report in I. L. R. 31 All. 572.

(1) (1909) I. L. R. 31 All. 572.

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Maulvi *Muhammad Rahmatullah* for Maulvi *Ghulam Mujtaba* (with the Hon'ble Pandit *Moti Lal Nehru*), for the respondent, was not called upon to reply.

RICHARDS, C. J., and BANERJI and CHAMIER, JJ.:—The suit out of which this appeal has arisen, was brought to enforce a mortgage of the 31st of January, 1882, executed by one Sardar Khan, in favour of one Achhal Das, under the following circumstances. The property comprised in the mortgage was 3 biswas out of 10 biswas. Sardar Khan died in 1888, leaving him surviving two daughters, a brother and an illegitimate son. The appellant, Rashid-un-nissa, is one of those daughters. The mortgage of the 31st of January, 1882, was assigned by Achhal Das, the mortgagee, to the plaint-**[477]** iffs and their brothers, who where the sons of Mauladad Khan, the brother of Sardar Khan. The plaintiffs, in 1894, along with their brothers, brought a suit upon their mortgage, against the two daughters of Sardar Khan and against Abdul Majid, his illegitimate son, and they obtained a decree on the 28th of August, 1894. In 1897, Rashid-un-nissa brought a suit to have this decree set aside. We may mention that before the suit of 1894 was brought, an arbitration award had been made under which certain shares were allotted to the daughters, the brother and the illegitimate son of Sardar Khan. The object of Rashid-un-nissa's suit was to have the decree and the award set aside in so far as they effected her interests. She obtained a decree from the Privy Council in 1909, and under that decree she was restored to possession of three biswas out of the 10 biswas owned by Sardar Khan. After the passing of the Privy Council decree to which we have referred, the plaintiffs, who are two of the assignees of the bond of 31st of January, 1882, brought the suit out of which this appeal has arisen, and they seek to recover from Rashid-un-nissa's share of the mortgaged property her proportionate share of the mortgage debt. The court below has decreed their claim.

It is contended here that as the plaintiffs had already obtained a decree on the mortgage of 1882, they could not maintain a second suit on the basis of the same mortgage, and the foundation for the contention is that the decree obtained in 1894 was a joint decree against the whole of the mortgaged property, and could be enforced against any part of that property, and is, therefore, capable of enforcement as against the property of the heirs of Sardar Khan other than Rashid-un-nissa, present appellant, for the full amount alleged to be due for her share of the mortgage debt.

On referring to the decree we find that the prayer in the suit in which it was passed was that for the amount claimed, the mortgaged property should be ordered to be sold according to the specification given in the plaint, and in the specification given at the foot of the plaint, the share of each heir is separately specified. In the decree also the share of each heir is separately specified, as also the amount of demand against each of those shares. This was a natural claim in view of the fact that the integrity of the mortgage had been broken up by reason of the plaintiffs having **[478]** acquired the share of their father Mauladad Khan, which was also liable for the mortgage debt. It further appears that the plaintiffs had purchased at auction another part of the mortgaged property. So that it is manifest that the mortgage did not subsist as one indivisible mortgage, but each of the persons liable was only liable to the extent of his or her proportionate share of the debt. It was for this reason that the plaintiffs in the suit of 1894, claimed from each heir a proportionate part only of the mortgage debt and sought to bring to sale the share of that heir only

for the realization of that part. This was the claim which was decreed, and therefore we must hold that the decree was in effect a separate decree against each of the heirs for the proportionate liability of that heir. That being so, Rashid-un-nissa's share was, according to that decree, liable for her proportionate share of the mortgage debt. By the decree of the Privy Council obtained by her that decree having been set aside, the plaintiffs are entitled to recover from her the portion of the mortgage debt for which she is liable.

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It is next urged that the court below ought to have given credit to the appellant for any amount which Abdul Majid may have paid in excess of his quota of liability. This contention is, in our opinion, untenable, and the view taken by the court below in regard to it, is correct.

We, accordingly, dismiss the appeal with costs. We extend the time for payment of the mortgage money for a period of six months from this date.

Appeal dismissed.

34 A. 478 (= 16 I. C. 105=9 A. L. J. 798).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice and Mr. Justice Banerji.

LALI JAN (*Defendant*) *v.* MUHAMMAD SHAFI KHAN (*Plaintiff*).*

[26th April, 1912.]

Muhammadan law—Hanafi law--Gift—Construction of document-- Condition in derogation of the grant invalid.

A deed of gift of certain property provided as follows :—

'My son Naki Khan, will remain owner (*malik*) of the remaining two thirds and of the said two-thirds Naki Khan will remain full and absolute owner of one-third (*malik kamil o katai*), and he shall have the powers of an owner with respect to it, and Naki Khan will be owner (*malik*) of the other third also, and his name will be entered in the khewat, but the income of it is given for the [479] maintenance of my minor grandson, Muhammad Shafi Khan, son of Muhammad Taqi Khan, deceased. According to law, Naki Khan is guardian of Shafi Khan, he must give the income of that one-third for the maintenance of the minor and Naki Khan will not have the power of transfer over that one-third during the life of the minor.'

Held, on a construction of the deed, that the condition against alienation was invalid; but the condition as to the payment of one-third of the income to Muhammad Shafi Khan was valid and attached to the property in the hands of a transferee who was found to have notice thereof. *Nawab Umjad Ally Khan* v. *Mussumat Mohumdee Begum* (1) followed.

THIS was an appeal under section 10 of the Letters Patent from a judgment of CHAMIER, J. The facts of the case are fully stated in the judgment under appeal, which was as follows :—

" Musammat Tamanna Begam executed a *tamliknama* whereby she made one-third of certain property *waqf* and provided as follows with regard to the remaining two-thirds :—

'My son, Naki Khan, will remain owner (*malik*) of the remaining two-thirds, and of the said two-thirds, Naki Khan will remain full and absolute owner of one-third (*malik kamil o katai*), and he shall have the powers of an owner with respect to it, and Naki Khan will be the owner (*malik*) of the other third also and his name will be entered in the khewat, but the income of it is given for the maintenance of my minor grandson, Muhammad Shafi Khan, son of Muhammad Taqi Khan, deceased. According to law, Naki Khan is guardian of Shafi Khan, he must give the income of that

*Appeal No. 144 of 1911, under section 10 of the Letters Patent.

(1) (1867) 11 Moo. I. A. 517.

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I. C. 105=9
A. L. J. 798.

one-third for the maintenance of the minor and Naki Khan willl not have the power of transfer over that one-third during the life of the minor.'

"Soon after Naki Khan sold the whole two-thirds of the property to the respondents Lali Jan, who is said to be a prostitute. In the present suit the appellant, Shafi Khan, suing by his next friend, prays for possession of one-third of the property and for cancellation of the deed of sale in favour of the respendent. The defence is that the whole two-thirds of property were given to Naki Khan and under the Muhammadan law the conditions that he should not have power to transfer portion of the property and should make over the profits of that portion to Shafi Khan, are invalid and must be disregarded.

"The Munsif held that Shafi Khan was entitled to the profits of one-third of the property but not to possession of that share and passed a decree accordingly.

"Both parties appealed, and the District Judge held that all the conditions regarding one-third of the property were void, and that the respondent was not bound to make over the profits of that share to the appellant. Accordingly he dismissed the appeal of Shafi Khan, allowed the appeal of Lali Jan, and dismissed the suit of Shafi Khan with costs. Shafi Khan has appealed to this Court. S. A. No. 1119 is his appeal against the decree passed on his appeal to the District Court, S A. No. 1120 is his appeal against the decree passed on the respondent's appeal to that court.

[480] "It is in the first place contended that the *tamliknama* gives one-third of the property to Shafi Khan out and out. If this view is correct, the appellant must succeed. I think, however, that it is impossible to construe the *tamliknama* as giving Shafi Khan one-third of the property out and out. It is possible to construe the deed as giving him one-third for life and to regard the provision that it shall stand in the name of his uncle as an arrangement for the management of the property. But it appears to me that according to the correct construction of the deed, Naki Khan takes the whole two-thirds out and out and the intention was to bind him to allow Shafi Khan to have the profits of one-third for his life. The question is whether such a condition is permitted by the Muhammadan law. The parties are *Sunnis*. According to the Hanafi Law any derogation from the completeness of a gift is null, and if the intention to give to the donee the entire subject-matter be clear, subsequent conditions derogating from or limiting the extent of the right are null and void. In other words, according to the Hanafi law, the gift is valid and the condition is void. (Ameer Ali on Muhammadan law, vol I, p. 77). According to the same authority if a man was to give a piece of land to another on the condition that he should give to him the whole produce of the land in perpetuity the condition would be bad, but it is otherwise with a gift by A to B without any restriction on the power of disposition but subject to the condition that B should pay periodically to A a part of the usufruct of the property, both the gift and the condition would be valid, and if B should alienate the property, the assignee would take it subject to the condition. In these cases, says the learned author, the reason is obvious, for the reservation of an interest by the donor for himself or for himself and his heirs, does not interfere with the right of property vesting in the transfer by the act of transfer. For these propositions he cites the case of *Nawab Umjad Ally Khan* v. *Mohumdee Begum* (1) and the Nawadir, an authority which I have been unable to consult. SIR ROLAND WILSON (p 334) states the law in the same way, but doubts the correctness of the decision in the case just cited. That was, however, a decision of their Lordships of the Privy Council, and it is binding upon me if it applies to the present case. The parties to that case were Shiahs, but the decision does not purport to rest upon any peculiarity of the Shia law. According to it, the condition that the donee, Naki Ali Khan, shall pay the usufruct of part of the property to his nephew is valid.

"The condition that Naki Ali Khan shall not alienate the property seems to be invalid. The respondent contends that she is not bound by the condition regarding the payment of the usufruct to the appellant because she is a purchaser for value and the property is not charged with the payment of the usufruct to the appellant. I cannot accept this contention. She must have had notice of the condition, for it was contained in the deed under which Naki Ali Khan acquired title to the property. She holds the property on the same terms on which Naki Ali Khan held it.

"For the above reasons I dismiss S. A. No. 1119 with costs, and I allow S. A. No 1120 with costs here and in the lower appellate court and restore the decree of the court of first instance."

(1) (1867) 11 Moo. I. A. 517.

1912
APRIL 26.

APPELLATE CIVIL.

34 A. 478=16 I. C. 105=9 A. L. J. 798.

[481] The defendant alone filed an appeal under section 10 of the Letters Patent.

Mr. *Abdul Raoof*, for the appellant :—

The view taken by the learned Judge is wrong. The condition attached to the gift under the Muhammadan law is invalid. The view taken by the learned Judge is correct under the Shia school of Muhammadan law, but not under the Sunni school. The parties in the present case are Sunnis. The ruling laid down by their Lordships in *Nawab Umjad Ally Khan* v. *Mussumat Mohumdee Begum* (1) does not apply, as the parties there were Shias. Mr. Ameer Ali's view is not in keeping with the orthodox school of Muhammadan law and should not be given effect to. He modernizes the Muhammadan law, which may be good, but it is not the law as it is understood in India. SIR ROLAND WILSON has criticised the ruling in 11 Moore's Indian Appeals.

Pandit *Mohan Lal Sandal*, for respondent :—

The case in 11 Moore's Indian Appeals is not based upon any peculiarity of Shia law. Though the parties in that case were Shias, their Lordships referred to the Hedaya, which is an authority under the Sunni School of Muhammadan Law. See Ameer Ali's Mahomedan Law, vol, I, pp. 77, 78, 85 and 86; Hedaya, p. 483; Abdul Rahman's Institutes of Musalman Law, Art. 439, pp. 250 and 442; *Kasim Husain* v. *Sharif-unnissa* (2).

Mr. *Abdul Raoof* was heard in reply.

RICHARDS, C. J., and BANERJI, J.—The facts of the case and the questions of law which arise in it are fully dealt with in his judgment by our learned brother. In our opinion the conclusion at which he arrived is supported by the decision of their Lordships of the Privy Council in *Nawab Umjad Ally Khan* v. *Mussumat Mohumdee Begum* (1). That was no doubt a case between Shias, but the rule of law was considered as applying equally to Shias and Sunnis. This has been shown by Mr. Ameer Ali on page 86 of Vol. I of his well-known work on Muhammadan law. We dismiss the appeal with costs.

Appeal dismissed.

34 A. 482 (=14 I. C. 744=9 A. L. J. 743.)

[482] FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Karamat Husain and Mr. Justice Chamier.

THAKUR DIN RAM AND ANOTHER (*Defendants*) *v.* HARI DAS (*Plaintiff*).*

[3rd May, 1912.]

Act No. IX of 1903 (*Indian Limitation Act*), *schedule I, article* 152—*Limitation—Appeal—Jurisdiction—Appeal presented to Judge at his private house after court hours.*

A memorandum of appeal was presented to a District Judge at his private house, after court hours, on the last day of limitation. *Held* that the Judge had jurisdiction to accept the memorandum of appeal so presented, though he was not obliged to do so. *Jai Kuar* v. *Heera Lal* (3) overruled.

[Dist. 82 I. C. 928=20 L. W. 655; Fol. 65 I. C. 675=1922 Pat. 88; Rel. 79 I. C. 1017 =46 M. L. J. 78=1924 M. W. N. 162=19 L. W. 468=47 Mad. 312.]

*Second Appeal No. 572 of 1911, from a decree of J. H. Cuming, District Judge of Jaunpur, dated the 2nd of March, 1911, confirming a decree of Harihar Prasad, City Munsif of Jaunpur, dated the 23rd of December, 1910.

(1) (1867) 11 Moo. I. A. 517.
(2) (1883) I. L. R. 5 All. 285.
(3) (1874) 7 N. W. P. H. C. Rep. 5.

1912
MAY 3.

FULL BENCH.

34 A. 482=14 I. C. 744=9 A. L. J. 743.

THE facts of this case were as follows:—

The plaintiff's suit was decreed by the first court on the 23rd of December, 1910, judgment being delivered at about 4 P. M. The courts were closed for the Christmas vacation from the 24th of December, 1910, to the 13th of January, 1911, both days inclusive. The defendants applied for copies of judgment and decree on the 14th of January, 1911, the day the court re-opened and presented the appeal on the 27th of January, 1911, at 4-50 P. M., to the District Judge at his house. The last day for filing the appeal was the 27th of January, if the time during which the courts were closed (*viz.*, the 24th of December, 1910, to the 13th of January, 1911) were not excluded. The District Judge on the 28th of January noted the fact of presentation the day before, and admitted the appeal, subject to objections at the hearing. At the hearing on the objection of the respondent, the District Judge held that the presentation at his private residence was not a valid presentation and the appeal was time-barred. The defendants appealed.

On the appeal coming on for hearing before KARAMAT HUSAIN and CHAMIER, JJ., they referred it to a larger Bench by the following order :—

"The question for decision in this second appeal is, whether, as held by the lower appellate court, the defendants' appeal to that court was barred by limitation. If the appeal was barred by limitation, the further question arises whether the District Judge should have considered whether the defendants had sufficient cause for not filing the appeal within limitation.

[483] "The suit was decided by the Munsif on the afternoon of December, 1910. The civil courts in the district were closed from the 24th of December till the 13th of January. When the courts re-opened on the 14th of January the defendants applied for a copy of the judgment and decree and obtained it in five days. The appeal to the lower appellate court would have been in time if presented on or before the 27th of January, 1911. On the last-mentioned date the defendants' pleader took the appeal to the District Judge's house and there presented it to him at 4-50 P.M. He received it and took it to court with him on the following day. It was then discovered that there was a deficiency of six annas in the court fee on appeal. That was made good at once and nothing turns on that.

"The appellants contend that the appeal was presented within time, both because it was received by the District Judge within limitation, though after the usual court hours and at an unusual place, and because the period during which the courts were closed should be treated as part of the time requisite for obtaining copies of the judgment and decree. On the first point the decision of this court in *Jai Kuar* v. *Heera Lal* (1) is against them. On the second point the decision of the Madras High Court in *Suminatha Ayyar* v. *Venkatasubba Ayyar* (2) is in their favour, but seems to me to be inconsistent with the decision of the Full Bench of this Court in *Bechi* v. *Ashanullah* (3), by which we are bound, and which, we think, is correct.

"As at present advised, we are of opinion that the decision in *Jai Kuar* v. *Heera Lal* is erroneous and should be overruled. We think that it is clear that a Judge is not bound to receive an appeal after court hours at his private house, but that if he does so, it should be held that the appeal has been presented to him for the purposes of limitation.

"We direct that the record of the case be laid before the Hon'ble the Chief Justice, with a view to its being placed before a larger Bench.

"We have considered the question whether the Judge should have inquired whether the defendants had sufficient cause for not presenting the appeal within time. It appears to us that it was not his duty to do so. He was not asked to do so, and there was no affidavit before him as to the facts. The affidavit filed in this court cannot be used for the purpose of establishing facts which might have been but were not placed before the District Judge. In the circumstances we are unable to hold that the appellants have established sufficient cause for not presenting their appeal before the time at which it was actually presented."

(1) (1874) 7 N. W. P. H. C. Rep. 5.
(2) (1903) I. L. R. 27 Mad. 21.
(3) (1889) I. L. R 12 All. 464.

1912
MAY 3.
FULL BENCH.
34 A. 482=14 I. C. 744=9 A. L. J. 743.

The appeal was then argued before a Full Bench.

Babu *Piari Lal Banerji*, for the appellant.

The appellants were entitled to exclude the period within which the courts were closed for the vacation as time requisite for obtaining copies. The application for copies was made at the very earliest opportunity that it could be made, and it was not possible for the appellants to apply for copies earlier, when the [484] judgment was delivered after 4 p.m. on the 23rd of December. According to the rules prevailing in the lower courts, applications for copies are not received at that hour of the day, and it is a well-known principle of law that if the parties are prevented from doing a thing in court on a particular day, not by their own act or omission but by the act or omission of the court, they are entitled to do it at the first opportunity, and their act will be deemed to have been done at the earliest period of time at which it could have been done. As the appellants applied immediately on the re-opening of the court on the 14th of January, the law must attribute to them the intention of applying on the very day judgment was delivered if it were possible for them to do so. The matter would have been different if the appellants had waited one day even after the re-opening of the courts to apply for copies. He would not then have been entitled to the benefit of the exclusion of the holidays. The time required for obtaining copies must in each case be a question of fact depending on the circumstances of each particular case, as was correctly laid down in *Thanamal* v. *Bihali* (1). Under identical circumstances the Madras High Court had ruled that the vacation ought to be excluded; *Saminatha Ayyar* v. *Venkatasubba Ayyar* (2). This case was not at all at variance with the principle underlying the Allahabad cases, as that court expressly laid down that—under the special circumstances of that case, which were identical with those of the present case,—the vacation ought to have been excluded as being a portion of the time required for obtaining copies. This court, it is true, has held in Full Bench that the time required for obtaining copies did not begin to run till the application was actually made; *Bechi* v. *Ahsan-ullah* (3).

In the first place the point for decision in the present case did not arise in that case and the remarks were only *obiter dicta*. It further presupposed that it was possible for the party to apply for copies at an earlier period and did not purport to deal with a case where it was not possible for a party to apply earlier. In fact, Mahmood, J., in dealing with an hypothetical case similar to the present, was of opinion that the application would, under those [485] circumstances, be presumed to have been made before the holidays. All the remarks in the above case must be read as subject to the facts of that particular case. And in a later case many of those remarks were held to be *obiter dicta* and not binding; *Siyadat-un-nissa* v. *Muhammad Mahmud* (4).

As to the next point, it was open to the District Judge to accept an appeal in court after the usual court hours. It was also open to the District Judge to hold his court during court hours at his private residence, and there was no reason to suppose that the District Judge had no jurisdiction to accept an appeal at his private residence after court hours. It was, of course, open to the District Judge to refuse to do anythiug at home, but having accepted the appeal, it was not open to the other side to object. The case of *Janki Kuar* v. *Heera Lal* (5) was wrongly decided.

(1) (1894) Punj. Rec. 6.
(2) (1908) I. L. R. 27 Mad. 21.
(3) (1890) I. L. R. 12 All. 461.
(4) (1897) I. L. R. 19 All. 342.
(5) (1874) 7 N. W. P. H. C. Rep. 5.

1912
MAY 3.
FULL BENCH.
34 A. 482=
14 I. C. 754=
9 A. L. J. 743.

Lala *Purushottam Das Tandan* for the respondents :—

[RICHARDS, C. J.—We want to hear you on the question as to whether the appeal was validly presented at the house of the District Judge.]

The question whether the appeal, if presented after the usual court hours, was yet within time, if presented before the day had expired, depended on the meaning that would be given to the word 'day.' If 'day' meant the usual calendar day of 24 hours, parties would be entitled to present suits and applications up to 12 o'clock in the night, and yet there are absolutely no arrangements made for the receipt by any officer of such appeals and applications at such unusual hours. The word 'day' could only mean the court day consisting of the hours as fixed by this court. The District Judge after he had left court ceased to be a District Judge and was only a private individual, and by accepting the appeal he could not constitute himself a District Judge. Moreover, he passed no order then and there, but simply received the appeal and acted as the hand to present the appeal on behalf of the appellant on the next day in court. He never purported to exercise any judicial function as District Judge when the appeal was presented. To take an illustration, if the District Judge were abused at home, he could not constitute himself a court for the purpose of instituting contempt proceedings. He could not any more constitute himself a court for the purpose of receiving the appeal.

[486] Babu *Piari Lal Banerji* was not called on to reply.

RICHARDS, C.J. and KARAMAT HUSAIN and CHAMIER, J.J.—The facts of this case are as follows:—The Munsif delivered judgement in this case on the evening of the 23rd of December, 1910, allowing the plaintiff's claim in full. The Christmas vacation began the next day and the court did not re-open till the 14th of January, 1911, after the Muharram holidays. The appellants applied for a copy of the judgment and decree on the 14th of January and obtained it on the 19th. On the evening of the 27th of January, they handed an appeal to the District Judge at his private residence. If this can be deemed a sufficient presentation of the appeal, the appeal is within time. The District Judge dismissed the appeal as barred by limitation, on the strength of the ruling in *Janki Kuar* v. *Heera Lal* (1). In our opinion the appeal must be deemed to have been presented within time. No doubt, the learned District Judge might have refused to receive the appeal out of court hours, but he did not think fit to do so. He received the appeal and subsequently made an endorsement on it, showing that it had been presented to him at 4-50 p.m. on the 27th January and stating that it would be admitted if it was found to be within limitation and the other requirements of the law had been complied with. No reasons are given in the ruling of this Court referred to above, and we do not think that it should be followed. It is a matter of common knowledge that applications are in cases of emergency made to Judges at their private residences, and are received by them. It is impossible to hold that Judges act in such circumstances without jurisdiction. The present case was one of emergency. The 27th of January was the last day of limitation for the appeal. In our opinion the learned District Judge was justified in receiving the appeal at his private residence and the appeal must be deemed to have been presented within time. The District Judge was right in following the ruling of this Court, but for the reasons which we have given, we think that that ruling was erroneous. We set aside the

(1) (1874) 7 N. W. P. H. C. Rep. 5.

decree of the District Judge and remand the case to him with directions that the appeal be restored to the pending file and disposed of according to law. Costs here and hitherto will be costs in the case.

Appeal decreed and cause remanded.

1912
MAY 3.

FULL BENCH.

34 A. 482=14 I. C. 744=9 A. L. J. 743.

34 A. 487 (=10 A. L. J. 45=15 I. C. 319=13 Cr. L. J. 479).

[487] REVISIONAL CRIMINAL.

Before Mr. Justice Karamat Husain.

GANESHI LAL *v.* NAND KISHORE.*

[6th May, 1912.]

Criminal Procedure Code, section 197—Criminal misappropriation—Jurisdiction—"Place where consequences of act ensued."

The word 'consequence' in section 179 of the Criminal Procedure Code means a consequence which forms a part and parcel of the offence. It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of that offence.

Hence where an agent in charge of a branch shop in Sultanpur misappropriated money belonging to his principal which should have been sent to the head office at Cawnpore, it was *held* that the Courts at Cawnpore had no jurisdiction to try the agent for criminal misappropriation. *Queen-Empress* v. *O'Brien* (1) and *Colville* v. *Kristo Kishore Bose* (2) distinguished. *Babu Lal* v. *Ghanshan Das* (3) referred to.

[Appl. 38 Mad. 689; Ref. 35 All. 29; 69 I.C. 631=23,Cr. L. J. 743; 74 I. C. 74=1 Rang. 56=24 Cr. L. J. 746; 81 I. C. 538=25 Cr. L. J. 922;]

A complaint was lodged before a Magistrate of the Cawnpore district by one Nand Kishore, carrying on business at Cawnpore, against Ganeshi Lal, upon the following allegations. The complainant stated that Ganeshi Lal had been put in charge as his *gumashta* of a branch shop at Gauriganj in the district of Sultanpur; that contrary to his instructions Ganeshi Lal had kept the shop open and had realized some 1,500 and odd rupees, which he had misappropriated instead of sending it to the head office at Cawnpore. The Magistrate rejected the complaint, holding that he had no jurisdiction to entertain it. The Sessions Judge, however, took a contrary view and sent the case back to the Magistrate. The accused thereupon applied in revision to the High Court.

Babu *Satya Chandra Mukerji*, for the appellant.

Mr. *C. Ross Alston*, for the opposite party.

KARAMAT HUSAIN, J.—In this case Nand Kishore lodged a complaint against Ganeshi Lal. The substance of the complaint is as follows:—The head office of the complainant is at Cawnpore. A branch of the firm was opened at Gauriganj, district Sultanpur, in Sambat 1964. The accused was appointed a *gumashta* and his share was fixed at four annas in the rupee. He worked till Sambat 1966 and was asked to come to Cawnpore. The accused [488] seemed to have been guilty of criminal breach of trust. The complainant directed him to close the shop at Gauriganj and not to reopen it until the complainant had gone there and had checked the account. The complainant went to his home at Bhiwani in the Hissar district. When he returned in 1907, it came to

* Criminal Revision No. 195 of 1912 from an order of Austin Kendall, Sessions Judge of Cawnpore, dated the 22nd February, 1912.

(1) (1896) I. L. R. 19 All.. 111.
(2) (1899) I. L. R. 26 Cal. 746.
(3) (1908) 5 A. L. J. 833.

1912
MAY 6.

REVISIONAL CRIMINAL.

34 A. 487=10 A. L. J. 45 =15 I. C. 319 =13 Cr. L J. 479.

his knowledge that the accused had opened the shop and misappropriated the money realized by him which he had to send to Cawnpore. A sum of about Rs. 1,583-14-6 has been misappropriated by him. When the complainant was examined, he distinctly stated that the accused misappropriated the money belonging to the branch of the firm at Gauriganj. The Magistrate to whom the complaint was made came to the conclusion that he had no jurisdiction inasmuch as the offence appeared to have been committed in Gauriganj. In revision, the learned Judge was of opinion that the court at Cawnpore had jurisdiction. In his order he says :—"The facts alleged constitute an even stronger case for jurisdiction in the Cawnpore courts than did the facts in a previous case, I. L. R. 19 All., 111, or I. L. R. 26 Cal., 746. Having regard to section 179 and to the above rulings in explanation thereof, I find that the Magistrate had jurisdiction to proceed with the case." An application in revision is made to this Court, and it is urged on behalf of the applicant that the order of the Joint Magistrate is right. Section 179 of the Code of Criminal Procedure runs as follows :—" When a person is accused of the commission of any offence by reason of anything which has been done and of any consequence which has ensued, such offence may be inquired into or tried by a court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued." The word 'consequence' in this section, in my opinion, means a consequence which forms a part and parcel of the offence. It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of the offence. In *Babu Lal* v. *Ghansham Das* (1) it is remarked :—" It is contended that section 179 by reason of the words contained in it 'and of any consequence which has ensued,' gives the Magistrate at Aligarh in this case jurisdiction. But the only reasonable interpretation which can be put upon these words is that they are [489] intended to embrace only such consequences as modify or complete the acts alleged to be an offence." The above remarks support the view I take. The loss to the principal firm at Cawnpore is, therefore, not a consequence of the act of the accused committed at the branch of the firm within the meaning of section 179, Criminal Procedure Code. In the case of *Colville* v. *Kristo Kishore Bose* (2) I find the following passage.—" He seems to have thrown out in the course of his judgment that he has no jurisdiction to take cognizance of the complaint because the offence, if any, was committed at Shalunar within the jurisdiction of the District Magistrate of Howrah. But it appears to us that the moneys having been received from the complainant's firm at Calcutta, and the balance of accounts as stated by the complainant having been rendered in Calcutta, the Presidency Magistrate had jurisdiction to take cognizance of the complaint in question." The above facts are very different from the facts of the case before me, and the case is no authority for the proposition that if an offence under section 408 is committed in a branch of a firm the courts at the head office of the firm will have jurisdiction. In the case of *Q. E.* v. *O'Brien* (3) the facts were also different, and the loss to a branch of the firm was not held to be a loss to the principal firm at another place. For the above reasons, I hold that the courts at Cawnpore have no jurisdiction to proceed with the case, and set aside the order of the learned Sessions Judge. Let the record be returned.

Application allowed.

(1) (1908) 5 A. L. J. 333.
(2) (1899) I. L. R. 26 Cal. 746.
(3) (1896) I. L. R. 19 All. 111.

34 A. 490 (= 10 A. L. J. 48=15 I. C. 49).

[490] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

AZIZ BAKHSH (*Objector*) *v.* KANIZ FATIMA BIBI AND ANOTHER (*Decree-holders*).*

[7th May, 1912.]

1912
MAY 7.

APPELLATE CIVIL.

34 A. 490=10 A. L. J. 48 =15 I. C. 49.

Civil Procedure Code (1908) *order XXI, rule* 57—*Execution of decree—Attachment—Application for execution dismissed but subsequently restored on review.*

By a mistake of the Court an application for execution against property which was under attachment was dismissed, but the decree-holder obtained a review of that order and the executing court was directed to proceed. There was no order removing the attachment. *Held* on application by the decree-holder to sell the attached property that the attachment still subsisted and was valid as against a sale made by the judgment-debtor previous to the review.

[**Appr.** 35 I. C. 210; **Ref.** 3 Pat. L J. 310=45 I. C. 589; 42 All. 39=17 A. L. J. 901; 17 A. L. J. 52=41 All. 157; 62 I. C. 348=33 C. L. J. 201=25 C. W. N. 544.]

IN this case the assignee of a simple money decree applied for attachment of two classes of property, (1) property burdened with a mortgage in favour of the assignor, and (2) property not so mortgaged. The first court disallowed the judgment-debtor's objection, but upon appeal it was allowed by the High Court and the application was dismissed *in toto*. The decree-holder, however, made an application for review, and a modified decree was passed dismissing the application for execution in respect of the mortgaged property alone. During the pendency of the application for review, the judgment-debtor had transferred the property to a third person, and the lower court after receipt of the first order had sent the record to the record room. After review the decree holder applied to the executing court to go on with the execution as to the non-mortgaged property. The judgment-debtor objected; but his objections were disallowed. The judgment-debtor thereupon appealed to the High Court.

Mr. *Nihal Chand*, for the appellant.

Mr. *B. E. O'Conor* and Maulvi *Ghulam Mujtaba*, for the respondents.

KARAMAT HUSAIN and TUDBALL, JJ.—This is an appeal by a judgment-debtor from an order passed in execution proceedings.

The person seeking to execute the decree is the assignee of a simple money decree which was transferred to the court of the Subordinate Judge of Meerut.

[491] The assignee of the decree attached two lots of property, (1) property which was burdened with a mortgage in favour of her assignor; (2) property which was not so mortgaged. Both sets of property were attached. The judgment-debtor objected that the mortgaged property could not be sold in execution without a suit being brought on the mortgage.

The first court disallowed the objection. An appeal was preferred by the judgment-debtor, to this Court, a Bench of which, on the 2nd of June, 1909, upheld the objection and passed a decree dismissing the application for execution *in toto*. In this order there was clearly an error, as some of the property attached was not mortgaged property.

Accordingly, on the 10th of August, 1909, the decree-holder applied for review of the judgment of the 2nd of June, 1909. The application was granted, and this Court, on the 13th of June, 1910, passed a modified order dismissing the application for execution only in respect to the

* Frist Appeal No. 54 of 1912, from a decree of Soti Raghubans Lal, Subordinate Judge of Meerut, dated the 25th of November, 1911.

1912
MAY 7.

APPELLATE CIVIL.

34 A. 490=
10 A. L. J. 48
=15 I. C. 49.

mortgaged property and remitting the record to the lower court with orders to continue with the execution of the decree according to law in regard to the rest of the property. In the meantime, the lower court on receipt of the decree of the 2nd June, 1909, had on the 18th of August, 1909, sent the record into the record-room.

While the application for review was pending, *i.e*, between the 10th of August, 1909, and the 13th of June, 1910, the judgment-debtor sold the nonmortgaged property to a third party.

After the decision of the 13th of June, 1910, the decree-holder applied to the lower court on the basis of this Court's order of that date to go on with the execution proceedings and to sell the attached (non-mortgaged) property. The judgment-debtor (not his transferee) objected, pleading that under order XXI, rule 57, the previous attachment had ceased to exist, and that a fresh attachment was necessary and the property could not be sold as he had already sold it to another person.

The lower court rejected the objection, and hence this appeal by the judgment-debtor.

Stress is laid on order XXI, rule 57. The rule clearly does not apply. It relates to the case of a default by the decree-holder which prevents the court from continuing the execution proceed- **[492]** ings and results in a dismissal of the application for execution by reason of that default. In such a case the rule lays down that the attachment ceases to exist directly the order of dismissal is passed. The rule allows the court on the occurrence of such default to either dismiss the application or adjourn the proceedings, and adds that if the application be dismissed the attachment ceases at once.

In the present case there was no default, nor after such a dismissal would the revival of the execution proceedings cause a revival of the attachment, at least so as to prejudice the rights of strangers who have in the meantime acquired a title to the property (*vide* 14 C. L. J. 476). This latter case does not help the appellant who is himself the judgment-debtor; nor is the case reported in 13 C. L. J. 243, of any assistance, for in that case there was a clear specific order releasing the property from attachment. Prior to the Code of Civil Procedure now in force there was often considerable doubt whether an attachment came to an end on the passing of an order dismissing an application for execution by reason of the decree-holder's default (*vide* I. L. R. 33 Cal. 666). This has now been set at rest by order XXI, rule 57. But in the present case there was no such order of dismissal for default. The first order of dismissal passed by this Court on appeal on the 2nd of June, 1909, was set aside on review, and the order finally passed on the appeal only disallowed the application for execution in so far as it related to the mortgaged property, and upholding the application in regard to the property now in question and ordering the lower court to go on with the execution of the decree in respect thereto.

In regards to this property there has, therefore, been no dismissal of the application for execution. The lower court's order of the 18th of August, 1909, consigning the record to the record-rooms does not and cannot help the appellant. He made the transfer while the application for review was pending. We would point out that his transferee has not come into court.

We hold that in the circumstances of this case the attachment of the property in question at no time came to an end, and we, therefore, dismiss the appeal with costs.

Appeal dismissed.

34 A. 493 (=10 A. L. J. 19=16 I. C. 157).

[493] APPELLATE CIVIL.

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Before Sir Henry Richards, Knight, Chief Justice and Mr. Justice Banerji.

MUHAMMAD AKHTAR HUSAIN KHAN AND OTHERS (*Plaintiffs*) *v.* TASADUQ HUSEIN (*Defendant*).*

[10th May, 1912.]

Partition—Appeal against preliminary decree—Final decree passed during pendency of appeal—Cross objections filed against final decree—Appeal against preliminary decree maintainable.

Where the plaintiffs in a suit for partition had preferred an appeal from the preliminary decree, and had also, in the defendant's appeal from the final decree, filed cross objections, it was *held* that there was no bar to the hearing of the plaintiffs' appeal against the preliminary decree. *Kuriya Mal* v. *Bishambhar Das* (1) and *Narain Das* v. *Balgobind* (2) distinguished.

[Ref. 36 All. 532; 78 I. C. 978; 84 I. C. 674=40 C. L. J. 291.]

THIS was an appeal under section 10 of the Letters Patent from a judgment of PIGGOTT, J. The facts of the case appear from the judgment under appeal, which was as follows :—

"The question raised by this second appeal is a somewhat curious one. In a suit for partition a preliminary decree was passed on the 19th of December, 1907. On the 1st of February the plaintiffs in the suit preferred an appeal against the said decree. They neglected, however, to ask the appellate Court for any order staying proceedings in the Court of first instance during the pendency of this appeal. The result was that the appeal was still pending when, on the 10th of March, 1908, the first Court proceeded to pass a final decree. Against this decree the defendant appealed, while the plaintiffs later on put in a memorandum of cross objections under order XLI, rule 22, of the present Code of Civil Procedure. In this petition the plaintiffs did not raise any of the points which they had taken in their memorandum of appeal against the preliminary decree but merely objected to certain matters which had been determined by the final decree alone. I have just held in a connected appeal by the defendant that this appeal of the said defendant against the final decree was maintainable, and have remanded that case to the lower appellate court for a decision both on the appeal and on the cross objections. What I have now to decide is simply whether the plaintiffs' appeal against the preliminary decree of the 19th December, 1907, is maintainable, in view of the fact that these plaintiffs have not appealed against the final decree passed on the 10th of March, 1908. It is contended that the present case is distinguishable from that decided by this Court in I. L. R. 32 All. 225, because in the present case the appeal was filed before the final decree had been passed. I find myself unable to draw any distinction of principle on this ground. The reasons given in the above reported case for not entertaining an appeal against a preliminary decree unless the final decree is also challenged, do not seem to me to be affected by the circumstance that there was no final decree in existence at the moment when the appeal against the preliminary decree was filed. This view was taken by a Bench of this Court in F. A. No. 3 of 1910, decided on the 21st of March, 1911. I have pointed out that the plaintiffs could have protected themselves either by obtaining a stay order from the appellate court, or by repeating in their memorandum [494] of cross objections the grounds on which they had challenged the preliminary decree in their appeal against the same. Even now it is open to the lower appellate court, if it is satisfied that the plaintiffs have acted in good faith, to admit a further memorandum of cross objections, or to permit amendment of the memorandum already presented so as to meet the difficulty to which the plaintiffs find themselves. The appeal now before me must, in my opinion, fail. It is, accordingly, dismissed with costs."

The plaintiffs appealed.

The Hon'ble Dr. *Sandar Lal* and Mr. *S. A. Haidar*, for the appellants.

Dr. *Satish Chandra Banerji*, for the respondent.

* Appeal No. 97 of 1911 under section 10 of the Letters Patent.

(1) (1910) I. L. R. 32 All. 225. (2) (1911) 8 A. L. J. 604.

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RICHARDS, C. J.—This appeal arises under the following circumstances. The suit was one for partition. A preliminary decree was made on the 19th of December, 1907. The plaintiffs preferred an appeal within time against this preliminary decree. Before the appeal was decided, however, a final decree was made on the 10th of March, 1908. The defendant preferred an appeal against the final decree, and the plaintiffs filed cross objections under order XLI, rule 22. The two appeals then came before the lower appellate court. It dismissed the plaintiffs' appeal on the ground that they had not appealed from the final decree, and it dismissed the defendant's appeal upon the ground that he had not appealed against the preliminary decree. Both parties appealed to this Court, and our learned brother set aside the decree of the lower appellate court, dismissing the defendant's appeal and remanding the case to be heard on its merits. He, however, dismissed the plaintiffs' appeal on the ground that they ought to have appealed against the final decree. Reliance was placed upon the ruling of *Kuriya Mal* v. *Bishambhar Das* (1) and also on the case of *Narain Das* v. *Balgobind* (2). The facts in the present appeal are not identical with the facts in either of the two rulings relied on. The final decree never became final. The defendant had appealed against it, and the plaintiffs had filed cross objections. It was, therefore, *sub judice* when the appeal of the plaintiffs from the preliminary decree came on for hearing. The case of *Kuriya Mal* v. *Bishambhar Das* was like the present a case which arose before the present Code of Civil Procedure came into operation. The case of *Narain Das* v. *Balgobind* was one to which the provisions of the present Code were applicable. The decision in the latter [496] case seems to me to have rested entirely upon the ruling in *Kuriya Mal* v. *Bishambhar Das*. Section 97 of the Code of Civil Procedure provides as follows :—

"Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree." It seems to me that this section shows that the proper made of challenging the correctness of the preliminary decree is an appeal against that decree. I can see no reason why a party should be called upon to appeal against the final decree and to incur the expense of so doing merely to keep the other appeal alive. It may well be that the party has no objection to the final decree in itself and that his sole objection is to the preliminary decree. In many cases the party would admit that if the preliminary decree is confirmed, the final decree is correct. It seems to me also, that the final decree depends upon the preliminary decree, and that if an appeal is duly taken to the preliminary decree and succeeds the final decree necessarily fails with the reversal of the preliminary decree upon which it depends. I would allow this apppeal.

BANERJI, J.—I have also arrived at the same conclusion. The ground upon which the appeal of the plaintiffs was dismissed by the lower appellate court was that they had not appealed from the final decree passed by the court of first instance. That court over-looked the fact that at the time when the appeal of the plaintiffs came on for hearing, there was pending in that court an appeal preferred by the defendant in which objections had been taken by the plaintiffs, so that at the time of the hearing of the appeal of the plaintiffs from the preliminary decree, the final decree was *sub judice* and had not become final. That circumstance distin-

(1) (1910) I. L. R. 32 All. 225. (2) (1911) 8 A. L. J. 604.

guishes this case from the two rulings on which the learned Judge of this Court has relied and which have been referred to by the learned Chief Justice. In the first of those cases no appeal had been preferred from the final decree, and in the latter of them the period of appealing from that decree is said to have expired when the appeal from the preliminary decree was filed. That is not the case here. Therefore, there was no reason for not entertaining the appeal preferred by the plaintiffs from the preliminary decree passed by the court of first instance. I also would allow the appeal.

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[496] BY THE COURT.—The order of the Court is that the decrees of the court below and of this Court are set aside, and the case is remanded to the lower appellate court with directions to readmit it under its original number in the register and to hear and decide it on its merits. Costs here and heretofore will be the costs in the cause. The record may be sent back, as soon as possible, to enable the lower appellate court to dispose of the appeals of both parties at an early date.

Appeal allowed.

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FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Karamat Husain and Mr. Justice Chamier

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DROPADI (*Petitioner*) *v.* HIRA LAL (*Opposite party*).*

[19th May, 1912.]

Act No. III of 1907 (*Provincial Insolvency Act*), *section* 46 (4)—*Appeal—Limitation—Application of general provisions of the law of limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *sections* 12, 29.

The Provincial Insolvency Act is a special law within the meaning of section 29 of the Indian Limitation Act, but, inasmuch as it is not in itself a complete Code, there is nothing to prevent the application thereto of the general provisions of the Indian Limitation Act. Such general provisions do not " affect or alter " the period prescribed by a special law, but only the manner in which that period is to be computed. *Jugal Kishore* v. *Gur Narain* (1) overruled. *Beni Prasad Kuari* v. *Dharaka Rai* (2), *Joti Sarup* v. *Ram Chandar Singh* (3) and *Veeramma* v. *Abbiah* (4) followed. *Poulson* v. *Modhoosoodun Paul Chowdhry* (5), *Unnoda Persaud Mookerjee* v. *Kristo Coomar Moitro* (6), *Nagendro Nath Mullick* v. *Mathura Mohun Parhi* (7), *Girija Nath Roy Bahadur* v. *Patani Bibee* (8), *Bihari Lal Mookerjee* v. *Mungolanath Mookerjee* (9), *Golap Chand Nowluckha* v *Krishto Chunder Dass Biswas* (10), *Nijabutoola* v. *Wazir Ali* (11), *Khetter Mohun Chuckerbutty* v. *Dinabashy Shaha* (12), *Guracharya* v. *The President of the Belgaum Town Municipalities* (13), *Kullayappa* v. *Lakshmipathi* (14), *Abdul Hakim* v. *Latif-un-nessa Khatun* (15) and *Suraj Bali Prasad* v. *Thomas* (16) referred to.

[Dist. 35 All. 410 ; 45 I. C. 228=27 C. L. J. 374 ; '30 I. C. 703=39 Mad. 593 ; Ref. 37 M. L. J. 110=26 M. L. T. 136=10 L. W. 226=1919 M.W. N. 565=43 Mad. 51.]

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* First Appeal No. 154 of 1911 from an order of Austin Kendall, District Judge of Cawnpore, dated the 24th of July, 1911.

(1) (1911) I. L. R 33 All. 738.
(2) (1901) I. L. R. 23 All. 277.
(3) Weekly Notes, 1902, p. 34.
(4) (1893) I. L. R. 18 Mad. 99.
(5) (1865) 2 W. R. Act X Rulidgs, 21.
(6) (1872) 15 B. L. R. 60, note.
(7) (1891) I. L. R. 18 Cal. 368.
(8) (1889) I. L. R. 17 Cal. 268.
(9) (1879) I. L. R. 5 Cal. 110.
(10) (1879) I. L. R. 5 Cal. 314.
(11) (1882) I. L. R. 8 Cal. 910.
(12) (1884) I. L. R. 10 Cal. 265.
(13) (1884) I. L. R. 8 Bom. 529.
(14) (1889) I. L. R. 12 Mad. 467.
(15) (1903) I. L. R. 30 Cal. 582.
(16) (1906) I. L. R. 28 All. 48.

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The facts of this case appear sufficiently from the following order of reference made by KARAMAT HUSAIN and CHAMIER, JJ.:—

"The question for decision in this and the connected appeal is whether a person filing an appeal under section 46 of the Provincial Insolvency Act is entitled [497] to the benefit of section 12 of the Limitation Act. KNOX and PIGGOTT, JJ., in *Jugal Kishore* v. *Gur Narain* (1) held that he is not. In the course of their judgment they say that the only case on the point which they know of, in this Court, is that of *Beni Prasad Kuari* v. *Dharaka Rai* (2). It is evident that their attention was not drawn to the case of *Suraj Bali Prasad* v. *Thomas* (3). They distinguish the decision in I. L. R. 23 All. on the ground that it proceeds upon a *very special line of reasoning*. It seems to us that it proceeds upon two grounds, namely, that section 5 of the Limitation Act does not '*extend or alter*' a period of limitation and that the Rent Act of 1881 could not be considered a complete Code in itself so as to render the provisions of the Limitation Act inapplicable.

"The first ground applies generally to all cases of this kind and was so understood by the learned Judges who decided the case in I. L. R. 28 All.

"It seems to us that if the decisions in I. L. R. 23 All. and I. L. R. 28 All., are right, the decision in I. L. R. 33 All. must be wrong.

"Section 29 (1) (*b*) of the Limitation Act of 1908 reproduces section 6 of the Limitation Act of 1877. Therefore the construction placed upon section 6 of the Act of 1877 by the Judges that decided the case in 23 All. is not affected by the passing of the Limitation Act of 1908.

"We think that much confusion is likely to result from the conflict between the decision in 33 Allahabad and the earlier decisions in 23 and 28 Allahabad.

"We direct that this case be laid before the Hon'ble the Chief Justice with a view to its being laid before a larger Bench".

Mr. *M. Agarwala*, for the appellant:—

The time spent in obtaining copies of judgment and decree should be excluded in computing the period of limitation for the appeal. The Indian Insolvency Act, it is true, provides for the period of limitation of appeals, but there is nothing to show that the methods of computation of the period of limitation set out in part 3 of the Limitation Act were to be excluded in computing the period of limitation prescribed by that Act. The rule set out in section 12 of the Limitation Act only lays down how the period of 30 days is to be calculated when some days had been spent in obtaining copies of judgment and decree. An appeal under the Insolvency Act cannot be filed without a copy of the decree appealed against, and in some cases it would be impossible to file the appeal at all within 30 days. Section 29 of the Limitation Act provides that nothing in that Act would affect or alter any period of limitation prescribed by any special or local law. The Indian Insolvency Act is certainly not a local law, nor is it a special law. In one sense all Acts of the Legislature deal with special subjects, and, as such, might be called special laws. But the expression **[498]** '*special law*' means, what in England is known as a private Act of Parliament. Moreover, by applying section 12 of the Limitation Act the peroid of limitation prescribed by the Insolvency Act would remain the same, but in calculating that period certain days would have to be excluded as provided for in that section which is based upon an obvious rule of justice and common sense. He cited the following cases:—*Suraj Bali Prasad* v. *Thomas* (3), *Beni Prasad Kuari* v. *Dharaka Rai* (2), *Wall* v. *Howard* (4), *Abdul Hakim* v. *Latif-un-nessa Khatun* (5), *Kheter Mohun*

(1) (1911) I. L. R. 33 All. 738.
(2) (1901) I. L. R. 23 All. 277.
(3) (1906) I. L. R. 28 All. 48.
(4) (1896) I. L. R. 18 All. 215.
(5) (1903) I. L. R. 30 Cal. 532.

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Chuckerbutty v. *Dinabashy Shaha* (1), *Nijabutoolla* v. *Wazir Ali* (2), *In re Land Acquisition Act* (3) and *Guracharya* v. *The President of the Belgaum Town Municipalities* (4).

Munshi *Gulzari Lal*, for the respondent : —

The Insolvency Act is certainly a special law inasmuch as it deals with the special subject of insolvency, and if this were not a special law, there was no Act in the statute book which would be special law. According to the definition of special law as given in section 41 of the Indain Penal Code, the Insolvency Act is certainly a special law. Moreover, the Insolvency Act by containing a provision for the period of limitation applicable to appeals was intended by the Legislature to a self-contained enactment.

He cited *Kumara Akkappa Nayanim Bahadur* v. *Sithala Naidu* (5), *Jugal Kishore* v. *Gur Narain* (6), *Timal Kuari* v. *Ablakh Rai* (7), *Girija Nath Roy Bahadur* v. *Patani Bibee* (8), and *Nagendro Nath Mullick* v. *Mathura Mohun Parhi* (9).

Mr. *M. L. Agarwala* was heard in reply.

RICHARDS, C. J., and KARAMAT HUSAIN and CHAMIER, JJ.— One Ram Narain was declared to be insolvent by the Court of Small Causes, Cawnpore, and the respondent was appointed to be receiver of his estate. On the application of the respondent under section 37 of the Provincial Insolvency Act, certain transfers made by the insolvent in favour of the applicant were set aside by an order dated the 18th of March, 1911. The applicant presented an appeal [499] to the District Judge on the 26th of April, 1911. His appeal was within limitation only if he was entitled under section 12 of the Limitation Act to deduct the time spent by him in obtaining a copy of the order of the court of first instance. The District Judge, following the decision of KNOX and PIGGOTT, JJ., in *Jugal Kishore* v. *Gur Narain* (6), held that the applicant was not entitled to the benefit of section 12 of the Limitation Act. Accordingly he dismissed the appeal. This is an application for revision of the order of the District Judge. It has been treated by the office as a first appeal from an order, but it is an application under the proviso to section 46 (1) of the Provicial Insolvency Act.

In the course of their judgment in the case cited, KNOX and PIGGOT, JJ., say that the only case in this Court bearing on the point of which they are aware, is that of *Beni Prasad* v. *Dharaka Rai* (10) (the actual reference is to a case reported at page 270 of the same volume, but this was evidently a slip). They distinguished that case on the ground that it proceeded on a very special line of reasoning. It seems to us that the decision of STRACHEY, C. J., and BANERJI, J., in I. L. R. 23 All. 277, proceeded upon two grounds, namely, that section 5 of the Limitation Act of 1877 did not, within the meaning of section 6 of that Act, 'affect or alter' a period of limitation prescribed by the N. W. P. Rent Act of 1881, and that the latter Act could not be considered a complete Code in itself so as to render the general provisions of the Limitation Act inapplicable. KNOX and PIGGOTT, JJ., held that if section 12 of the Limitation Act were applied to an appeal under section 46 of the Insolvency Act, it would, within the meaning of section 29 of the present Limitation Act, 'affect or

(1) (1884) I. L. R. 10 Cal. 265.
(2) (1882) I. L. R. 8 Cal. 910.
(3) (1906) I. L. R. 30 Bom. 275.
(4) (1884) I. L. R. 8 Bom. 529.
(5) (1897) I. L. R. 20 Mad. 476.
(6) (1911) I. L. R. 33 All 738.
(7) (1876) I. L. R. 1 All. 254.
(8) (1890) I. L. R. 17 Cal. 263.
(9) (1891) I. L. R. 18 Cal. 36.
(10) (1901) I. L. R. 23 All. 277.

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alter' the period of limitation prescribed for an appeal under the Insolvency Act. As the language of section 29 of the present Limitation Act is to all intents and purposes the same as that of section 6 of the Limitation Act of 1877, the decision of KNOX and PIGGOTT, JJ., conflicts with that of STRACHEY, C. J., and BANERJI, J., upon a question of the correct construction of the Limitation Act, which is of considerable importance. It also conflicts with the decision of BANERJI, J., in *Joti Sarup* v. *Ram Chandar Singh* (1), which was not brought to their notice.

[500] The question has been argued very fully before us, and our attention has been drawn to a large number of decisions bearing upon it. For the applicant it has been contended that the Provincial Insolvency Act is not a 'special law' within the meaning of section 29 of the Limitation Act, and that, even if it is a 'special law,' the application of section 12 of the Limitation Act to the appeal in this case does not, within the meaning of section 29 of that Act, 'affect or alter' the period prescribed for an appeal under section 46 of the Provincial Insolvency Act.

So far as we are aware, the expression 'special law' has not been defined by the Legislature, except in the Penal Code, and it is not permissible to use the definition in that Code as a guide to the meaning of that expression in the Limitation Act. It may be that the expression was intended to cover only laws like the Rent Act X of 1859, which was held by the Privy Council to be a complete Code in itself, but it seems more likely that the words were intended to be understood in their ordinary sense as meaning an Act dealing with a particular subject. Even so the expression is not free from difficulty. The Code of Civil Procedure is a general law (see L. R. 3 I. A. 7), though it purports to deal only with procedure. The Forfeited Property Act of 1859 is obviously a special law. But what of such an Act as the Transfer of Property Act? The Registration Act has been held to be a special law, and we think rightly. The Provincial Insolvency Act, though it applies to a large part of British India, appears to us to be a special law, as it creates a special jurisdiction and deals with a very special branch of the law. We are of opinion that the Provincial Insolvency Act is a special law within the meaning of section 29 of the Limitation Act.

We think the course of legislation on the subject throws some light upon the true meaning of section 29 of the present Limitation Act. Act XIV of 1859, section 3, provided that when by any law then or thereafter to be in force, a shorter period of limitation than that prescribed by that Act was specially prescribed for the institution of a particular suit, such shorter limitation should be applied notwithstanding that Act; and section 14 of that Act contained provisions similar to those contained in section 14 of the present Limitation Act. While the Act was in force, a question arose whether a suit for rent under Act X of 1859 was governed by Act XIV or not. A Full Bench of the Calcutta High Court answered this [501] question in the negative, see *Poulson* v. *Modhoosoodun Paul Chowdhry* (2), and this decision was approved in a later case by their Lordships of the Privy Council, who said that the special legislation contained in Act X was of such a special kind that according to the well-established rule for the construction of Statutes, it must be presumed that the Legislature did not intend by the general enactment in Act XIV to interfere with it. They pointed out that Act X was intended to form a special and complete Code of Procedure with regard to the trial of questions

(1) Weekly Notes, 1903, p. 34.

(2) (1865) 2 W. R. Act X Rulings p. 21.

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relating to rent and the occupancy of land in the mufassil—*Unnoda Persaud Mookerjee* v. *Kristo Coomar Moitro* (1). In accordance with that decision it was held by a Full Bench in *Nagendro Nath Mullick* v. *Mathura Mohan Parhi* (2) that section 14 of the Limitation Act of 1877 did not apply to suits under Act X of 1859. See also *Girija Nath Roy Bahadur* v. *Patani Bibee* (3).

Section 6 of the Limitation Act of 1871 provided as follows:—"When by any law not mentioned in the schedule hereto annexed and now or hereafter to be in force, a period of limitation differing from that prescribed by this Act is especially prescribed for any suits, appeals or applications, nothing herein contained shall affect such law." This was replaced in 1877 by section 6 of the Limitation Act of that year, which provided as follows: "When by any special or local law now or hereafter in force in British India, a period of limitation is specially prescribed for any suit, appeal or application, nothing herein contained shall affect or alter the period so prescribed." The alteration in the language is noticeable and suggests an intention to limit the operation of special or local laws to the periods prescribed by them and to re-introduce the principle of section 3 of the Limitation Act of 1859, which limited the operation of other Acts to any shorter periods prescribed by them. This seems to have been the view taken in *Behari Loll Mookerjee* v. *Mungolanath Mookerjee* (4), where section 12 of the Limitation Act of 1877 was held to cover an application for review of judgment in a case under the Bengal Rent Act of 1869 and in *Gotap Chand Nowluckha* v. *Krishto Chunder Dass Biswas* (5) where section 5 of the Limitation Act of 1877 was [502] held to apply to a suit under the Bengal Rent Act of 1869. Similarly in *Nijabutoolla* v. *Wazir Ali* (6), and in *Khetter Mohun Chuckerbutty* v. *Dinabashy Shaha* (7), it was held that sections 5 and 14 of the Limitation Act of 1877 applied to suits under section 77 of the Registration Act. The last three decisions were approved and followed by the Bombay High Court in *Guracharya* v. *The President of the Belgaum Town Municipalities* (8). On the strength of three of the Calcutta decisions it was held in a reference under the Madras Forest Act of 1882, I. L. R., 10 Mad., 210, that section 5 of the Limitation Act of 1877 applied to an appeal under that Act, and in *Kullayappa* v. *Lakshmipathi* (9) that section 14 of the Limitation Act of 1877 applied to a suit under the Madras Rent Recovery Act, 1865.

After examining the cases mentioned above and others, MUTHUSAMI IYYAR, J., in *Veeramma* v. *Abbiah* (10) came to the conclusion that the general provisions of the Limitation Act of 1877 were applicable to suits and other proceedings under Acts prescribing special periods of limitation, unless those Acts were complete Codes in themselves to which the general provisions of the Limitation Act could not be applied without incongruity. This view was accepted by STRACHEY, C. J., and BANERJI, J., in *Beni Prasad Kuari* v. *Dharaka Rai* (11) and by BANERJI, J., in *Joti Sarup* v. *Ram Chundar Singh* (12), both cases under the N. W. P. Rent Act, 1881.

(1) (1872) 15 B. L. R. 60 Note.
(2) (1891) I. L. R. 18 Cal. 368.
(3) (1889) I. L. R. 17 Cal. 268.
(4) (1879) I. L. R. 5. Cal. 110.
(5) (1879) I. L. R. 5 Cal. 314.
(6) (1882) I. L. R. 8 Cal. 910.
(7) (1884) I. L. R. 10 Cal. 265.
(8) (1884) I. L. R. 8 Bom. 529.
(9) (1889) I. L. R. 12 Mad. 467.
(10) (1893) I. L. R. 18 Mad. 99.
(11) (1907) I. L. R. 23 All. 277.
(12) Weekly Notes, 1902, p. 34.

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There is therefore authority for the proposition that the general provisions of the Limitation Act, 1877, are applicable to suits and other proceedings under other Acts which prescribe special periods of limitation, but which are not intended to be complete Codes in themselves, and that the words 'affect or alter' in section 6 of the Limitation Act of 1877 relate only to the period prescribed and not to the way in which that period is to be computed. The same words appear in section 29 of the present Limitation Act. It cannot, however, be said that this view has gone unchallenged. SHEPHARD, J., in the case reported in I. L. R. 18 Mad. 99, expressed the opinion that the application of the general **[503]** provisions of the Limitation Act to periods of limitation prescribed by other Acts did 'alter or effect' those periods and CHANDRAVARKAR, J., in a land acquisition case in I. L. R. 30 Bom. 275, said it was a moot question whether the general provisions of the Limitation Act could be applied in this way, though he followed a previous decision of the Bombay High Court by which he considered himself bound.

The question is one of considerable difficulty, and it must be admitted that at first sight it is straining the words to hold that the application of the general provisions of the Limitation Act to periods of limitation prescribed by other Acts does not 'affect or alter' those periods. In one sense it certainly does. But the construction accepted by STRACHEY, C. J., BANERJI, J., and MUTHUSAMI AYYAR, J., seems to us to be correct. Apart from the history of this piece of legislation, we find it difficult to believe that when the Legislature introduced, as it has, into several Acts, provisions giving a right of appeal and prescribing periods within which the right may be exercised, it intended as a general rule that those provisions should be applied without reference to the general provisions contained in the general Limitation Act. In many, if not most, cases the Code of Civil Procedure is made applicable, with the result that an appellant must produce a copy of the order against which he is appealing. It is reasonable to suppose that the Legislature intended to give him time to procure a copy of the order. The general provisions of the Limitation Act are founded mainly upon equitable considerations which apply as much to periods of limitation prescribed by special Acts as to periods of limitation prescribed by the limitation Act itself.

Upon the question whether this or that Act is a complete Code in itself to which the Limitation Act should not be applied, there is considerable difference of opinion. In some of the cases already cited, the Calcutta High Court held that the general provisions of the Limitation Act, 1877, were applicable to suits under the Registration Act. But in *Veeramma* v. *Abbiah* (1) three Judges held that they did not apply and that decision was followed in *Abdul Hakim* v. *Latif-un-nessa* (2). In *Suraj Bali Prasad* v. *Thomas* (3) it was held that section 5 of the Limitation Act, 1877, did apply **[504]** to a suit under the Registration Act. It is unnecessary to express any opinion on this point, but the soundness of one of the reasons given for holding that the general provisions of the Limitation Act do not apply to suits under the Registration Act, namely, that a suit to compel registration of a document might be delayed for many years under section 7 of the Limitation Act of 1877 (section 6 of the present Act), is open to question, for that section applies only to suits the period of limitation for which is prescribed by the schedule. The same reason was given by KNOX

(1) (1898) I. L. R. 18 Mad. 99.
(2) (1908) I. L. R. 30 Cal. 582.
(3) (1906) I. L. R. 28 All. 48.

and PIGGOTT, JJ., for holding that the general provisions of the Limitation Act did not apply to proceedings under the Insolvency Act.

There remains the question whether the Provincial Insolvency Act is a complete Code in itself. In our opinion it is not. In order to ascertain the procedure to be followed in original, appellate or revisional proceedings, one has to refer to the Code of Civil Procedure. It appears to us that the object of section 47 of the Act was to attract the provisions of the Code of Civil Procedure. There are several Acts, for example, the Succession Act, the Probate and Administration Act, and the Land Acquisition Act, which make the Code of Civil Procedure applicable to proceedings under the Act and give a right of appeal to the High Court, but do not prescribe any period of limitation for the appeal. It has always been assumed, probably rightly, that such appeals are appeals under the Code of Civil Procedure, governed by what is now article 156 of Schedule I to the Limitation Act and by the general provisions of the Act also. Sub-section (4) of section 46 of the Provincial Insolvency Act does not seem to have been required, but whether it was required or not, we do not think that it can have been inserted for the purpose of rendering the general provisions of the Limitation Act inapplicable.

For the above reasons we are of opinion that section 12 of the Limitation Act applied to the appeal presented by the present applicant to the District Judge. In this view the appeal was within time. We set aside the order of the District Judge and remit the case to him to be disposed of according to law. Costs in this Court to be costs in the cause.

Appeal allowed.

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34 A. 496=10 A. L. J. 3=16 I. C. 149.

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34 A. 505 (=9 A. L. J. 749=16 I. C. 88).

[505] FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Tudball.

SHEO NARAIN (*Plaintiff*) *v.* JANKI PRASAD AND OTHERS (*Defendants*) AND LACHMI NARAIN (*Plaintiff*).*

[11th May, 1912.]

Hindu Law—Mitakshara—Partition—Whether grandmother entitled to share in the case of a partition between father and sons.

Held that upon a partition between a father and his sons, the grandmother, that is, the father's mother, does not get a share in the case of a family governed by the Benares school of the Mitakshara law.

Radha Kishen Man v. *Bachchaman* (1) followed. *Sheo Dayal Tewaree* v. *Judoo Nath Tewaree* (2), *Badri Roy* v. *Bhugwat Narain Dobey* (3) and *Shibbosoondery Dabia* v. *Bussoomuity Dabia* (4) distinguished.

[Ref. 29 I. C. 166 ; 83 I. C. 142 ; 22 A. L. J. 890 ; Dist. 71 I. C. 564.]

This was a suit for partition of family property brought by one Sheo Narain against his father and brother (by another wife), claiming 1/3rd share. The mother and the grandmother and the son of the pliantiff were subsequently added as parties on objection taken by the defendant. The defence among other defences was that the grandmother of the plaintiff

* First Appeal No. 178 of 1910, from a decree of Mohan Lal Hukku, Subordinate Judge of Cawnpore, dated the 4th of March, 1910.

(1) (1883) I. L. R. 3 All.. 118.
(2) (1887) 9 W. R. C. R. 61.
(3) (1883) I. L. R. 8 Cal. 649.
(4) (1882) I. L. R. 7 Cal. 191.

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34 A. 505=9 A. L. J. 749 =16 I. C. 88.

was entitled to a share also. The learned Subordinate Judge gave a share to the grandmother. The plaintiff appealed. The Bench before which the appeal came referred to a Full Bench the following question, namely, whether a grandmother in a *Mitakshara* family is entitled to a share on partition of ancestral property, which the grandsons seek to obtain.

The Hon'ble Dr. *Sundar Lal* (with him Maulvi *Muhammad Ishaq*), for the appellant, submitted that in Hindu Law, there are two classes of writers, one represented by Yajnavalkya, who give a share to father's wives, and the other represented by Vyas, who give a share to the mother (which includes a grandmother but not a stepmother). Yajnavalkya uses the word "father's wives" which cannot include a grandmother. The share which is assigned to the mother is in lieu of maintenance. There are others too who are entitled to maintenance, but no share is assigned to them. Vajnavalkya in Chapter II, verse 114-115 says that a father may separate his sons at his pleasure, and **[506]** if he makes the allotments equal, his wives to whom no *stridhan* has been given, must be made partakers of equal portions. This text clearly shows that the only persons who are entitled to a share at partition between father and sons are the father's wives. Yajnavalkya nowhere gives a share to the grandmother. As a general rule in Hindu Law, females are not entitled to any share, but the text here directs that the mother should get the share and thus it makes an exception in favour of the mother. The females only get in the absence of males. The Mitakshara, which is a commentary on Yajnavalkya, also in Chapter I, section II, *placitum* 19, says, that father's wives are partakers of equal portions, but allots no share to the grandmother. Viramitrodaya, which is a commentary on the Mitakshara, deals with partition in Chapter II, part I, and in *placitum* 19, quotes Yajnavalkya, Vyas and other writers, and says in the end that the stepmother does not get a share and makes no mention of the grandmother. Subodhini and Balambhatta also do not assign any share to the grandmother. The Madan Parijata gives a share to the mother but not to the grandmother. Thus, it appears, that so far as authorities of the Benares school are concerned, none of them give a share to the grandmother. There are authorities which gave a share to the grandmother, but they are applicable to Bengal only. As to case law, the only case of Allahabad is that of *Radha Kishen Man* v. *Bachhaman* (1), but no authorities have been discussed. The case of *Puddum Mookhee Dossee* v. *Rayee Monee Dossee* (2) and *Rayee Monee Dossee* v. *Puddum Mookhee Dossee* (3) are cases governed by Bengal law. In *Sheo Dyal Tewaree* v. *Judoo Nath Tewaree* (4) the point did not arise and is an *obiter dictum*. The case of *Shibbosoondery Dabia* v. *Bussoomuty Dabia* (5) and *Purna Chandra Chakravarti* v. *Sarojini Debi* (6) are both cases from Bengal and only Bengal authorities have been discussed. The case of *Badri Roy* v. *Bhugwat Narain Dobey* (7) is apparently a Mitakshara case, but the decision is based on Bengal authorities.

Pandit *Shiam Krishna Dar* (for Dr. *Tej Bahadur Sapru*; with him Pandit *Kailash Nath Kunzru*), for the respondents. **[507]** submitted that it was not a specific case of a grandmother claiming a share against a grandson, but it was a case of a mother claiming against a son. The eldest member of the family is the father and the grandmother claimed as mother of the father. She was a member of the joint family in her

(1) (1880) I. L. R. 3 All 118.
(2) (1869) 12 W. R. C. R. 409.
(3) (1870) 13 W. R. C. R. 66.
(4) (1868) 9 W. R. C. R. 61.
(5) (1881) I. L. R. 7 Cal. 191.
(6) (1904) I. L. R. 31 Cal 1065.
(7) (1882) I. L. R. 8 Cal. 649.

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own right. She has certain rights, such as that of maintenance. There are some authorities which use the word 'mother' and not 'father's wives' Vishnu and Brihaspati use the word mother, and so does Vyas, who includes grandmother in the word mother. In any case, the grandmother will take a share as mother of the father. She may not get any share where the partition is between grandsons only, but when one of the parties to the partition is the father, she comes in as mother of the father. There are no texts which contradict Vyas, and assuming that there are, these texts are to be reconciled, and the only way to do that is to give the grandmother a share. He cited Mayne's Hindu Law, 7th edition, pp. 650 and 544 ; Jolly's Hindu Law, p. 103 ; Ghose's Hindu Law, p. 283 ; Golap Chandra Sarkar's Hindu Law. pp. 268 and 270. Even in Bengal, an attempt was made to show that grandmother had no share. In I. L. R. 31 Cal. p. 1065, the arguments were based on the same principles as in the present case, and the Judges on consideration of all texts held that the grandmother has a share. He cited Mandlik's Hindu Law, p. 44 ; Sir Francis Macnaghten's Hindu Law, pp. 28, 30 and 52 ; and West and Buhler's Hindu Law, pp. 677, 780.

RICHARDS, C. J., and BANERJI and TUDBALL, JJ.—The question referred to the Full Bench is, "whether on a partition between a father and his sons the grandmother, that is, the mother of the father, gets a share, according to the Mitakshara as prevailing in these Provinces."

This question has arisen in a suit brought by the plaintiff, Sheo Narain, against his father, Janki Prasad, and his brother, Bishambhar, who are governed by the Benares school of the Mitakshara, for partition of joint ancestral property, and he claimed a third share. His stepmother, Musammat Ram Dei, and Musammat Mana, his paternal grandmother, that is, the mother of his father Janki Prasad, were added as defendants. Both of them claimed shares for themselves. It was urged in the court below that the grandmother was not entitled to a share, but this contention was [508] overruled. As there is a conflict of authority on the point, it has been referred to us for determination. We may state that the plaintiff's father, Janki Prasad, is the only son of his father, Mangal Sen and has no brother or nephews, so that this is not a case of partition between the sons and grandsons of Mangal Sen.

After hearing the arguments addressed to us and considering the authorities placed before us, we are of opinion that the question referred to us must be answered in the negative.

The Mitakshara in the Chapter I, section II, §§ 8 and 9, lays down the rule for partition between the father and his sons in the lifetime of the father. In section VII of the Chapter, is stated the rule as to partition between sons after the death of the father. In the case of partition in the lifetime of the father, the text of Yajnyavalkya is this:—

" If he the (father) makes the allotments equal, his wives, to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like portions " (Mitakshara, Chapter I, Section II, §8).

The author of the Mitakshara expounds the above texts in these terms :—

"When the father by his own choice makes all his sons partakers of equal portions, his wives, to whom peculiar property had not been given by their husband or by their father-in-law, must be made participant of shares equal to those of sons."

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In both the text and the commentary there is no mention of the grandmother and the only female who is declared entitled to a share is the wife of the father. The word in the original is *patni*, *i. e.*, wife, which can never mean the mother of the father.

As to partition after the father's death, section VII, §1, of the Mitakshara is as follows:—

"When a distribution is made during the life of the father, the participation of his wives equally with his sons has been directed." * * * The author now proceeds to declare their equal participation, when the separation takes place after the demise of the father: "Of heirs dividing after the death of the father, let the mother also take an equal share." [Yajnyavalkya, 123 (*a*).] The word used in this case is, as is natural, 'mother,' the original being '*mata*.'

[509] It is thus manifest that Yajnyavalkya and the author of the Mitakshara make a distinction between partition during the lifetime of the father and partition after his demise. In the former case a share is allotted to the wife of the father; in the latter to the mother of the sons effecting the partition. A text of Vyasa is quoted in the Virmitrodaya, the Vyavahara Mayukha, the Saraswati Vilasa and other works to the following effect:—"The father's sonless wives, however, shall be made equal sharers; as also the paternal grandmothers, for they are declared to be equal to mothers." And this text is relied upon as an authority for the allotment of a share to the grandmother. It must be borne in mind that Vyasa evidently refers to the case of a partition between sons after the demise of the father, when the *mother* of those effecting the partition gets a share, and declares that grandmothers being "equal to mothers" are like the mother entitled to a share. This text cannot apply to the case of partition in the father's lifetime when his wife (*patni*) gets a share. Therefore, if in any case the grandmother would be given a share, it would be in the event of a partition between sons after the father's death. On this point we express no opinion, as the case before us is not one of partition after the father's demise. No other text has been cited to us, and we can find none, which supports the contention that when in the father's lifetime a partition takes place between him and his sons, the grandmother of the sons, that is, his own mother, should be allotted a share. The *Vyavastha Chandrika* by Shyama Charan Sarkar was referred to in a case decided by the Calcutta High Court to which we shall presently refer. The learned author, on p. 356. Volume II, Part I, states the rule deducible from the authority of text-writers in these terms:—"When a paternal grandfather's estate is divided by grandsons, the paternal grandmother is to have a share equal to that of a grandson," and he cites the text of Vyasa referred to above and a passage in Strange's Hindu Law. It is clear from the context and from the position of the above passage, as compared with what precedes, that the learned author was referring to the case of partition among grandsons after the death of the father and not to the case of partition in the lifetime of the father. We are, therefore unable to hold upon the authority of the texts of sages and **[510]** commentators that on a partition between the father and his sons the mother of the father gets a share. The reason for the rule seems to be that the mother of the father should look to her own son for support and maintenance.

The view which we have taken above was adopted by this Court in *Radha Kishen Man* v. *Bachchaman* (1). The learned Judges gave no reasons

(1) (1881) I. L. R. 3 All. 118.

for their opinioin but assumed that the grandmother does not get a share.

The contrary opinion was held by the Calcutta High Court in *Badri Roy* v. *Bhugwat Narain Dobey* (1). The learned Judges apparently followed the ruling in *Shibbosoondery Dabia* v. *Bussoomutty Dabia* (2) which was a case under the Dayabhaga law of the Bengal school, and not a case governed by the Mitakshara. They also rely on the passage in the Vyavastha Chandrika which we have quoted above. As we have already pointed out, that passage does not support the view of the learned Judges. We are, therefore, unable with all deference, to agree with them.

No other case to which the Mitakshara law of the Benares school applies has been cited before us or referred to in the judgment of the court below except the case of *Sheo Dyal Tewaree* v. *Judoo Nath Tewaree* (3) which was undoubtedly a *Mitakshara* case, but all that the learned Judges say in it is that "the mother or grandmother, as the case might be, is entitled to a share, when sons or grandsons divided the family estate between themselves." This *dictum* is inapplicable to the present case, which is not one of partition between sons and grandsons.

For the reasons stated above, we are of opinion that upon a partition between the father and his sons, the grandmother, that is, the father's mother, does not get a share in the case of a family governed by the Benares school of the law *Mitakshara*. This is our answer to the reference.

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34 A. 505=9 A. L. J. 759 =16 I. C. 88.

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34 A. 511 (10 A. L. J. 373=17 I. C. 396 =12 M. L T. 392=14 Bom. L. R. 1073=17 C. W. N. 49=16 C L. J. 629 =1912 M. W. N. 1052= 23 M. L J. 741=39 I. A. 68.)

[511] PRIVY COUNCIL.

MUHAMMAD MEHDI HASAN KHAN (*Defendant*) *v.* MANDIR DAS (*Plaintiff*).*

and cross appeal : two appeals consolidated.

[10th May and 18th June, 1912.]

[*On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow.*]

Burden of proof—Suit on mortgage bond—Production by plaintiff of copy of bond on the ground of loss of the original—Defendant's admission of execution and production of original with payment of debt endorsed by agent of mrtogagee—Rebuttal of defendant's evidence by plaintiff with false story—Act No. I of 1872 (*Indian Evidence Act*), *section* 114.

In a suit for money due on a mortgage bond, the plaintiff produced only a copy of the document, alleging in his plaint that it had been lost. The defendant admitted its execution, but alleged that the debt had been discharged; and in support of his allegation he produced the original document containing the endorsement of the mortgagee through her agent of payment of the debt. The Subordinate Judge, relying on section 114 of the Evidence Act, put the *onus* on the plaintiff, who, to account for the possession of the bond by the defendant, set up a case supported by witnesses which both courts below held to be false. The Subordinate Judge dismissed the suit. The Judges of the Judicial Commissioner's court disbelieved the evidence on both sides, set aside the presumption under section 114 of the Evidence Act, and endeavoured to make out a case for the plaintiff based on a theory of their own.

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* *Present* :—Lord SHAW, Sir JOHN EDGE, and Mr. AMEER ALI.

(1) (1883) I. L. R. 8 Cal. 649.
(2) (1882) I. L R. 7 Cal. 191.
(3) (1867) 9 W. R. C. R. 61.

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34 A. 511=10 A. L. J. 373=17 I. C. 396=12 M. L. T. 392=14 Bom. L. R. 1073=17 C. W. N. 49=16 C. L. J. 629=1912 M. W. N. 1052=23 M. L. J. 741=39 I. A. 68.

Held (reversing that decision) that the first court was right in holding that the production by the defendant of the bond with the endorsement of payment cast on the plaintiff the burden of proving that the debt was still oustanding; and that the appellate court should not have disregarded the presumption under section 114 in favour of a "possibility" based on surmise. Suspicion, though a ground for scrutiny, could not be made the foundation of a decision.

[Dist. 20 I. C. 308; Fol: 38 Mad. 166; 28 M. L. J. 92=26 I. C 899; 1915 M. W. N. 638; Ref. 36 I. C. 562; 1917 Pat. 186=3 P. L. W. 935; 68 I. C. 892; 83 I. C. 246.]

Two consolidated appeals from a judgment and decree (31st July, 1907) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (31st January, 1907) of the Court of the Subordinate Judge of Bara Banki.

The suit which gave rise to these appeals was instituted on the 16th February, 1906, to recover from the defendant Rs. 62,717-2-3 on the basis of a mortgage deed dated the 22nd December, 1898.

The plaintiff in his plaint alleged that he was the nephew of one Kakhal Mal, who died in 1895; that on his death Sukh Dei, his widow, obtained and held possession of the property left by Kakhal Mal until her death on the 5th January, 1903; and that on the 22nd December, 1898, the defendant borrowed Rs. 30,000 from Sukh Dei, and to secure repayment executed [512] the mortgage deed in suit by which he hypothecated the lands mentioned therein. The plaintiff stated that the only payment by the defendant was one of Rs. 2,700 towards interest, but that no further sum had been paid towards principal or interest, and according to the terms of the deed the sum sued for was due from the defendant to the plaintiff, who had obtained a certificate under section 8 of Act VII of 1889. The plaintiff also stated in paragraph 9 of his plaint that "the plaintiff did not get the original deed which is lost, therefore a copy has been duly filed in the present suit."

The defendant filed two written statements in defence, in the first of which he admitted the payment of Rs. 2,700 on account of interest; and further pleaded that he paid the remaining sum of Rs. 39,200 due under the deed in suit to Sukh Dei on Aghan Sudi 4th, Sambat 1959 (December 4th, 1902), and took back the original deed. In the second written statement he submitted that the provision for enhanced payment of interest in the deed was in the nature of a penalty and should not be enforced.

Before the issues were finally settled the Subordinate Judge after argument made the following order:—

"The plaintiff, Sri Mandir, brought the present suit for the recovery of the money due under the said bond on the allegation that he was the heir of the deceased, Musammat Sukh Dei. The said bond was not produced by him. It was stated in the plaint that it was missing. The bond has been produced in court from the possession of the defendant. It bears an andorsement purporting to have been signed by Musammat Sukh Dei to the effect that the money due under it had been paid off. It is not alleged on behalf of the plaintiff that the defendant either stole or got the bond stolen. Taking the provisions of section 114, Act I of 1872, into consideration, I am of opinion that the *onus* lies on the plaintiff to prove that the bond has not been discharged.

The second issue will therefore stand thus:—

Whether the money due under the mortgage bond in suit has not been paid off by the defendant?"

And that was the only issue material on these appeals.

The Subordinate Judge on the evidence dismissed the suit.

An appeal by the plaintiff came before Mr. E. CHAMIER, Judicial Commissioner, and Mr. J. SANDERS, Additional Judicial Commissioner (the principal judgment being delivered by the latter), who were of opinion that

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the *onus* had been wrongly thrown on the plaintiff by the first court, and they dealt with the case on the assumption that the *onus* of proving payment was on the [513] defendant. They considered that there were circumstances which rendered the payment very unlikely, and, though the plaintiff had adopted the reprehensible course of procuring false evidence which was worthless, that did not make the case of the defendant more probable. They did not believe the evidence of payment tendered by the defendant, whose omission to give evidence on his own behalf they held to be prejudicial to his case. In the result they arrived at the conclusion that he had not proved the alleged payment of Rs. 39,200, principal and interest of the bond in suit. The decree of the Subordinate Judge was therefore reversed, and a decree for the unpaid amount made in favour of the plaintiff.

The defendant appealed to His Majesty in Council.

The cross appeal by the plaintiff related only to the defendant's plea that the provision in the deed for compound interest at an enhanced rate in case of default was in the nature of a penalty and should not be enforced, a contention which was upheld by the appellate court, but which is immaterial to the present report.

On this appeal, which was heard *ex-parte*,—

Ross for the appellant contended that the appellate court was wrong in holding that the *onus* was on the appellant to prove the payment of the debt ; and had also erred in finding on the evidence that he had failed to discharge that *onus*. The *onus*, it was submitted, was clearly on the respondent to prove that no such payment as alleged by the defendant had been made, and that the mortgage deed was not returned. The possession of the deed bearing the endorsement of payment in the handwriting of the mortgagee's agent was a strong point in the appellant's favour, and the suit had been rightly dismissed by the Subordinate Judge. Reference was made to the Evidence Act (I of 1872), section 4, the definition of " may presume"; section 34 ; and section 114. Even if the *onus* was on the appellant he had discharged it.

1912, *June* 18*th*.—The judgment of their Lordships was delivered by Mr. AMEER ALI.—

These are two consolidated appeals from a judgment and decree of the Judicial Commissioners of Oudh, dated the 31st of July, 1907 and arise out of a suit brought by the plaintiff in the court of the Subordinate Judge of Bara Banki on the basis of a mortgage-bond executed by the defendant, Chaudhri Mehdi Hasan, on the 22nd of December, 1898, in favour of [514] one Sukh Dei, since deceased. It appears that Sukh Dei carried on in her life-time a money-lending business and that the plaintiff has obtained a succession certificate under Act VII of 1889 to collect the debts due to her estate. The present action was launched on the 16th of February, 1906, for the recovery of over Rs. 62,000, principal and interest, by the sale of the mortgaged premises. At the time of the institution of the suit the plaintiff produced only a copy of the document, alleging that the original had been lost. The defendant in his answer admitted its execution, but alleged that the debt was discharged. In support of his allegation he produced the original document containing the endorsement of payment by Sukh Dei and her general agent, Bansidhar.

In view of the presumption embodied in section 114 of the Indian Evidence Act (I of 1872), the Subordinate Judge was of opinion that the burden of establishing that the obligation created by the bond was still

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outstanding lay on the plaintiff. Their Lordships consider this to be the real meaning of the issue framed by him on the 6th of September, 1906, after argument. The plaintiff accepted the *onus* and obtained an adjournment for the production of evidence in rebuttal of the presumption arising from the possession of the document by the defendant. The hearing of the case was resumed in January, 1907, and the plaintiff examined a number of witnesses to prove that the defendant had dishonestly obtained possession of the bond after Sukh Dei's death through the instrumentality of Bansidhar. He also attempted to establish that Sukh Dei was not at Bara Banki on the date of the alleged payment. The defendant then went into evidence regarding the fact of payment and the delivery of the document to his servants on his behalf. The Subordinate Judge disbelieved the plaintiff's witnesses. With regard to the defendant's evidence, he observed as follows :—

> "I would have hesitated in believing the testimony of defendant's witnesses also, had it not been corroborated by the facts that the bond bearing an endorsement of payment was filed from the defendant's custody, and it was stated by plaintiff's own witnesses that the said endorsement was in the handwriting of Sukh Dei's general agent, Bansidhar."

In the result the Subordinate Judge dismissed the suit with costs.

From this decree the plaintiff appealed to the court of the Judicial Commissioner of Oudh. The learned Judges who heard [515] the appeal were of opinion that at the trial the *onus* had been wrongly thrown on the plaintiff. In this view the learned Judge who delivered the principal judgment proceeded to examine in the first instance the evidence produced by the defendant and came to the conclusion that it was not reliable. He then considered the testimony of the plaintiff's witnesses and was of opinion that it was false. As regards the fact that the document on which the suit was based was in the possession of the defendant, and produced by him with the admitted endorsement of Sukh Dei's general agent, he held that it must have come into the defendant's hands by some dishonest means. He accordingly reversed the decision of the first court and decreed the plaintiff's claim ; and his learned colleague concurred in this judgment. The defendant has appealed to His Majesty in Council and there is a cross appeal by the plaintiff on the question of interest disallowed by the learned Judges in the court below. But he has not appeared either in support of the judgment in his favour or to argue his own appeal.

Their Lordships after a careful consideration of the case have come to the conclusion that the judgment and decree of the Judicial Commissioners cannot be sustained.

Assuming that any question of *onus* remained after the parties had gone into evidence, and that it lay on the defendant to establish the allegation of payment, he appears to have proved facts which strongly support the presumption of law arising from the possession of the bond.

He showed that the endorsement of payment on the document was in the handwriting of Bansidhar, who, it is admitted, was the "recognised" and general agent of Sukh Dei and held a power of attorney from her, and that it bore his signature. The defendant also produced a letter of demand on behalf of Sukh Dei, dated some seventeen days before the date of the alleged payment, signed by Bansidhar. He proved further that this Bansidhar used to give acquittances on Sukh Dei's behalf. Matadin, who according to the plaintiff's own witnesses is the defendant's treasurer, states that he and two other fellow servants carried the money to Sukh

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Dei's house, and that she after payment signed the document in Hindi in his presence below the endorsement written by Bansidhar and returned it to him. There is not a [516] trace of cross-examination in the evidence of this witness with regard to the genuineness of Sukh Dei's signature. That statement remains uncontradicted, for no attempt, so far as their Lordships can see, was made to recall the plaintiff's witnesses to say the alleged signature of Sukh Dei was not in her hand.

To meet the case made by the defendant, the plaintiff produced three classes of testimony. He attempted to show that the defendant was heavily involved in debt at or about the time of the alleged payment, and he wished the court to draw from this circumstance the inference that repayment was unlikely. The Trial Judge very properly, in their Lordships' opinion, observed that the fact of the defendant's indebtedness "in itself would not go to prove that he did not repay the debt in question." And he referred to the evidence of one of the plaintiff's witnesses to show that the defendant was in funds in June, 1902, and repaid other debts.

The real and substantial case put forward by the plaintiff was of a two-fold character—first, that the bond was dishonestly and fraudulently made over to the defendant by Bansidhar after Sukh Dei's death; and, secondly, that Sukh Dei was not at Bara Banki on the date of the alleged payment. It is to be remarked that, although a book was produced by a pujari, whom the Subordinate Judge calls "a tutored and untruthful witness," to prove Sukh Dei's absence from Bara Banki, no attempt was made by the plaintiff to produce her *mahajani* books of account regularly kept in the course of business.

The Subordinate Judge disbelieved the story told by the plaintiff's witnesses and the appellate court agreed with him in holding that their testimony was worthless. But it has built up a theory of its own, based chiefly on surmises, regarding the manner in which the bond came into the possession of the defendant. The gist of the appellate court's judgment is to be found in the following statements, which also show how the learned Judges have looked at the case. Referring to the testimony of the plaintiff's witnesses, they say:—

"Worthless as this evidence is, it does not in any way make the defendant respondent's case more probable. In the view that I have taken of the evidence of payment, it is difficult to account for the possession of the bond on the part of the defendant; yet there are documents on the record whence it may [517] be inferred that some person for his own ends laid his hands on the document soon after the death of Musammat Sukh Dei and that through him it came into possession of the defendant."

And after referring to the disputes among Sukh Dei's relations after her death, they go on to say:—

"The plaintiff's inability to account for its disappearance no doubt suggested to him the reprehensible course of procuring false evidence, but when the question is considered whether the possession of the endorsed bond on the part of the defendant raises a presumption of payment, due weight should be attached to the possibility during this state of confusion of some person purloining the bond or even of its being lost and afterwards found and coming into the defendant's possession."

Their Lordships cannot help considering this mode of treating a case where two distinct and conflicting sets of facts are opposed to each other as unsatisfactory. The plaintiff came into court with a definite story to account for the possession of the document by the defendant. The learned Judges agree with the first court in holding that story to be false, and yet they proceed to build up a case for the plaintiff on what they call a "possibility." As already observed, the defendant did not rest his case merely on the legal presumption which arose from the possession of the

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document; he produced positive testimony which received corroboration from that presumption, and he proved facts which made his statement probable. The learned Judges having disbelieved the evidence on both sides, have set aside the presumption under section 114 of the Evidence Act, which only embodies the ordinary rule of law, by a possibility based on surmises. Now, it is a settled principle that suspicion, though a ground for scrutiny, cannot be made the foundation of a decision, and that is exactly what appears to have happened in this case.

With reference to the conflicting views of the two courts in India regarding the question of *onus*, in view of the presumption under section 114 of the Indian Evidence Act their Lordships are of opinion that the Subordinate Judge was right in holding that the production by the defendant of the bond with the endorsement of payment cast on the plaintiff the burden of establishing the affirmative proposition that the debt was still outstanding; in other words, of showing that the bond came in defendant's possession by dishonest means and that the signatures to the endorsement were either forgeries or unauthorized.

[518] On the whole their Lordships are of opinion that the judgment and decree appealed against should be set aside and the plaintiff's suit dismissed with costs in all the courts. And they will humbly advise His Majesty accordingly. The plaintiff will pay the costs of these appeals.

Appeal allowed.

Solicitors for the appellant :—*T. L. Wilson & Co.*

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34 A. 518 (=10 A. L. J. 140=16 I. C. 677).

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

BALMAKUND (*Decree-holder*) *v.* ASHFAQ HUSAIN (*Judgment-debtor.*)*

[2nd May, 1912.]

*Execution of decree—Assignment—*Ex parte *order passed subsequent to assignment—Power of court on application of assignee to reconsider such order.*

Pending an application for execution of a decree the decree-holder sold the decree. The purchaser applied for execution; but whilst his application was pending the former application of the original decree-holder came on for hearing, and it was decided, *ex parte*, that the decree was barred by limitation. *Held* that this decision was no bar to the consideration of the application for execution filed by the assignee of the decree nor was the court hearing this application bound by the former *ex parte* finding.

THE facts of this case were as follows :—

Jagannath Prasad obtained a decree against Ashfaq Husain. He applied for its execution on the 17th of April, 1911. The judgment-debtor objected that the executing court had no jurisdiction as the decree had been transferred to another court on a previous application, and that the decree was barred by limitation. The date fixed for hearing these objections was the 8th of June, 1911. In the meantime Jagannath had sold his decree to Balmakund on the 27th of April, 1911, who applied on the 2nd of June, 1911, for execution. Upon this application the court ordered notices to issue under order XXI, rule 16, and fixed the 24th of June, 1911,

* Second Appeal No. 47 of 1912, from a decree of Austin Kendall, District Judge of Cawnpore, dated the 8th of January, 1912, reversing a decree of Murari Lal, Officiating Subordinate Judge of Cawnpore, dated the 10th of November, 1911.

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for hearing any objections. On the 8th of June, 1911, the date fixed for hearing the objections to the application of the 17th of April, the decree-holder, Jagannath, did not appear ; the objections of the judgment-debtor were heard and allowed, and the application for execution was dismissed.

[519] When the application of Balmakund came up for hearing on the 24th of June the judgment-debtor objected that the matter had already been disposed of by the order of 8th June, and the decree could no longer be executed. The court overruled the objection and ordered execution to proceed. This order was reversed by the District Judge on appeal. The decree-holder appealed.

Dr. *Tej Bahadur Sapru*, for the appellant :—

The order of the 8th of June is not binding upon Balmakund, as he was no party to the proceedings. The original decree-holder having assigned his decree had ceased, at the date of that order, to have any interest in it. At that date the real decree-holder was Balmakund, and he had applied for execution before that date. In making the order of the 8th of June the court overlooked this fact altogether. That order should not have been passed while the application of the 2nd of June was pending decision.

Mr. *Abdul Raoof* (with him Mr. *B. E. O'Conor* and Mr. *Muhammad Ishaq Khan*), for the respondent :—

The order of the 8th of June stands intact. It has not been set aside by appeal, review or revision. The executing Court, which passed that order, could not set aside, alter or ignore it except by a formal review. The order of that Court granting Balmakund's application for execution is, therefore, illegal. At the date of the order of the 8th of June the only person whom the Court could recognize as decree-holder was Jagannath. The assignee, Balmakund, had no *locus standi* then, for up to that time the assignment had not been proved to and recognized by the Court. The assignment could not, *ipso facto*, wipe out the name of the original decree-holder at once ; it could take effect only when recognized by the Court in proper proceedings therefor. The order of the 8th of June was, therefore, passed against the right decree-holder, and is binding upon his assignee. The assignee should have given notice of the assignment to the parties and obtained postponement. I rely on the ruling in *Sinnu Pandaram* v. *Santhoji Row* (1).

Dr. *Tej Bahadur Sapru*, in reply :—

Notice of the assignment could be given only through the Court and on the assignee's application dated the 2nd of June. Notices [520] were ordered by the Court to issue. The court by granting Balmakund's application for execution, must be deemed to have, in effect, set aside or corrected its *ex parte* order of the 8th of June.

KARAMAT HUSAIN and TUDBALL, JJ.—In this case one Jagannath obtained a decree against Ashfaq Husain from the court of the Subordinate Judge of Cawnpore. He made several applications for the transfer of that decree either to the court at Lucknow or that at Bareilly. The decree-holder, on the 18th of April, 1911, made an application for execution in the court of the Sub-ordinate Judge of Cawnpore. The 8th of June was fixed for the hearing of objections raised by the judgment-debtor. Before that date the decree holder assigned that decree to Balmakund on the 27th of April, 1911. Balmakund, on the 2nd of June, 1911, made an application under order XXI, rule 16, for the execution of that decree.

(1) (1902) I. L. R. 26 Mad. 428.

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The munsarim on that very date made the following report:—" This is an application under order XXI, rules 11 and 16 of Act V of 1908, and an application in execution has been made on behalf of Jagannath Prasad, decree-holder, and the 8th of June, 1911. has been fixed for the disposal of the objections taken by the judgment-debtor. This application has been presented by the purchaser of the decree." The order on this report is that this be entered in the register of miscellaneous cases and notices fixing the 24th of June, 1911, be issued to the opposite party. The case be put up on the same date for disposal. On the 8th of June, 1911, the application setting out the objections raised by the judgment-debtor to the application of the original decree-holder, Jagannath, dated the 18th of April, 1911, was taken up. The decree-holder, Jagannath, was absent, for the simple reason that he had parted with his interest in the decree in favour of the assignee, Balmakund, who had no notice of that date. The Court, after hearing the objections raised by the judgment-debor, allowed those objections and held the decree to be barred by limitation. On the 10th of November, 1911, when the Court took up the application of the assignee, dated the 2nd of June, 1911, for disposal, objections were taken by the judgment-debtor. One of those objections was that the application for execution of the decree by the decree-holder was rejected finally on the objection of the judgment-debtor on the [521] 8th of June, 1911, and that, therefore, the decree could not now be executed. Regarding this objection the learned Subordinate Judge remarked as follows:—" I am of opinion that when the decree-holder had not appeared and his pleader did not proceed with the application, it simply should have been rejected. No trial and disposal of the objection was called for. Anyhow, the objections were decided against a person who had no longer any interest in the decree, having sold it before, and the decision was not binding upon the person who was the rightful owner and was not before the court. This disposes of the objection." An appeal was preferred to the learned District Judge, who allowed the appeal on the ground that the order of the Subordinate Judge, dated the 8th of June, 1911, was a subsisting order, and that all the steps taken subsequently thereto were *ultra vires*. The learned District Judge, in connection with that order, remarks:—" The proceedings of the lower court may be called careless or may be called inconsistent. But in my opinion they were perfectly legal, and the order of 8th June could not be ignored or set aside by the Court itself in subsequent proceedings. * * * On the facts it is clear that all subsequent proceedings were *ultra vires* and must be set aside." Taking this view of the order of 8th June, 1911, the learned District Judge allowed the appeal. A second appeal is preferred from the decree of the learned District Judge, and it is contended that the order of 8th June, 1911 regard being had to the circumstances of the case, is to be treated as in substance set aside by the learned Subordinate Judge. The learned counsel for the other side argues that that order has in no way been set aside, and that, therefore, it ought to stand. There can be no doubt that the learned Subordinate Judge, when he took up the case on the 8th of June, 1911, was in possession of the facts that the decree-holder had assigned the decree to Balmakund, that he had no subsisting interest in the decree, and that the assignee had no notice of the date fixed for the disposal of the objections taken by the judgment-debtor. The order which he passed was, therefore, quite illegal. That being so, we are of opinion that the learned Subordinate Judge, by his order, dated the 10th of November, 1911,

rectified the mistake committed by his predecessor on the 8th of June, 1911, and his remark in respect of that order must be treated as virtually [522] setting aside that order, which was an *ex parte* order, and we think that he had power to do so, inasmuch as it is open to every court to correct such mistakes. Such being the case, the view taken by the learned District Judge is not correct. The result is that we allow the appeal, set aside the order of the learned District Judge, and send back the case to him for the decision of the appeal on its merits. The appellant will be entitled to his costs of this appeal.

Appeal allowed.

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34 A. 522 (=19 I. C. 510=10 A. L. J. 61=13 Cr. L. J. 702).

REVISIONAL CRIMINAL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

EMPEROR v. HARDWAR PAL.*

[11th May, 1912.]

Act No. XLV of 1860 *(Indian Penal Code), sections* 182, 211—*Sanction to prosecute—Criminal Procedure Code, section* 195.

H. made a report against several persons, including one *S.* at a police station, charging them with rioting and voluntarily causing hurt. The police made inquiry and sent up several persons for trial, but not *S.* Some of these were convicted by the Magistrate, but acquitted by the Sessions Judge. Thereupon *S.* made a complaint to the Magistrate, charging *H.* with having made a false report in respect of himself to the police. The Magistrate took cognizance of the complaint.

Held that the Magistrate had no power to take cognizance of the complaint by reason of the absence of sanction.

[Dist. 44 Cal. 650=36 I. C. 857; Ref. 64 I. C. 839; 82 I. C. 167; 81 I. C. 217=21 A. L. J. 805=46 All. 43. Doubted 22 A. L. J. 829.]

The facts of this case were as follows:—

On the 23rd of March, 1911, a report was made to the police by Hardwar Pal to the effect that several persons named therein, including one Sher Bahadur Singh, had committed the offence of rioting. The police instituted a case against some of the persons named, but not against Sher Bahadur. The accused were tried and some of them convicted by a Magistrate. These latter appealed to the Sessions Judge, who acquitted them. Sher Bahadur then filed a complaint under the first portion of section 211 of the Indian Penal Code against Hardwar Pal, who objected that the case could not proceed without the sanction of either the Superintendent of Police or the Court. The Magistrate held that no sanction was necessary and issued process against the accused. Hardwar Pal then applied in revision to the High Court.

The application came on for hearing before KARAMAT HUSAIN, J., who referred it to a bench of two Judges.

[523] The case was subsequently heard by KARAMAT HUSAIN and TUDBALL, JJ.

Mr. *C. Ross Alston*, for the applicant:—

The Magistrate was wrong in holding that no sanction was necessary. If the offence were treated as that of making a false charge to the police, it would fall under section 182 of the Indian Penal Code, and the sanction

* Criminal Revision No. 164 of 1912 from an order of Kamta Prasad, Magistrate, first class, of Basti, dated the 2nd of February, 1912.

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of the Superintendent of Police would be necessary. If, however, the offence is to be taken as one falling under section 211, the sanction of the court before which the original case had come would be necessary.

Babu *Piari Lal Banerji* (for Babu *Durga Charan Banerji*), for the opposite party :—

The real question is whether there is in the present case anything in law debarring a Magistrate from taking cognizance of the offence in respect of which the complaint was filed. It is quite clear that if the offence charged falls under any of the clauses of section 195 of the Criminal Procedure Code, sanction would be necessary. As the complaint did not allege the commission of an offence under section 182 there was nothing to prevent the Magistrate from taking cognizance of the offence alleged, if it did not come within any of the clauses of section 195. If the facts alleged in the complaint constituted no offence other than an offence under section 182 of the Penal Code, it might then have been contended that the mere mention of another section of the Code could not take the case out of the purview of clause (*a*), section 195 of the Criminal Procedure Code. But the false report to the police did constitute an offence under the first part of section 211 of the Penal Code, though the case did not come into court.

This Court has held that section 211 consists of two parts; the first contemplates a charge made to the police and the second a false charge preferred in court. Therefore, although a false charge made to the police constitutes an offence under section 182 of the Penal Code, it is also an offence under the first part of section 211 of the same Code.

He cited *Empress of India* v. *Pitam Rai* (1), *Empress* v. *Parahu* (2), *Queen-Empress* v. *Bisheshwar* (3), *Imperatrix* v. *Jijibhai Govind* (4), *Queen-Empress* v. *Karim Buksh* (5), [524] *Karim Buksh* v. *Queen-Empress* (6) and *Queen-Empress* v. *Nanjunda Rau* (7).

It is, therefore, quite settled that the offence charged would fall under section 211, as the charge was not made in court; and as Sher Bahadur Singh was never sent up for trial, the offence, though falling under section 211, was not one committed in or in relation to any proceeding in any court. Section 195, clause (*b*) of the Criminal Procedure Code, does not require sanction for all offences under section 211, but only requires sanction where an offence under section 211 is committed in or in relation to any proceeding in any court. It does not require sanction when the offence is committed before the police; *Ashrof Ali* v. *The Empress* (8). *Putiram Ruidas* v. *Mahomed Kasem* (9), *Dharmadas Kawar* v. *The Emperor* (10).

It may be said that case was sent up by the police as regards some of the persons named in the report and that therefore the report constituted an offence committed in relation to a proceeding in court; but Sher Bahadur Singh, the person named in the report, had no connection whatever with any proceeeding in any court. The wrong committed against him was the making of a false report to the police, and as far as he was concerned, there was no proceeding in court. The false report, although it named several persons in one document, was really a report of distinct and several offences committed by different persons named in the report; and the matter

(1) (1883) I. L. R. 5 All. 215.
(2) (1883) I. L. R. 5 All. 598.
(3) (1894) I. L. R. 16 All. 124.
(4) (1896) I. L. R. 22 Bom. 596.
(5) (1887) I. L. R. 14 Cal 633.
(6) (1888) I. L. R. 17 Cal. 574.
(7) (1897) I. L. R. 20 Mad. 79.
(8) (1879) I. L. R. 5 Cal. 281.
(9) (1899) 3 C. W. N. 33.
(10) (1908) 12 C. W. N. 575.

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must be looked at as if there were separate reports against each of the persons named. One particular person had nothing in common with another person; and the making of the report to the police became an offence relating to a proceeding in court only *qua* the persons who were sent up for trial and not against Sher Bahadur Singh, who was not so proceeded against.

Mr. *C. Ross Alston*, in reply:—

The argument in support of the Magistrate's order is based on certain rulings of doubtful validity which interpret section 211 of the Indian Penal Code in, it is submitted, a purely arbitrary manner. That section does no more than separate minor false charges from serious false charges, punishing the latter more [525] severely than the former. It does not purport to deal with the offence of making false reports to the police, but with false charges instituted in court, according as the offences "falsely charged" are minor or major offences. A false report to the police, which the complainant carries no further, is punishable under section 182. This is the view taken in Gour's Penal Code, where it is said that section 182 was intended to apply to a report made to the police or to some officer other than a magistrate competent to hold an inquiry; whereas section 211 applies to a definite accusation preferred in a court of law. In I. L. R. 19 Bombay, at page 725. Mr. Justice Ranade expressed the same view. See also I. L. R. 15 Allahabad, page 336. The position in the Penal Code of section 211 also supports this view. The contention put forward, if the rulings are correct, involves the following absurdity. For offences under sections 172 to 188 of the Indian Penal Code the sanction of the public servant concerned is necessary; and for offences under sections 193 to 211, the sanction of the court concerned is necessary; but no sanction at all is necessary if the false report is to be punished under section 211, although the case concerns the making of a false report to the police. The argument advanced is undoubtedly the logical outcome of the rulings cited, for section 211 is not in clause (*a*) of section 195 of the Code of Criminal Procedure; and as regards Sher Bahadur if no proceedings *against him* were taken in court, no sanction under clause (*b*) could be applied for. If this is correct, is it not more probable that the rulings relied on are unsound than that the Legislature could have intended, in such a case, to make a sanction unnecessary either by the police authority or by the court. It might, however, be held that, as the original case did in fact come into court, the offence now charged "related to" a proceeding in court. This would make it unnecessary to discuss the larger question, for clause (*b*) of section 195 of the Code of the Criminal Procedure would then apply, and the sanction of court which heard and dismissed the original case would be necessary before the case now pending could proceed.

KARAMAT HUSAIN and TUDBALL, JJ.—The facts out of which this application in revision has arisen are as follows:—

The applicant here went to a police station and made a report against several persons, of whom Sher Bahadur Singh was one. He [526] accused them of the offences of rioting and voluntarily causing hurt. The police made inquiry and sent up several persons for trial, but not Sher Bahadur Singh.

The Magistrate tried the accused and the trial ended in the conviction of some of them. These latter appealed to the Sessions Judge, who acquitted them.

Thereupon Sher Bahadur Singh made a complaint to the Magistrate, stating the above facts against the present applicant, and charging the

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latter with having made a false report in respect to himself to the police, which, he said, constituted an offence under section 211 of the Indian Penal Code.

Objection was taken that the Magistrate could not take cognizance of the complaint without sanction obtained, and the terms of section 195 of the Code of Criminal Procedure were invoked to support the argument. The Magistrate has held that sanction is not necessary; hence the present application.

The facts stated in the complaint clearly constitute an offence under section 182 of the Indian Penal Code, *i. e.*, the giving of false information to the police, but it has been held by this High Court that they also constitute an offence under the first half of section 211 of the Indian Penal Code.

The argument which found favour with the court below is as follows. If the complaint had been made of an offence under section 182 of the Indian Penal Code on the facts of the present case the sanction of the police officer would have been necessary under section 195 (1) (*a*), Criminal Procedure Code, but that clause makes no mention of an offence punishable under section 211 of the Indian Penal Code; therefore as the complaint is laid under this latter section, no sanction is necessary. Section 195 (1) (*b*) relates only to proceedings in Court. This may perhaps be the natural result of the decision that the making of a false report to the police where the case has not come into court constitutes an offence under section 211 of the Indian Penal Code as well as one under section 182, but it leads to this absurdity that in the case of the lesser offence under section 182 a sanction is a *sine qua non*, whereas in the case of the more serious offence under section 211 a sanction is not at all necessary. It is unnecessary to set forth the reasons why the law lays down the necessity of a sanction in cases of the class mentioned in section 195 of the Code of Criminal Procedure. It is **[527]** obvious that they operate in the cases of both sections 182 and 211 of the Indian Penal Code, and it was never intended by the Legislature that complaint should be made in the circumstances of the present case without the sanction of the police officer concerned.

The difficulty might be solved by holding that in taking cognizance in the present case of an offence under section 211, the Magistrate is also taking cognizance of an offence under section 182, which he is forbidden to do by the terms of section 195 of the Code of Criminal Procedure without the sanction of the police officer concerned. He is, therefore, doing what is forbidden by the Code, and his action is illegal and *ultra vires*. The true solution may be as suggested by counsel for the applicant, that the Legislature never intended section 211 of the Indian Penal Code to apply to anything except charges preferred in Court to a Magistrate, and enacted section 182 to cover such a case as the present. However, there are the rulings of this Court and other High Courts on the subject, and as we are able in the circumstances of the present case to do justice without going behind those rulings, it is, therefore, unnecessary to discuss the point further. In the present case, there were proceedings in court. On the basis of the alleged false report the police made inquiry and sent up some of the accused for trial. Assuming that Hardwar Pal falsely implicated Sher Bahadur Singh in his report, and that the offence he thereby committed was one under the first paragraph of section 211, still it is quite clear that this offence was one committed in relation to a proceeding in court. It is obvious that there is considerable relation

between the first report and the proceeding in court, for the latter is the result of the former. The report led to the police inquiry and the latter to the proceeding in court. The offence if it be one under section 211 committed in respect to Sher Bahadur Singh was committed in relation to the proceeding in court, and at least the sanction of the court would be necessary under section 195 (1) (*b*). The argument that there was a separate complaint made to the police against each of the persons named in the report is the mere splitting of a hair as well as of a report. There was one report which led to a proceeding in court.

Whichever view we take of the law, it is clear in the circumstances of this case that the Magistrate had no power to take congnizance of the complaint made by reason of the absence of sanction.

[528] We allow the application and quash the proceedings as the Magistrate's action is illegal.

Application allowed.

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34 A. 528 (=16 I. C. 179=10 A. L. J. 25).

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

PIARI LAL AND OTHERS (*Plaintiffs*) *v.* MAKHAN AND OTHERS (*Defendants*).*

[14th May, 1912.]

Act No. XVI of 1908 (*Indian Registration Act*), *section* 17 (2) (*vi*)—*Mortgage—Receipt for mortgage money—Registration.*

A receipt for money due upon a mortgage was given in the following terms :—' 'The bond is returned. No money remains due." *Held* on suit for recovery of the mortgage debt that the receipt did not require to be registered and that the words " no money remains due " did not purport to extinguish the mortgage.

This was a suit to recover money alleged to be due upon a mortgage by sale of the mortgage property. In defence a receipt was produced in the following terms :—" The bond is returned. No money remains due." The court of first instance (Additional Subordinate Judge of Meerut) found that the receipt was not proved, nor the payment of the mortgage money, and decreed the plaintiffs' claim. On appeal the Additional Judge held that the receipt was proved, and, reversing the decree of the court of first instance, dismissed the suit. The plaintiffs appealed, their main contention being that the receipt was inadmissible inasmuch as it was not registered.

Mr. *Nihal Chand* and Munshi *Benode Bihari*, for the appellants.

The Hon'ble Dr. *Sunder Lal* and Pandit *Vishnu Ram Mehta*, for the respondents.

KARAMAT HUSAIN and TUDBALL, JJ.— This was a suit upon a mortgage. One of the pleas in defence was payment of the entire sum due on it. In support of that plea a receipt, dated Asadh Sudi 3rd, Sambat 1950, corresponding to 16th June, 1893, was produced. The court of first instance came to the conclusion that the receipt was not proved and that the payment was not proved. It, therefore, decreed the claim. There was an appeal

* Second Appeal No. 760 of 1911 from a decree of C. E. Guiterman, Additional Judge of Meerut, dated the 2nd June, 1911, reversing a decree of Muhammad Husain, Additional Subordinate Judge of Meerut, dated the 14th of November, 1910.

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to [529] the lower appellate court, which found that the receipt was genuine, and reversed the decree of the first court. The plaintiffs have preferred a second appeal to this Court, and two points are pressed before us. The first is that there is nothing in the recept and in the oral evidence adduced by the defendants to establish that the receipt refers to the mortgage which is the basis of the suit. The second is that the receipt purports to extinguish the right in the mortgaged property, and that, as it is unregistered, it is inadmissible in evidence. The receipt is to the following effect:—"The bond is returned. No money remains due." The defendants adduced oral evidence to establish that on the day on which the receipt was executed the sum of Rs. 275 was paid. The lower appellate court has believed that evidence.

Regarding the plea that the receipt does not show that the bond in dispute was paid up, we are of opinion that this is entirely a new point which was not raised either in the first court or in the court of first appeal, and as it raises a question of fact, we are not inclined to give the appellants an opportunity to have that point tried *de novo* at this stage of the litigation.

On the second point, having regard to the cases *Dalip Singh* v. *Durga Prasad* (1), *Imdad Husain* v. *Tasadduk Husain* (2), *Jiwan Ali Beg* v. *Basa Mal* (3), *Sri Ram* v. *Kesri Mal* (4), *Fakir* v. *Khotu* (5), and *Lakshman* v. *Damodar* (6), and the express wording of section 17, clause (2), sub-clause (xi), of the Indian Registration Act No. XVI of 1908, we are of opinion that the receipt, though unregistered, so far as it relates to the payment of the entire sum of the money due on the mortgage on the date of the receipt, is admissible in evidence, and the words "no money remains due" do not, in our opinion, purport to extinguish the mortgage. That being so, the receipt does not require registration. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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34 A. 530 (=10 A. L. J. 56=15 I. C. 80).

[530] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

MUKHTAR AHMAD (*Judgment-debtor*) *v.* MUQARRAB HUSAIN (*Decree-Holder*).*

[15th May, 1912.]

Civil Procedure Code (1908), *section* 47—*Execution of decree—Interlocutory order—Appeal.*

The court executing a decree struck off the proceedings upon the ground of wilful default on the part of the decree-holder in prosecuting his claim. Subsequently, however, finding that the decree-holder had not really been in default, the court cancelled its former order, held that an attachment which was in existence at that time still subsisted, and that execution should proceed. *Held* that this was not an order to which section 47 of the Code of Civil Procedure, 1908, applied.

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*First Appeal No 61 of 1912 from a decree of Keshab Deb, Subordinate Judge of Moradabad, dated the 4th November, 1911.

(1) (1877) I. L. R. 1 All. 442.
(2) (1884) I. L. R. 6 All. 335.
(3) (1886) I. L. R. 9 All. 103.
(4) (1896) I. L. R. 18 All. 333.
(5) (1882) I. L. R. 4 Bom. 590.
(6) (1900) I. L. R. 24 Bom. 609.

Observations of BANERJEE. J., in *Jogodishury Debea* v. *Kailash Chundra Lahiry* (1) followed.

[Fol: 19 C. W. N. 1009=19 C. L. J. 591; Ref: 20 C. L. J. 512=27 I. C. 444; 83 I.C. 1035 =22 A. L. J. 706=46 All. 733.]

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10 A. L. J. 56
=13 I. C. 50.

IN this case property was attached on the 17th of July, 26th of July, 27th of July, 28th of July, and 12th of August, 1909. The decree-holder along with his application filed an affidavit, dated the 15th of May, 1909, giving full particulars as required by order XXI, rule 66. After all these proceedings the judgment-debtor objected to the execution of the decree. His objection was disallowed and his appeal to the High Court was also dismissed. When the record went back to the court below in September 1910, notice was issued to the judgment-debtor under order XXI, rule 66, and the decree-holder was directed to file an affidavit under the same rule. But as no affidavit was filed by him, the court, on the 11th of November, 1910, struck off the case for default. The order runs as follows :—"The decree-holder notwithstanding two adjournments has failed to prosecute the proceedings. The case, therefore, cannot be adjourned any more. The proceedings are struck off." The court, however, subsequently discovered that that order was a wrong order, and that in fact there was no default of prosecution on the part of the decree-holder. It, therefore, held that the former attachment subsisted and that no fresh attachment was necessary, and it decided to go on with the execution proceedings. The judgment-debtor objected that a fresh attachment was necessary, but his objection was disallowed.

From this order the judgment-debtor appealed to the High Court.

[531] Maulvi *Muhammad Ishaq*, for the appellant.

Mr. *B. E. O'Conor* and Mr. *Abdul Raoof*, for the respondent.

KARAMAT HUSAIN and TUDBALL, JJ.—In this case property was attached on the 17th of July, 26th of July, 27th of July, 28th of July, and 12th of August, 1909. The decree-holder along with his application filed an affidavit, dated the 15th of May, 1909, giving full particulars as required by order XXI, rule 66. After all these proceedings the judgment-debtor objected to the execution of the decree. His objection was disallowed and his appeal to the High Court was also dismissed. When the record went back to the court below in September, 1910, notice was issued to the judgment-debtor under order XXI, rule 66, and the decree-holder was directed to file an affidavit under the same rule. But as no affidavit was filed by him, the court, on the 11th of November, 1910, struck off the case for default. The order runs as follows :—"The decree-holder notwithstanding two adjournments has failed to prosecute the proceedings. The case, therefore, cannot be adjourned any more. The proceedings are struck off." The court, however, subsequently discovered that that order was a wrong order, and that in fact there was no default of prosecution on the part of the decree-holder. It, therefore, held that the former attachment subsisted and that no fresh attachment was necessary, and it decided to go on with the execution proceedings. The judgment-debtor objected that a fresh attachment was necessary, but his objection was disallowed.

From that order disallowing the objection this appeal is preferred. A preliminary objection to the hearing of the appeal is taken by the learned counsel for the other side. The substance of his contention is that this order is 'a mere interlocutory order and does not come within the purview of section 47 of the Code of Civil Procedure. The words

(1) (1897) I. L. R. 24 Cal. 725.

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of section 47 are, no doubt, very wide, and if taken in their literal sense will cover every order of an interlcoutory nature that may be passed in execution proceedings. But that does not seem to have been the intention of the Legislature. In our opinion the view taken by BANERJEE, J., in *Jogodishury Debea* v. *Kailash Chundra Lahiry* (1) is a sound one. On page 739 he remarked as follows:—"It is not every order made in execution of a decree that comes within section 244. [532] If that were so, every interlocutory order in an execution proceeding, such as an order granting or refusing process for the examination of witnesses, would be appealable; and far greater latitude would be given of appealing against orders in such proceedings than is allowed as against orders made in suits before decree—a thing which could hardly have been intended. See *Sreenath Roy* v. *Radhanath Mookerjee* (2) and *Behary Lal Pundit* v. *Kedar Nath Mullick* (3). An order in execution proceedings can come under section 244 only when it determines some question relating to the rights and liabilities of parties with reference to the relief granted by the decree; *not when, as in this case, it determines merely an incidental question as to whether the proceedings are to be conducted in a certain way.* I may add that the language of section 244, which enacts that certain 'questions shall be determined by an order of the court executing the decree, and not by separate suit,' clearly indicates that the questions contemplated by the section must be of a nature such that it is possible to suppose that but for the section they could have formed the subject of determination by a separate suit. But a question of an incidental character can never come under that description, and an order determining such a question cannot, therefore, be a decree as defined in section 2." We agree with this view, which applies very aptly to the circumstances of this case now before us. The result is that we hold that no appeal lies from the order of the court below, and we dismiss the appeal with costs.

Appeal dismissed.

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34 A. 533 (=10 A. L. J. 27=15 I. C 85=13 Cr. L. J. 452.)

[533] MISCELLANEOUS CRIMINAL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

JAGGU AHIR *v.* MURLI SHUKUL.*

[16th May, 1912.]

Criminal Procedure Code, sections 145, 526—*Transfer*—"*Criminal case*"—"*Accused person.*"

Held that the expression 'criminal case' as used in section 526 of the Code of Criminal Procedure includes a proceeding initiated under section 145 of the Code and that the High Court under section 526 has power to transfer such a proceeding from one court to another court subject to all the conditions under which a transfer can be made. *Arumuga Tegundan* (4), *Lolit Mohan Moitra* v. *Surja Kanta Acharjee* (5) and *Gurudas Nag* v. *Gaganendra Nath Tagore* (6) referred to. *In re Pandurang Govind Pujari* (7) dissented from.

An 'accused person' is one over whom a criminal court exercises jurisdiction. *Queen-Empress* v *Mutasaddi Lal* (8) followed.

[Ref: 18 C. W. N. 393=23 I. C. 727=15 Cr. L. J. 359; 76 I. C 562=25 Cr. L. J. 194.]

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* Criminal Miscellaneous No. 52 of 1912.

(1) (1897) I. L. R. 24 Cal. 725.
(2) (1883) I. L. R. 9 Cal. 773.
(3) (1891) I. L. R. 18 Cal. 469.
(4) (1902) I. L. R., 26 Mad. 188.
(5) (1901) I. L. R 28 Cal. 709.
(6) (1905) 2 C. L. J. 614.
(7) (1900) I. L. R. 25 Bom. 179.
(8) (1898) I. L. R. 21 All. 107.

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10 A. L. J. 27
=15 I. C. 84
=13 Cr. L. J. 452.

THE applicant applied for the transfer of a criminal proceeding instituted under section 145 of the Criminal Procedure Code. On the application coming on for hearing before PIGGOTT, J., a preliminary objection was raised by the opposite party that the High Court had no power to transfer criminal proceedings under section 145 of the Criminal Procedure Code. PIGGOTT, J., referred the point to a bench of two Judges. The matter then came on before KARAMAT HUSAIN and TUDBALL, JJ.

Pandit *Shiam Krishna Dar* (for Munshi *Binode Behari*) for the applicant :—

This Court has power to transfer all cases pending in inferior criminal courts. Section 526 is very wide and gives this Court power to transfer on sufficient grounds any '*criminal case.*' It is not necessary that an offence should have been committed before the matter could be called a '*criminal case.*' A criminal case is one which is tried by a criminal court. The Bombay case proceeded upon the erroneous assumption that it was necessary to constitute a criminal case, that an offence should have been committed.

Mr. *M. L. Agarwala*, for the opposite party :—

There is a material difference in the wording of the section conferring on District Magistrates power to transfer cases and of the section conferring such power on the High Court. In section [534] 526 the words "*criminal case*" are used, whereas in section 528 the word '*case*' is used. It is obvious, therefore, that the Legislature intended to discriminate between a '*case*' and a '*criminal case.*' Every proceeding would, of course, be a *case* ; but would not necessarily be a '*criminal case.*' The reason for the distinction is obvious. Proceedings under section 145 and cognate sections are proceedings taken to prevent the commission of offences, and the District Magistrate, as head of the district, is responsible for the maintenance of its peace. He, as the person on the spot, is best able to decide whether the exigencies of public peace would allow of the delay involved in transfer proceedings. It could never have been the intention of the Legislature to allow such proceedings to be indefinitely postponed or delayed, while questions of academical importance were being discussed in this Court. The mischief which these proceedings were intended to prevent would be perpetrated during the time that the transfer proceedings remained pending.

Pandit *Shiam Krishna Dar* was heard in reply.

KARAMAT HUSAIN and TUDBALL, JJ.—The question referred to us is whether the High Court has jurisdiction under section 526 of the Code of Criminal Procedure or under the Letters Patent (especially by section 22) to transfer from the court of one Magistrate to the court of another Magistrate a proceeding under section 145 of the Code of Criminal Procedure. There is a conflict of authority on the point. In *In re Pandurang Govind Pujari* (1) it was held that the High Court had no power under section 526 of the Code to transfer a proceeding under section 145 of the Code from one court to another. The reason given is that such a proceeding is not a "criminal case" within the meaning of section 526, that a criminal case means a case arising out of and dealing with *some crime already committed* and does not include proceedings taken for the prevention of a crime. The Madras High Court in *Arumuga Tegundan* (2) dissented from the Bombay case. The learned Judges said :—" We have no doubt of our power to transfer this case both under section 526 of the

(1) (1900) I. L. R. 25 Bom. 179.

(2) (1902) I. L. R. 26 Mad. 188.

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Code of Criminal Procedure and clause 29 of the Letters Patent. If a case under section 145 of the Code of Criminal Procedure is not a "criminal case," it is difficult to conceive what it [535] is. With all respect we are unable to agree with the decision of the Bombay High Court in *In re Pandurang Govind Pujari*." In *Lolit Mohan Moitra* v. *Surja Kanta Acharjee* (1) GHOSE, J., held as follows:—

"An investigation under section 145 of the Code of Criminal Procedure is an inquiry within the meaning of clause (*a*) of section 526 of that Code.

"A Magistrate trying a case under section 145 is a criminal court within the meaning of the Code.

"The expression 'criminal case' in section 526 means a case over which a Criminal Court has jurisdiction."

It is doubtful whether the High Court has power under section 526 to transfer cases other than those in which a person is charged with an offence. The High Court may, under section 15 of the Charter Act, transfer a case under section 145.

TAYLOR, J., held as follows:—"The expressions 'case' and 'criminal case' are not co-extensive. The phrase 'criminal case' is used in a limited sense and does not apply to every case congnizable by a Criminal Court. It is doubtful whether the High Court has power under section 526 to transfer cases which do not relate to matters which may strictly be described as criminal as relating to a crime or offence under the law. The power, however, exists under section 29 of the Letters Patent wherein the phrase 'criminal case' appears to be used without the distinction which apparently exists in the Criminal Procedure Code in respect of cases tried by a Criminal Court as opposed to civil cases."

In *Gurudas Nag* v *Gaganendra Nath Tagore* (2) RAMPINI and MOOKERJI, JJ., held that a proceeding under section 145 of the Code of Criminal Procedure was a "criminal case" and expressly dissented from in *In re Pandurang Govind Pujari* (3). Our answer to the question turns upon the meaning we give to the phrase "criminal case" in section 526 of the Code of Criminal Procedure. There is nothing in the section to lead us to infer that the phrase means a "criminal case arising out of an offence which has already been committed." Had that been the intention of the Legislature, it could have easily expressed it in apt words and would not have used an expression of a larger connotation. [536] We are of opinion that it includes proceedings taken under section 145 for the prevention of a crime.

A Magistrate who conducts those proceedings does so as a criminal court under the provisions of the Code of Criminal Procedure, and it cannot be said that he performs the function of an executive officer.

The expression "criminal case" in clause (8) of section 526 need not necessarily be taken to have been used in the narrow sense of a criminal case arising out of an offence already committed.

The High Court is the highest tribunal in these provinces, and one of its important functions is to supervise the work of all the Criminal Courts subordinate to it, and there is no reason why the Legislature should deem it fit to limit the power of the High Court to transfer only such "criminal cases" as arise out of the offences already committed, and for that purpose should use a phrase of a more general import. Besides such

(1) (1901) I. L. R. 28 Cal. 709.
(2) (1905) 2 C. L. J. 614.
(3) (1900) I. L. R. 25 Bom. 179.

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a limitation can serve no useful purpose. The contention of the learned counsel for the opposite party that the expression "an accused person" which occurs in section 526 of the Code indicates that the phrase "criminal case" refers only to such cases as arise out of the offences which have already been committed is without force. That expression has been used in a larger sense, *i.e.*, the person over whom a Criminal Court excercises jurisdiction. BANERJI, J., in *Queen-Empress* v. *Mutasaddi Lal* (1) said :— "The Code of Criminal Procedure contains no definition of an 'accused person,' but it was held by the Bombay High Court in *Queen Empress* v. *Mona Puna* (2) that the term 'accused' means a person over whom a Magistrate or other (criminal) court is exercising jurisdiction. The same view was taken by the Calcutta High Court in *Jojha Singh* v. *Queen-Empress* (3). I see no reason to put a different interpretation on the words 'an accused person' in section 434."

It was further urged that proceedings under sections 176, 488 and 491 of the Code of Criminal Procedure can hardly be called a "criminal case" notwithstanding the fact that they are conducted under the Code of Criminal Procedure, and this shows that [537] every proceeding held under the Code is not a "criminal case". In our opinion this contention is without substance. We are inclined to hold that in the absence of anything to the contrary, every case over which a criminal court exercises jurisdiction under the Code is a "criminal case" for the purposes of that Code.

On a careful consideration of the wording of section 526 of the Code of Criminal Procedure, the policy of the law and the cases to which we have referred in this judgment, we hold that the expression "criminal case" in section 526 includes a proceeding initiated under section 145 of the Code, and that the High Court under section 526 has power to transfer it from one court to another court subject, of course, to all the conditions under which a transfer can be made.

In this view of the case it is unnecessary to consider the effect of section 22 of the Letters Patent upon the power of the High Court to transfer a proceeding under section 145 of the Code of Criminal Procedure.

With the above expression of opinion the case was again put up before PIGGOTT, J., who passed the following order :—

PIGGOTT, J.—The Bench to which the question was referred has held that this Court has jurisdiction to make the order of transfer required. I have considered the question on its merits, and what chiefly impresses me is the absence of any answer to paragraph 10 of the applicant's affidavit in the explanation of the Deputy Magistrate. I think a transfer will be in the interests of justice. I accordingly transfer this case from the court of Munshi Nizam-ud-din Ahmad to that of the District Magistrate of Ballia. The latter may either dispose of the case himself, or may exercise his own powers of transfer so as to refer it to the court of any other Magistrate of his district competent to dispose of the same, except Munshi Nizam-ud-din Ahmad himself.

Record returned.

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(1) (1898) I. L. R. 21 All. 107.
(2) (1892) I. L. 16 Bom. 661.
(3) (1896) I. L. R. 23 Cal. 493.

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34 A. 538=15 C. 227=10 A. L. J. 66.

34 A. 538 (=15 I. C. 227=10 A. L. J. 66).

[538] APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Chamier.

ASGHAR HUSAIN (*Plaintiff*) *v.* PAL AHIR AND OTHERS (*Defendants*).*

[17th May, 1912.]

Estoppel—Occupancy holding mortgaged to zamindar and sold in execution of a decree on the mortgage as a fixed-rate holding—Ejectment of purchaser—Right of purchaser to recover possession—Possessory title.

An occupancy holding was mortgaged to the zamindar as a fixed-rate holding; was sold as such in execution of a decree on the mortgage and purchased by a stranger, who remained in possession thereof for some eleven years, paying rent to the zamindar. Subsequently the purchaser was dispossessed by the judgment-debtor. *Held* on suit by the purchaser to recover possession that the defendant was estopped from setting up the plea that the holding was an occupancy holding and that, the defendant having no title at all, the plaintiff was entitled to regain possession on the strength of his possessory title.

THIS was an appeal under section 10 of the Letters Patent against a judgment of RICHARDS, J. The facts of the case sufficiently appear from the judgment under appeal, which was as follows:—

"This appeal arises out of a suit for possession of immoveable property. The merits of the case seem to be with the plaintiff, who obtained a decree in both the Courts below. It appears that the defendants or their predecessor in title mortgaged the property now in suit. In the mortgage the property was described as being held as a fixed-rate tenancy. A suit was instituted on foot of the mortgage. A decree was granted and the property was sold as a fixed-rate tenancy. The auction purchase took place on the 23rd of August, 1897, and the sale was confirmed on the 2nd of November, 1897. The plaintiff in his plaint alleges all these facts, and further that he was dispossessed by the defendants on the 17th of October, 1908. The suit was instituted on the 21st of November, 1908. Notwithstanding the description of the property in the mortgage and in the decree, as also at the time of the auction sale, it now turns out that all along the property was held as an occupancy holding and not as a fixed-rate tenancy. The plaintiff comes into court having to admit that the holding is an occupancy holding. The lower appellate court has held that the holding is an occupancy holding, but that the defendants are estopped from setting up this defence. In my opinion the defendants are entitled to succeed. Section 9 of Act XII of 1881 provides that a right of occupancy shall not be transferable in execution of a decree. The result is that the plaintiff has to come into Court and ask for possession on the basis of an alleged sale of an interest in land which the law in the most express terms provides shall not be sold. A number of authorities have been cited. In the case of *Ashu Tosh Sikdar* v. *Behari Lal Kirtania* (1) it was held that a sale in contravention of the terms of section 99 of the Transfer of Property Act is not a nullity, but [535] merely voidable. In that case the property had been attached and sold on foot of a simple money decree, there being at the time a subsisting mortgage against the property vested in the decree-holder. The appeal arose out of an application to set aside the sale and not, as in the present case, a suit to recover possession based on the sale. Furthermore, the provisions of section 99 of the Transfer of Property Act are not altogether analogous to the provisions of section 9 of Act XII of 1881. In the case of *Mudho Lal* v. *Kutwari* (2) it was held that in execution of a decree for enforcement of a hypothecation bond by sale of specific property an objection by the judgment-debtor that the property is not transferable with reference to section 9 of the N. W. P. Rent Act could not be entertained. This case also arose out of execution proceedings. In the present case the plaintiff has to come into court admitting that he is not in possession and that he is seeking possession of property which he has to admit was not transferable by the court. In other words the plaintiff has to say himself the very thing which it is claimed the defendants are estopped from saying.

"I am asked to hold that the decrees of the courts below may be supported by virtue of section 9 of the Specific Relief Act. The plaintiff, it was said, being in possession and being wrongfully dispossessed, brought his suit within six months. I am afraid that this contention is not open to the plaintiff. Even assuming that the

* Appeal No. 39 of 1911 under section 10 of the Letters Patent.

(1) (1907) I. L. R. 35 Cal. 61. (2) Weekly Notes, 1888, p. 41.

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plaintiff was dispossessed by the defendants otherwise than in due course of law, if he had wished to recover possession on this ground, he ought to have instituted the suit on this ground alone and not, as he has done in the present case, by bringing a suit for ejectment on title. It has been clearly and distinctly held by a Full Bench of this Court in the case of *Lachman* v. *Shambhu Narain* (1) that a plaintiff suing for possession on the basis of title cannot get a decree for possession under the first paragraph of section 9 of the Specific Relief Act. Although I feel bound to allow this appeal, I do not think that the defendants are entitled to costs in any court. I accordingly allow the appeal and, setting aside the decrees of both the courts below, dismiss the plaintiff's suit. I direct that the parties shall abide their own costs in all courts."

The plaintiff appealed.

Dr. *Satish Chandra Banerji*, for the appellant :—

The defendants, who are the mortgagors and, as such, were defendants to the suit on the mortgage, and who were judgment-debtors to the decree in execution of which the plaintiff purchased the property in dispute, had full knowledge of all proceedings before and after execution and had full opportunity of raising the objection at several stages of those proceedings that the holding was an occupancy holding, and as such non-transferable. Having failed to raise such objection at any time prior to the sale, it was not competent for them to resist the purchaser after the confirmation of the sale, when, so far as the parties to the execution case **[540]** were concerned, the title vested in the purchaser ; *Dwarkanath Pal* v. *Tarini Sankar Ray* (2). Moreover, the defendants having failed to come within six months of their dispossession their occupancy right was extinguished, and they had no right left to interfere with the possession of the plaintiff ; *Dalip Rai* v. *Deoki Rai* (3).

Mr. *Muhammad Ishaq Khan*, for the respondents :—

The principle of estoppel could not be invoked to defeat the plain provisions of a Statute. There was an express provision of law that an occupancy holding could not be sold. The fact that the defendants did not raise the point during the pendency of the suit and the execution proceedings could not operate as an estoppel ; *Jagadbandhu Saha* v. *Radha Krishna Pal* (4), *Abdul Aziz* v. *Kanthu Mallik* (5). The defendants being in actual physical possession of the property, the plaintiffs must establish his title before he could oust them. The defendants were occupancy tenants and were wrongfully dispossessed. They, however, got back possession before the expiry of 12 years. They could not be ejected. Section 79 of the Agra Tenancy Act applied where the zamindar dispossessed his tenants. It did not apply to the case of the dispossession of a tenant by an outsider.

Dr. *Satish Chandra Banerji* was not heard in reply.

TUDBALL and CHAMIER, JJ.—The facts of the case out of which this appeal has arisen are as follows. The predecessors in title of the defendants respondents were occupancy tenants of a certain holding. On the 4th of June, 1885, they mortgaged this holding *describing it as a fixed-rate tenure* in favour of the *zamindar of the village*. A suit was brought to enforce the mortgage in December, 1895, and on the 27th of July, 1896 a decree for sale was passed. On the 23rd of August, 1897, the property was sold as a *fixed-rate tenure* and was purchased by the plaintiff, a stranger to that suit. The judgment-debtors objected to the zamindar being allowed to bid at the sale. On the 2nd of November, 1897, a sale-certificate was granted to the plaintiff. From that date up to the 16th of

(1) (1910) I. L. R. 33 All. 174.
(2) (1907) I. L. R. 34 Cal. 199.
(3) (1899) I. L. R. 21 All.. 204.
(4) (1903) I. L. R. 36 Cal. 920.
(5) (1910) I. L. R. 38 Cal. 512.

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15 I. C. 227=
10 A. L. J. 66.

October, 1908, the plaintiff had been in possession of the holding paying rent to the zamindar. [541] On the latter date he was dispossessed by the defendants, who asserted that the land was their occupancy tenure. Hence the present suit was brought by the plaintiffs to recover possession. The court of first instance and the lower appellate court decreed the claim. On second appeal to this Court the learned Judge before whom the case came dismissed the suit, holding that, as a right of occupancy could not be sold in execution of a decree, the plaintiff acquired no title to the holding, and therefore he was not entitled to a decree in a suit for ejectment against the defendants. Two points are pressed before us. The first is that the judgment-debtors are estopped from saying that the tenure was an occupancy tenure and not a *fixed-rate tenure*; and secondly, even though no title passed to the plaintiff by the auction-sale, still, on the 16th of October 1908, the defendants had no title themselves, and therefore the plaintiff is entitled to a decree for possession against them on the strength of his possessory title. We think both these contentions are sound. It is clear that the defendants as well as the zamindar gave out that the tenure was a fixed-rate tenure, that is, one transferable in execution of a decree. The judgment-debtors in the mortgage suit raised no objection whatsoever either in the course of the suit or in execution proceedings on the ground that the tenure was not transferable under law. The plaintiff, acting on the belief that the tenure was a fixed-rate tenure, as stated by the parties to the mortgage-deed and the mortgage suit, purchased it. We think that it does not lie in the mouth of the defendants to say now that the tenure was not a fixed-rate tenure. Furthermore, it is quite clear that for about eleven years the defendants had been out of possession. The plaintiff has held possession and has been accepted by the zamindar as a tenant and has paid rent for the holding. Any right which the defendants had as tenants disappeared long ago, and when, on the 16th of October, 1908, they dispossessed the plaintiff, the latter had at least a possessory title, while the defendants had no title whatsoever. On the basis of his possessory title alone the plaintiff would be entitled to a decree. We allow this appeal, set aside the judgment of the learned Judge of this Court, and restore the decree of the lower appellate court. The plaintiff will have his costs throughout.

Appeal allowed.

34 A. 542 (=10 A. L. J. 70=15 I. C. 174).

[542] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

GUPTESHWAR RAM AND OTHERS (*Defendants*) *v.* RATI KRISNA RAM AND ANOTHER (*Plaintiffs*).*

[21st May, 1912].

Pre-emption—Wajib-ul-arz—Custom—Effect of joining in the purchase a co-sharer having an inferior right.

The vendee in a suit for pre-emption having equal rights which the pre-emptor disables himself from resisting a suit for pre-emption as much by associating with himself in the purchase another co-sharer whose rights are inferior to those of the pre-emptor as by associating with himself a stranger.

[Ref. 51 I. C. 153=17 A. L. J. 391=41 All. 423; Fol. 71 I. C. 562=21 A. L. J. 194.]

* Second Appeal No. 511 of 1911 from a decree of F. D Simpson, District Judge of Gorakhpur, dated the 24th of January, 1911, confirming a decree of Kashi Nath, Officiating Munsif of Bansgaon, dated the 26th of June, 1910.

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34 A. 542=
10 A. L. J. 70
=15 I. C. 174.

THIS was a suit for pre-emption based upon custom as recorded in the village wajib-ul-arz. The plaintiffs alleged that a custom of pre-emption prevailed, and that one of the vendees, although he had an equal right with the plaintiffs, had lost his right by joining with him in the sale a person who, though a co-sharer, had an inferior right to the plaintiffs. The defendants alleged that there was no custom of pre-emption and that the joining of a person who was a co-sharer, although his right was inferior, did not entitle the plaintiffs to pre-emption even on the assumption that a custom of pre-emption prevailed in the mahal. Neither side gave oral evidence, but there was adduced in evidence the wajib-ul-arz of 1833, the wajib-ul-arz of 1860, and certain decrees, in some of which it was held that a custom existed and in others that it did not exist. The court of first instance (Munsif of Bansgaon) found that the custom of pre-emption existed, but that the vendee, by joining in the purchase a person who had inferior rights to those of the plaintiff, had forfeited his own rights, which were equal. That court accordingly decreed the claim, and its decree was affirmed by the District Judge in appeal. The defendants appealed to the High Court.

Munshi *Parmeshwer Dayal*, for the appellants.

Munshi *Girdhari Lal Agarwala*, for the respondents.

RICHARDS, C. J. and TUDBALL, J.—This appeal arises out a suit for pre-emption. The plaintiffs alleged that a custom of pre-emption prevailed and that one of the vendees, although he had an equal right with the plaintiffs, had lost his right by joining with him in the sale a person who, though a co-sharer, had an inferior right to the plaintiffs. The defendants alleged that there [543] was no custom of pre-emption and that the joining of a person who was a co-sharer, although his right was inferior, did not entitle the plaintiffs to pre-emption even on the assumption that a custom of pre-emption prevailed in the mahal. Neither side gave oral evidence, but there was adduced in evidence the wajib-ul-arz of 1833, the wajib-ul-arz of 1860, and certain decrees, in some of which it was held that a custom existed and in others that it did not exist. The learned Munsif considered the evidence carefully and came to the conclusion that the custom existed. He also held that the joining in the purchase of a person who had inferior rights to the plaintiffs forfeited the right of the vendee whose right was equal to that of the plaintiffs.

The learned District Judge's judgment is not so satisfactory. He decided the case entirely on the words of the wajib-ul-arz of 1860. In this we think he was wrong. He ought to have considered the evidence adduced by both parties and come to a conclusion whether or not the custom existed. As, however, we have all the evidence before us, we think that there is no necessity, specially where no oral evidence was adduced, to put the parties to the unnecessary expense of a further hearing. Mr. *Parmeshwar Dayal* has called our attention to the history of the village in the *kaifiyat nizamat*, which he strongly relies upon, as showing that no custom existed. He has also called our attention to the fact that the decree in which the custom was upheld was a compromise decree. The wajib-ul-arz of 1833 states the right of pre-emption in general terms. The wajib-ul-arz of 1860 states it with much more particularity. It gives a right first to a near co-sharer and, secondly, to a co-sharer in the *thok*. The defendant No. 1 is a co-sharer in the same *khata* with the plaintiffs. The other vendee is a co-sharer in the same *thok* but in a different *khata*. We think both the courts below were correct in holding

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that a co-sharer in the same *khata* was a nearer co-sharer than a co-sharer in another *khata* though in the same *thok*. We also think that if we assume the custom of pre-emption to exist, a vendee, although having an equal right with the plaintiff, loses his right when he brings in as a co-vendee a co-sharer having an inferior right. It is urged that the bringing in of a co-sharer, even though his right is inferior, is very different from introducing a stranger. It is admitted that the introduction of a stranger [544] forfeits the right of the co-sharer against whom pre-emption is sought. We, however, can recognise no distinction in principle between the introduction of a stranger and the introduction of a person having an inferior right to the pre-emptor. If it were otherwise, pre-emption as between co-sharers could always be defeated if one co-sharer having an equal right could be induced to join in the purchase.

The question remains whether or not we should hold that the custom of pre-emption has been proved to exist. With regard to the litigation it shows this much that the right of pre-emption has consistently been claimed. Unfortunately it would appear that the question was never tried out in any previous litigation in the way we think it ought to have been tried out, namely, by hearing and considering the evidence adduced by the parties pro and con. The cases were generally decided solely upon the actual words appearing in the wajib-ul-arz, and, as we know, it very seldom happens that any two Judges take precisely the same view of the meaning of those words We, therefore, think that in the circumstances of the present case the reference to the previous litigation shows little more than that the right of pre-emption has been from time to time claimed. In our opinion and on the authority of *Returaji Dubain* v. *Pahlwan Bhagat* (1), the reference to the right of pre-emption in these two wajib-ul-arzes raised a *prima facie* case that a custom of pre-emption prevailed in the village. It is said that the history of the village, as set forth in the *kaifiyat nizamat*, shows that no custom of pre-emption could ever have arisen and this is sufficient to rebut the *prima facie* case established by the plaintiffs. Having carefully considered this document, we do not think that in the present case it does rebut the plaintiff's case. The history of the village shows that the zamindari is a very old one. So far as the *kaifiyat nizamat* goes, it does not show that there was ever a transfer or sale subsequent to the year 1833. There were auction purchases, but in these cases the right of pre-emption would not be set up. It is urged that the property came into the single possession of a Raja in 1220 Falsi. Even this is not very conclusive, because we find the next settlement was not made with the Raja, but apparently with the same family who were the proprietors [545] before the Raja came in. It is, therefore, probable that the Raja's interest was of a temporary character. On the whole we think that the plaintiff established the existence of the custom of pre-emption he set up. This being so, the decree of the court below was correct. We, accordingly, dismiss the appeal with costs.

Appeal dismissed.

(1) (1911) I. L. R. 33 All. 196.

34 A. 545 (=10 A. L. J. 73=16 I. C. 455).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

MUHAMMAD YASIN (*Plaintiff*) *v.* ILAHI BAKHSH AND OTHERS (*Defendants*).*

[23rd May, 1912.]

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APPELLATE CIVIL.

34 A. 545=10 A. L. J. 73=16 I. C. 455.

Land-holder and tenant—Rights of tenants with respect to groves—Custom—Wajib-ul-arz—Construction of document—"Malik."

The wajib-ul-arz of a village contained the following provision as to grove land :—"Persons who have planted a grove and who are in possession of a grove have the rights of an owner (*ikhtiyar malikana*). If any trees fall down, they can plant fresh trees without the permission of the zamindar, * * * When the land becomes denuded of all trees, the planter of the grove will have the first right to cultivate the land."

Held, that these provisions implied a right of transfer in the possessor of grove land.

[Fol. 17 I. C. 656; Ref. 24 I. C. 81; 63 I. C. 437=43 All. 606; 73 I. C. 529=21 A. L. J. 457; 75 I. C. 655.]

THIS was an appeal under section 10 of the Letters Patent from a judgment of BANERJI, J. The facts of the case sufficiently appear from the judgment under appeal, which was as follows :—

" This was a suit for possession of certain trees existing on plots of land Nos. 568 and 569, which are part of the waste land of the village. The parties to the suit are co-sharers in the zamindari. The plaintiff purchased the trees from one Jagaoli Lal under a sale-deed, dated the 20th of December, 1900. He alleged that the trees belonged to the predecessors in title of his vendor, that he was in possession by virtue of his purchase and that the defendants were wrongfully interfering with him and by virtue of an order of the criminal court had taken possession. The defendants stated that the trees belonged to the zamindars and had been planted by them, that the plaintiff's vendor or his predecessor was never in possession, and even if the trees were planted by Thakur Dayal, the ancestor of the plaintiff he had left the village, and the trees had lapsed to the zamindars. It has been found by the lower appellate court that the trees in question were planted by Thakur Dayal, who was a member of a joint Hindu family; that Jagadi Lal was the last male member of the joint family; that he was the owner of the trees ; that Thakur Dayal or the plaintiff's vendor did not abandon the village, and that after the sale to the plaintiff the latter was in possession. The learned Subordinate Judge has also found that Thakur Dayal was not a tenant, by which he apparently means an agricultural tenant. But he holds that as it has not been shown that Thakur Dayal had no right to sell the trees, it must be presumed that he had such right. Accordingly the lower appellate court affirmed the decree of the court of first instance, [646] decreeing the plaintiff's claim. It seems to me that for a proper determination of this suit it is necessary to ascertain certain facts which have not been found by either of the courts below. It should be found whether Thakur Dayal was in possession adversely to the zamindars. If he was not in adverse possession and planted the trees with the permission of the zamindars, it should be ascertained under what conditions he was allowed to plant the trees. If he planted the trees on the condition that he should have the right to enjoy the produce of the trees and should also be competent to sell them, the plaintiff has acquired a valid title to the trees. If, on the other hand, there was a restriction upon his right to transfer, the sale to the plaintiff can have no effect. There would still be the question whether by custom or otherwise a person planting trees with the permission of the zamindar has a right to sell the trees either to some of the zamindars or to strangers. I accordingly refer the following issues to the lower appellate court under order XLI, rule 25, of the Code of Civil Procedure : (1) By what right did Thakur Dayal plant the trees in question, and what was the nature of his possession of the trees ? Was he in adverse possession of them ? (2) Did Thakur Dayal plant the trees with the permission of the zamindars ? (3) If he did so, what were the conditions, if any, under which he was permitted to plant the trees ? (4) If

* Appeal No. 6 of 1912 under section 10 of the Letters Patent.

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no particular conditions were attached to his right of enjoying and selling them, had he by custom or otherwise a right to sell the trees in question? The court will take such evidence relevant to the above issues as may be adduced by the parties. On return of the findings ten days will be allowed for filing objections."

On receipt of the findings, BANERJI, J., held on a construction of the wajib-ul-arz that the plaintiff had failed to establish a custom giving the holder of a grove a right to sell the grove as such, though he might sell the timber, and accordingly allowed the appeal.

The plaintiff appealed.

Babu *Piari Lal Banerji*, for the appellant :—

The plaintiff as purchaser of the rights of the grove-holder was entitled to retain possession of the grove as such, as long as the grove retained its character. If the original grove-holder could not be dispossessed, there was no reason to hold that his transferee could be dispossessed. There is nothing in law to show that the right of a grove-holder is a mere personal right. The Tenancy Act which makes the interest of a non-occupancy tenant non-transferable does not apply to a grove-holder. This was decided in *Ismail Khan* v. *Mithu Lal* (1). Moreover, in the present case the wajib-ul-arz distinctly recorded the fact that grove-holders had rights of ownership with respect to their [547] grove. The word *malik* is most general and comprehensive, and, as observed by their Lordships of the Privy Council, implies absolute ownership unless there is anything in the surrounding circumstances to qualify such meaning ; *Surajmani* v. *Rabi Nath Ojha* (2).

Mr. *Muhammad Ishaq Khan*, for the respondent.

It is quite clear that full rights of ownership were not given to a grove-holder. If such rights were given, the wajib-ul-arz would not record the fact that a grove-holder was not entitled to replant trees in case the trees fell down. The whole language of the wajib-ul-arz clearly controls the opening sentence.

Babu *Piari Lal Banerji*, was not heard in reply.

RICHARDS, C. J., and TUDBALL, J.—This appeal arises out of a suit in which the plaintiff claimed to recover possession of a grove. The court of first instance and the lower appellate court decreed the plaintiff's claim. On second appeal to this Court the decrees of the courts below were reversed and the plaintiff's suit dismissed. The facts are very simple and undisputed. The grove was planted by one Thakur Dayal with the consent of the zamindars. The plaintiff, who is also a zamindar, purchased it from Jagaoli Lal, the representative of Thakur Dayal, on the 20th of December, 1900. He has been ousted from possession by the other zamindars, who have been put into possession evidently under section 145 of the Code of Criminal Procedure. The wajib-ul-arz deals very fully with the rights of persons to plant groves. It is notorious that in some places it is considered by the zamindars themselves very desirable to encourage the planting of groves. The wajib-ul-arz in the present case shows that this was the case in the village in question. It provides that persons who plant with the consent of the zamindars, or are in possession of groves, are to have the rights of a *malik*. They can cut down and sell the trees on terms of paying one-fourth of the value of the timber to the zamindars. They are entitled to retain possession of the grove so long as it continues to have the characteristics of a grove. They are entitled when a tree is cut down, or falls down, to replace it with another without even

(1) (1912) 9 A. L. J. 483.

(2) (1908) I. L. R. 30 All. 84.

asking the consent of the zamindar. Even after the trees have been cut down entirely, they are to have the first right to become tenants of the land at a [548] rent payable to the zamindars. From the above recital of the wajib-ul-arz it would appear that the zamindars, on whose behalf the wajib-ul-arz was prepared, made provision not only for the actual planters of the groves but for persons who had become possessed of them. Furthermore, it is quite clear that long possession of the grove by persons other than zamindars was contemplated. Trees do not grow up in a day, and further the owner for the time being of the grove was entitled to renew it from time to time by planting fresh trees. It is, therefore, quite clear that the person who planted a grove with the consent of the zamindars acquired substantial right of a lasting and valuable nature. It is almost impossible to understand how in many cases the planter of a grove could enjoy to the full the benefits conferred upon him by the zamindars when he agreed to plant a grove unless he had a right to transfer it. The wajib-ul-arz contemplates enjoyment beyond an ordinary man's life. It almost seems to follow from the terms of the wajib-ul-arz itself that the planter of the grove had a right of transfer. *Prima facie* every man has a right to dispose of any property he possesses, whether it be a grove or anything else. Of course it frequently happens that the Legislature for reasons of policy places restrictions on rights of transfer ; for example, in the case of certain tenancies, it is expressly provided by act of the Legislature that the tenant shall have no power to transfer, and if the grove in question was part of, or an appurtenance to, such a tenancy, it is clear that the tenant could not sell the trees. We know of no law which prohibits a person who has acquired rights similar to those of Jagaoli Lal from transferring such rights. Jagaoli Lal planted this grove and acquired all the rights and privileges mentioned in the wajib-ul-arz. There certainly is no legislative enactment prohibiting such a transfer. In the present case it is urged that there was a finding of the Court that there was no custom or evidence of a custom entitling a grove holder to sell. In our opinion the wajib-ul-arz affords the strongest evidence that the grove-holder in the present case had an interest which he was entitled to transfer. Reliance is placed on an unreported case, Letters Patent Appeal No. 23 of 1909. In some respects the facts in that case were not altogether dissimilar to the facts in the present case, but it would appear from the judgment that there was this very [549] important distinction. The wajib-ul-arz, instead of stating that the planter of a grove was a *malik* of the grove, on the contrary, stated that the trees belonged to the zamindars. The only entry in favour of the defendant was a note to the effect that the tenants also claimed the trees. We think that this case is quite distinguishable from the case before us. In our opinion the decree of the lower appellate court on the facts of the present case was correct and ought to be restored. We, accordingly, allow the appeal, set aside the decree of this Court, and restore the decree of the lower appellate court with costs of both hearings in this Court.

Appeal allowed.

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34 A. 549=9 A. L. J. 819 =15 I. C. 126.

34 A. 549 (=9 A. L. J. 819=15 I. C. 126).

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Banerjee, Mr. Justice Tudball and Mr. Justice Chamier.

HORILAL AND ANOTHER (*Defendants*) *v.* MUNMAN KUNWAR AND OTHERS (*Plaintiffs*).*

[27th March, 1912.]

Hindu law—Joint Hindu family—Mortgage—Purchase of mortgaged property by managing members—Suit for sale against managing members alone—Parties—Civil Procedure Code (1908), *order XXXIV, rule* 1.

Where in a suit for sale on a mortgage the defendants mortgagors were the managing members of a joint Hindu family, who in that capacity had purchased the mortgaged property, it was *held* that the family was sufficiently represented by the managing members and that the suit would not fail by reason of the non-joinder of the other members of the family.

The following cases were referred to in the judgments delivered by the various members of the Bench :—

Kishan Prasad v. *Har Narain Singh* (1), *Bhawani Prasad* v. *Kallu* (2), *Debi Singh* v. *Jia Ram* (3), *Ram Narain Lal* v. *Bhawani Prasad* (4), *Sheik Ibrahim Tharagan* v. *Rama Iyer* (5), *Kendall* v. *Hamilton* (6), *Daulat Ram* v. *Mehr Chand* (7), *Lala Surja Prasad* v. *Gulab Chand* (8), *Ramasamayyan* v. *Virasami Ayyar* (9), *Kunj Behari Lal* v. *Kandh Prasad Narain Singh* (10). [560] *Lutchmanen Chetty* v. *Siva Prokasa Modeliar* (11), *Gan Savant Bal Savant* v. *Narain Dhond Savant* (12), *Vithu Dhondi* v. *Babaji* (13), *Ramakrishna Narayan Sindhe* v *Vinayak Narayan Saswadkar* (14), *Chimna* v. *Sada* (15), *Arunachala Pillai* v. *Vithialinga Mudaliyar* (16), *Angamuthu Pillai* v. *Kolandavelu Pillai* (17), *Shamrathi Singh* v. *Kishan Prasad* (18), *Pateshri Partap Narain Singh* v. *Rudra Narain Singh* (19), *Ramsebuk* v. *Ramlall Koondoo* (20), *Alagappa Chetti* v. *Vellian Chetti* (21), *Jaddo Kunwar* v. *Sheo Shankar Ram* (22), *Jogendro Deb Roykut* v. *Funindro Deb Roykut* (23), *Kashinath Chimnaji* v. *Chimnaji Sadashiv* (24), *Naranji* v. *Moti Gavanji* (25), *Harihar prasad* v. *Mathura Lal* (26), *Gendan Lal* v. *Rabu Ram* (27), and *Nathi Lal* v. *Lala* (28).

[**Fol.** 17 I. C. 290 ; **Not Fol:** 41 Cal. 727 ; **Dist** : 21 I. C. 712 ; **Ref:** 25 I. C. 620 ; 35 All 380 ; 34 All. 615 ; 64 I. C. 966 ; 81 I. C. 737 ; 66 I. C. 945 ; 67 I. C 931=42 All. 58 ; 71 I. C. 623 ; 80 I. C. 12 ; 79 I. C 1001 ; **Fol:** 72 I. C. 142 ; **Ref:** 72 I. C. 722=36 C. L. J. 294 ; **Fol:** 82 A. L. J. 702.]

THIS was a suit for sale based on a mortgage, dated the 14th of November, 1870, executed by one Naiti Singh in favour of Dharam Singh. Dharam Singh was the husband of the plaintiff respondent Munman Kunwar. Naiti Singh was represented in the suit by his brother and two nephews. One Tilok Ram purchased the mortgaged property from

*Second Appeal No. 361 of 1911 from a decree of B. J. Dalal, District Judge of Shahjahanpur, dated the 31st of March, 1911, reversing a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 31st of January, 1911.

(1) (1911) I. L. R. 33 All. 272.
(2) (1895) I. L. R. 17 All. 537.
(3) (1903) I. L. R. 25 All. 214.
(4) (1881) I. L. R 3 All. 443.
(5) (1911) 21 M L. J. 508.
(6) (1879) L. R 4 App. Cas. 504.
(7) (1887) I. L. R. 15 Cal. 70.
(8) (1900) I L. R. 27 Cal. 724.
(9) (1890) I. L. R. 21 Mad. 222.
(10) (1907) 6 C. L. J. 362.
(11) (1899) I. L. R. 26 Cal. 349.
(12) (1883) I. L R. 7 Bom. 467.
(13) (1908) I. L. R. 32 Bom. 375.
(14) (1910) 12 Bom. L. R. 219.
(15) (1910) 12 Bom. L. R. 811.
(16) (1882) I. L. R. 6 Mad. 27.
(17) (1899) I. L R. 23 Mad. 190.
(18) (1907) I. L R 29 All. 811.
(19) (1904) I. L. R. 26 All. 528.
(20) (1881) I. L. R. 6 Cal. 815.
(21) (1894) I. L. R. 18 Mad. 33.
(22) (1910) I. L. R 33 All. 71.
(23) (1871) 14 Moo. I. A. 367.
(24) (1906) I. L. R. 30 Bom. 477.
(25) (1907) 9 Bom. L. R 1126.
(26) (1908) 12 C. W. N. 598.
(27) (1912) 9 A. L. J. 86.
(28) (1912) 9 A.L. J. 410.

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the mortgagor on the 7th of January, 1889. The purchaser died, leaving Hori Lal and Jagannath, his sons, behind him. In the suit the sons of Hori Lal and Jagannath—four in number—were not impleaded as defendants.

It was contended by the defendants that the suit was bad for non-joinder—as the sons, being members of a joint Hindu family, were necessary parties. The suit was dismissed by the court of first instance on that ground, as time had expired for impleading that sons of Hori Lal and Jagannath. The lower appellate court found the Hori Lal and Jagannath were the managing members of their family and as such represented the other members, and decreed the claim. The respondents Hori Lal and Jagannath appealed to the High Court.

Munshi *Gobind Prasad* (Munshi *Lakshmi Narain* with him), for the appellants :—

It is one of the incidents of a joint Hindu family that sons acquire an interest in the family property by birth. If sons existed and a [551] decree was passed against the father alone, it could not be executed. Order XXXIV, rule 1, of the Code of Civil Procedure provides that all persons interested shall be joined—the only exception being laid down in the explanation. The course of rulings here has been that if a decree was passed against one member of a family, it bound him alone ; *Ramanand* v. *Koleshar* (1). This case was followed in *Sundar Lal* v. *Chittar Mal* (2). If the son were not made a party, he could not raise the plea of absence of family necessity ; *Chandradeo Singh* v. *Mata Prasad* (3). The principle that the manager represents the others is inconsistent with the principle of Hindu law that every son has an interest in the joint property ; *Gendan Lal* v. *Babu Ram* (4), *Nathi Mal* v. *Lala* (5). The doctrine that the sons are parties to the suit through their fathers would mean denying to the sons their right of redemption. If they are not made parties to the suit, they cannot reopen it later, and if it is held that they are not necessary parties, their right as Hindu sons would be gone. They need never be impleaded ; *Bhawani Prasad* v. *Kallu* (6), *Debi Singh* v. *Jia Ram* (7), *Badri Prasad* v. *Madan Lal* (8). A member of a joint family has no defined share ; *Bal Gobind Das* v. *Narain Lal* (9) *Gendan Lal* v. *Babu Ram* (4).

[TUDBALL, J.—Referred to *Ramakrishna* v. *Vinayak* (10)].

Munshi *Benode Bihari*, for the respondents :—

There was no defect of parties—the fathers sufficiently represented their sons. He cited *Suraj Bansi Kuar* v. *Sheo Prasad Singh* (11), *Vithu Dhondi* v. *Babaji* (12), *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (13), *Lala Surja Prasad* v. *Golab Chand* (14), *Bhawani Prasad* v. *Kallu* (15), *Sheo Pershad* [552] *Singh* v. *Sahib Lal* (16), *Lutchmanen Chetty* v. *Siva Prokasa Modeliar* (17) and *Baldeo Sonar* v. *Mobarak Ali Khan* (18). There was another set of cases providing that no guardian could be appointed of a minor in a joint Hindu family ; *Gharibullah* v. *Khalak*

(1) Weekly Notes. 1887, p. 217.
(2) (1907) I. L. R. 29 All. 1.
(3) (1909) I. L. R. 31 All. 176.
(4) (1912) 9 A. L. J. 86.
(5) (1912) 9 A. L. J. 410.
(6) (1895) I. L. R. 17 All. 537.
(7) (1903) I. L. R. 25 All. 214.
(8) (1893) I. L. R. 15 All. 75.
(9) (1893) I. L. R. 15 All. 339.
(10) (1910) 12 Bom. L. R. 219.
(11) (1878) I. L. R. 5 Cal. 148.
(12) (1908) I. L. R. 32 Bom. 375.
(13) (1883) I. L. R. 7 Bom. 467.
(14) (1900) I. L. R. 27 Cal. 724.
(15) (1895) I. L. R. 17 All. 537.
(16) (1893) I. L. R. 20 Cal. 453.
(17) (1899) I. L. R. 26 Cal. 349.
(18) (1902) I. L. R. 29 Cal. 583.

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Singh (1); because the *karta* of the family was the guardian. As a consequence, a son was naturally represented by his father. In the case in 9. A. L. J. R. 86, it was held that no decree could be passed, as the interests of the members could not be defined. But in *Maharaj Singh* v. *Balwant Singh* (2), which was affirmed by the Privy Council, it was held that a decree could be passed against the interests of the other brother. Another case was *Balwant Singh* v. *Rani Kishori* (3).

Munshi *Gobind Pershad*, in reply :—

The case of *Kishan Prasad* v. *Har Narayan* (4) did not apply. That was not a case of defendants. If the sons were made parties, they could plead that the debt was personal to the father or that it was not for legal necessity ; but later they could impeach it only on the ground of immorality. Cases occur where the interests of the father are adverse to those of his sons. They are necessary parties under order XXXIV, rule 1. Can it be said they have no interest in the property? *Muhammad Muzamilullah Khan* v. *Mithu Lal* (5).

RICHARDS, C. J.—This appeal arises out of a suit for sale on foot of a mortgage. The mortgage was dated the 14th of November, 1870. The mortgagee was one Dharam Singh, husband of the plaintiff, and the mortgagor was one Nite Singh. Tilok Ram purchased the mortgaged property on the 7th of January, 1889, and the defendants, Hori Lal and Jagannath, are the sons of Tilok Ram, who is now dead. They pleaded amongst other things that their four sons, constituting with themselves a joint Hindu family, were not made parties to the suit. This is the plea with which we are concerned in the present appeal. Having regard to the respective dates of the mortgage and of the institution of the suit, the non-joinder of parties, if such there was, could not be cured by making the sons of Hori Lal and Jagannath parties, because the [553] suit at the time their absence was pleaded, was barred by limitation. Order XXXIV, rule 1, of the Code of Civil Procedure, provides as follows :—

" Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

It is contended that all the members of the joint family have an interest in the right of redemption, and that as they were not made parties originally and cannot now be added as parties, the suit should be dismissed.

I do not think that the words in the rule " subject to the provisions of the Code " can help the plaintiff. It is true that the Code provides that no suit shall fail for want of parties, but this does not mean that the defendants cannot insist on having all the necessary parties before the court either by their being made parties when the suit was instituted or being afterwards added as parties. I, therefore, think that unless in the circumstances of the present case Hori Lal and Jagannath can be said to represent their sons, or in other words that the sons are really parties to the suit through Jagannath and Hori Lal, the suit should be dismissed. All the members of the joint Hindu family have beyond doubt an " interest " in this mortgaged property.

It has been found by the court below that Hori Lal and Jagannath are the managers of the family, and that their names alone appear in the

(1) (1903) I. L. R. 25 All. 407.
(2) (1906) I. L. R. 28 All. 508.
(3) (1899) I. L. R. 20 All. 267.
(4) (1911) I. L. R. 33 All. 272.
(5) (1911) 8 A. L. J. 901.

village record. I think that we should accept this finding, and my judgment presumes that Jagannath and Hori Lal are the managers of the joint Hindu family made up of themselves and their four sons. I propose in the first instance to deal with the question apart from decided cases.

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Prior to the passing of Act V of 1908 (the present Code of Civil Procedure) the enactment dealing with parties to a suit relating to a mortgage was section 85 of the Transfer of Property Act. That section is as follows :—

"Subject to the provisions of the Code of Civil Procedure, section 437 all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage, provided that the plaintiff has notice of such interest."

[554] The only change material in any way to the present question is the dropping out of the words "Provided that the plaintiff has notice of such interest" in order XXXIV, rule 1. It must be remembered that neither section 85 of the Transfer of Property Act nor order XXXIV, rule 1, was any departure from the well established practice of the courts. It was always necessary that persons interested in the mortgaged property should be made parties to a suit relating to the mortgage. If the mortgage debt belonged to a number of persons they should all be parties, so that the person paying off the mortgage might get a good discharge. The persons to whom the property mortgaged belonged were entitled to be parties to enable them to defend the suit and have the amount due (if any) properly ascertained. I do not think, therefore, that any greater importance should be attached to the absence of some of the members of the joint family, because their presence is now required by a rule of the Code of Civil Procedure instead of a well established rule of practice. It seems to me that if it is intended by order XXXIV, rule 1, to provide that in a case like the present all the members of a joint Hindu family must be defendants by name, and could not be represented by the manager, the law requires the plaintiff to do what in many cases must be a practical impossibility. The members of a joint Hindu family are frequently very numerous, comprising often absent members and infants of tender years. Furthermore, during the course of the litigation, there would be in all probability frequent births of sons, and the array of defendants would never be strictly complete unless during the entire time the suit was running its course, every newly born son was added as a defendant. The plaintiff, in many cases, would have no possible means of ascertaining the existence of the infant members of the family.

It seems to me to be impossible to dispute the proposition that it is a general rule of Hindu law that the manager represents the family in all transactions with the outer world, provided these transactions are family matters. Indeed, if it were not so, it is difficult to understand how the affairs of the family could be carried on. If this proposition is correct, I can see no good reason why, in a case like the present, the manager should cease to represent the family when the family has to institute or defend a suit in a court of justice. Before suit, the **[555]** manager can pay and be paid the family debts and take and give a valid discharge for the same. In the present case, the property was purchased by Tilok Ram, presumably with family funds. On his death, the names of his sons, Hori Lal and Jagannath alone, were recorded. Every defence which can be put forward in the present suit, can properly and fairly be put forward by the managers. I am very far from saying that a

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plaintiff in a mortgage suit would be prudent in refraining from making as many members of the family as possible parties to the suit. On the contrary, in all suits, and particularly in suits in which the mortgage was made by a manager and there is any possible question of the mortgage not having been made for legal necessity or a family purpose, the plaintiff would be wise to make all or as many members of the family as possible parties, so that they may be bound by the result of the suit. Furthermore, I am of opinion that in all such suits, notwithstanding that the manager is a party, the court should not hesitate to add as a party any member of the family who applies to be made a party, so as to enable him to put forward any defence which he desires to make, including, of course, a defence challenging the mortgage as not having been made for family necessity and family purposes.

In the course of the argument a great mass of authority has been cited, and it seems to me that the great weight of authority of the courts in India has been in favour of holding that a decree against a manager in a suit like the present is not void, but that on the contrary, the members of the family who were not parties to the suit, are bound by the decree on the ground that they were sufficiently represented by the manager, and that they can only re-open the litigation by showing that the mortgage was not for family purposes. It seems to me inconsistent to hold that the family is represented by the manager when the question is raised after decree and that they are not so represented if the question is raised before decree. In *Bhawani Prasad* v. *Kallu* (1) it was, however, held that the sons who had not been made parties to a suit for sale on a mortgage brought against their father alone, could sue for and obtain a declaration that the property, being family property, could not be sold in execution of the decree against the father, and that they could obtain this declaration upon the sole [556] ground that they had not been made parties to the mortgage suit. This was a Full Bench case and was the decision of four out of the five Judges who constituted the Bench. BANERJI, J., dissented from the view taken by the rest of the Court. The case was not unlike the present, the difference being that the question did not arise until after a decree had actually been obtained against the father, while in the present case the plea has been taken in the suit by the defendants who were parties; there was this further difference that there was no finding that the father was the manager of the family, though in all probability he was. The case seems to me to have been decided by the majority of the Court upon the express words of section 85 of the Transfer of Property Act, which was the provision of law then in force providing for the parties to a suit relating to a mortgage. It does not seem to have been argued that the absent members of the family were or could be represented by their father as the manager. The effect of the decision has to some extent been modified by the case of *Debi Singh* v. *Jai Ram* (2). But it is nevertheless the decision of a Full Bench, and I think it ought to be followed and treated as binding upon this Court unless we see cogent reasons for not doing so. Do such cogent reasons exist? I have already pointed out that section 85 of the Transfer of Property Act has been repealed and replaced by a rule of the Code of Civil Procedure. It was evidently thought that a rule under the Code of Civil Procedure was a more fitting place for a provision relating entirely to a matter of procedure. It may well be that the court might consider itself more strictly bound by the express words in a

(1) (1895) I. L. R. 17 All. 537.

(2) (1903) I. L. R. 25 All. 214.

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section in the Transfer of Property Act than by a rule of procedure. I think the repeal of section 85 is some reason for holding that the ruling in *Bhawani Prasad* v. *Kallu* should not be followed in this case. I have also pointed out that no argument based on the manager being a party to the suit was put forward in the case. It is very probable that the father, against whom the decree for sale was made, was the managing member of the family, but there was no finding to that effect, and it is of course possible that he was not. I have also pointed out that the weight of authority in India has been to hold that, after decree at any rate, the absent members of a family [557] are bound by the decree against the manager, and the ruling in *Bhawani Prasad* v. *Kallu* has certainly not met with universal approval in the rest of the Courts in India. EDGE, C. J., pointed out the importance of having all the parties interested in the property before the Court so as to prevent further litigation. I agree that this is desirable, but, as already mentioned, this in many cases is impossible. If *Bhawani Prasad* v. *Kallu* is applied to cases where the manager is a party, each member of the family who was not made a party can re-open the whole litigation on that sole ground, even though it may turn out in the end that the mortgage was binding on the whole family. This, it seems, was the very thing the learned Chief Justice wished to avoid. As a matter of fact, there have been many such cases. In *Kishan Prasad* v. *Har Narain Singh* (1) certain persons brought a suit to recover money. The defendants pleaded that the plaintiffs and certain other persons constituted a joint Hindu family, and that the plaintiffs were not entitled to sue without joining as parties the other members of the family. The plaintiffs answered this plea by contending that they were managers and carried on the business, and therefore the other members of the family were not necessary parties, but that, if the defendant wanted to have them made parties, they were willing that they should be added. The court of first instance made the other members parties, but at the time it did so, the suit was barred so far as the added parties were concerned. The question arose whether or not the suit was barred by limitation. It had to be admitted that if the added parties were necessary parties originally, the making of them parties later on could not cure the defect by reason of limitation. The Subordinate Judge held that the absent members were not necessary parties and gave a decree. This court reversed the decree of the court of first instance, holding that it was necessary that all the members of the family should join in the suit. Their Lordships of the Privy Council reversed the decision of this Court and restored the decision of the court of first instance. It is true that in that case the suit was a suit on a contract and the persons who were originally plaintiffs were the parties to the contract; while the present case is a suit for sale on a mortgage executed by the vendor of the predecessor in title of the defendants. It seems to [558] me, however, that there is no difference in principle in the two cases. I feel certain that their Lordships of the Privy Council intended to hold, not merely that the actual parties to the contract could enforce it, but also that the other members of the family would be bound by the decree, and that such a decree could be enforced against the family property. I think this decision of their Lordships is strong ground for not applying the ruling in *Bhawani Prasad* v. *Kallu* to the circumstances and finding in the present case. What seems to me to be in principle the

(1) (1911) I. L.R. 33 All. 272.

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same question as the question involved in the appeal has recently arisen in a different way. The case was argued before this Bench. It was the case of *Madan Lal* v. *Kishan Singh* (1). A father who was found to be the manager of the family brought a suit to realize a mortgage which admittedly belonged to the family. He did not make his son a party. The defendants pleaded the non-joinder of the son. The question was whether the son was a necessary party. The very same arguments were put forward as are put forward in this case. The son was interested in the mortgage security and should, therefore, it was urged, under order XXXIV, argue that rule 1, be made a party. In such a case it seems to me impossible almost to the father could not represent the son. If no suit had been brought, the father could have received the mortgage money and have given a good discharge to the persons paying the money.

In my opinion, the manager of a joint Hindu family can represent the family in a case like the present and the other members need not be made parties, and I would dismiss the appeal.

BANERJI, J.—The question to be determined in this appeal is whether the suit of the plaintiff, which is one for sale on a mortgage, is liable to dismissal on the sole ground that the sons of the defendants Hori Lal and Jaggannath were not joined as defendants. The mortgage was made by Naiti Singh, who, subsequently to the mortgage, sold the mortgaged property to Tilok Ram, the deceased father of the aforesaid defendants. The court of first instance found on the merits against the defendants, but dismissed the suit on the ground that the sons of Hori Lal and Jagannath, who have an interest in the mortgaged property by reason of their being, with their fathers, members of a joint family, were omitted from the suit. The lower appellate court has found that Hori Lal and [559] Jagannath are managers of the joint family property belonging to them and their sons, and that they fully represent the interests of their sons. It has accordingly decreed the claim. The finding that Hori Lal and Jagannath are managers of the joint family of which they and their sons are members is a finding of fact and must be accepted by us in second appeal. We have, therefore, to consider whether in a mortgage suit all the persons having an interest in the mortgage security or in the right of redemption are, in the case of a joint Hindu family, represented by the managers of the family.

Order XXXIV, rule 1, of the Code of Civil Procedure, on which reliance is placed on behalf of the appellants, provides that "all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties." The requirements of this section are, in my opinion, fulfilled, if all such persons are represented, in the case of a joint Hindu family, by the managers of the family. The powers of the manager in a joint Hindu family are well-known. He represents the family in all business transactions: he can enter into contracts in regard to matters relating to the family, give discharges for debts due to the family, and pay debts due by the family. When, therefore, in respect of the mortgage due to or by the joint family, he sues or is sued in his own name in his capacity as manager all the other members of the family being represented by him must be deemed to have sued or been sued through him. If this view is correct, the omission to join in the array of parties members of the family other than the manager is not a defect in the frame

(1) F. A. No 91 of 1911. *Infra*, p. 572.

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of the suit, and it cannot be said that there has been a non-joinder of parties. All the persons interested are substantially parties to the suit through the manager. This was ruled by their Lordships of the Privy Council in the recent case of *Krishan Prasad* v. *Har Narain* (1). Their Lordships held that the managing members of a joint family business of money-lending are entitled to maintain suits brought to enforce contracts made in the course of that business, without joining in the suit with them, either as plaintiffs or as defendants, the other members of the family. This decision of their Lordships seems to me to settle the point. The case was, no doubt, that of a business contract, but the principle laid down applies [560] equally to a mortgage, and is applicable as well in the case of the defendants as in the case of the plaintiff. It has been held by all the High Courts that a decree obtained against the manager of a joint Hindu family binds the other members though they were not impleaded in the suit in which the decree was passed. The cases on the point have been referred to at length in the judgments of some of my learned colleagues, and I do not think any useful purpose will be served by repeating them. In *Ram Narain Lal* v. *Bhawani Prasad* (2) a Full Bench of this Court held that "when a member of a joint Hindu family is sued for a family debt, it may be assumed that he is sued for the same as the representative of the family; and when the decree in such a suit is substantially one in respect of the family debt and against the representative of the family, such decree may properly be executed against the family property." This case accepts the rule that the members of a joint family are represented by the manager in a suit brought against the latter alone in respect of a debt due by the joint family. This case was, it is true, decided before the passing of the Transfer of Property Act, but it has been repeatedly held that section 85 of that Act, which, with some modifications, has been re-enacted in order XXXIV, rule 1, of the present Code of Civil Procedure, only gave legislative effect to what had always been the law. It was, no doubt, held by the majority of the Court in *Bhawani* v. *Kallu* (3) that the omission of the son in a mortgage suit brought against the father entitled the son to bring a suit to repudiate the decree simply on the ground that he was not joined as a party to the mortgagee's suit. This view has not found favour with the other High Courts, and seems to me to be opposed to the principle laid down by their Lordships of the Privy Council in *Kishan Prasad* v. *Har Narain Singh*. The latest case on the point decided by the Madras High Court is that of *Sheik Ibrahim Tharagan* v. *Rama Iyer* (4).

The ordinary rule undoubtedly is that all persons interested in a suit should be made parties to it. But in the case of a joint Hindu family this rule is complied with if the manager of the family is sued or sues and thus represents the other members of the family. What is required is that all persons whose interests are [561] to be affected by the suit are sufficiently and substantially represented. In the case of a joint Hindu family, all persons interested are represented in the suit by the manager and are substantially parties to it through the manager. I do not think that it is essential that the manager, when he brings his suit, should state in distinct terms that he is suing as manager, or that the plaintiff in a suit against the family should describe the defendant as the manager of the family. All that is essential is that the manager is in fact suing or is being sued as such in respect of a family debt. If it is denied that the

(1) (1911) I. L. R 33 All. 272.
(2) (1881) I. L. R. 3 All. 443.
(3) (1895) I. L. R. 17 All. 537.
(4) (1911) 21 M. L. J. 508.

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person suing or sued is the manager, the fact must be proved. The question is merely one of procedure, and I do not think it affects the substantive law as to the representation of members of a joint Hindu family by the manager of the family. "Procedure," said Lord PENZANCE in the well-known case of *Kendall* v. *Hamilton* (1) "is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when in place of facilitating it is permitted to obstruct, and even extinguish legal rights, and is thus made to govern where it ought to subserve." In the present case the appellants have no defence to the suit on the merits, but they are seeking to defeat it on the ground of a defect in procedure. In my judgment there is no such defect, as the sons of the appellants are substantially parties through the appellants, who have been found to be the managers of the joint family of which all of them are members. I would, therefore, dismiss the appeal.

TUDBALL, J.—The facts of this case are simple. One Naiti Singh mortgaged the property in suit on the 14th of November, 1870, to one Dharam Singh. On the 7th of January, 1889, Naiti Singh sold the property to Tilok Ram, the father of defendants 4 and 5, Hori Lal and Jagannath. The appeal has been argued on the assumption that Tilok Ram, and his sons constituted a joint Hindu family and that the purchase was made out of joint family funds. The property thus purchased became the property of the joint family. It stood recorded in the name of Tilok Ram alone who, one may presume, was the manager. Tilok Ram died, and the names of Hori Lal and Jagannath were recorded in the Government records. Dharam Singh has died, and the present plaintiff, his widow and successor, has brought this suit for sale on the basis of the mortgage.

[562] To this suit she has made parties—

1. The heirs and representatives of Naiti Singh.
2. Hori Lal and Jagannath.

The suit was brought at the extreme limit of time allowed by law. Among other defences, Hori Lal and Jagannath pleaded that they had sons who were joint with them and therefore interested in the mortgaged property, and that these sons were necessary parties under order XXXIV, rule 1. This objection was taken at the earliest possible date.

On the merits the court of first instance found for the plaintiff, but it dismissed the suit on the ground that the sons of Hori Lal and Jagannath were necessary parties to the suit, and, not having been impleaded, the suit must fail. I presume that if there had been time to do so, the court would, under order I, rule 10, have made these sons parties and proceeded to decide the suit. If they had been thus made parties, however, at that stage the suit as against them would have been barred by time.

The plaintiff appealed and urged that Hori Lal and Jagannath were the managers of the family, and fully represented the interest of their sons and that it was not necessary to implead the latter as the joint family was fully represented through the managing members.

The lower appellate court held that these two defendants, 4 and 5, were the managers of the joint family, and that, therefore, it was unnecessary to implead their sons, and decreed the suit. Hori Lal and Jagannath appeal.

(1) L. R. 4 App. Cas. 504.

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Two points are taken :—

(1) That the plaintiff has not proved that the appellants are not managing members.

(2) That the sons of the appellants are necessary parties, and the suit must fail unless they are impleaded.

As regards the first point there is a clear finding by the lower appellate court, and there is no certificate that there is no evidence on record to support it. This plea, therefore, fails.

In regard to the second point it is clear that all persons having an interest in the mortgage security or the right of redemptipn must be joined as parties, *vide* order XXXIV, rule 1, Civil Procedure Code. The proper procedure, I take it, where such a person [563] has not been made a party, is for the Court to make him a party, and then the question of limitation, if it arises, may be decided.

But the question to be decided in the present appeal is whether or not, as a matter of fact, the sons of the appellants are virtually parties to the suit through their representatives, the managing members of the family. In other words :—"Can the managing member of a joint Hindu family be sued as representing the whole family without making the other coparceners parties in a suit for sale on a mortgage?"

The question is one of some difficulty by reason of the conflict of opinion disclosed in the various decisions of the High Courts in India. Order XXXIV, rule 1, of the Code of Civil Procedure is a rule of procedure which was formerly embodied in the Transfer of Property Act, section 85. The only differences are that the proviso of section 85 as to notice has been omitted, and the words "in the property comprised in the mortgage" have also been altered.

Unless there be some other law which operates in the case of a joint Hindu family, it is clear that the members thereof other than the manager would be necessary parties to a suit for sale on a mortgage. In the case of *Bhawani Prasad* v. *Kallu* (1) it was held by a majority of a Full Bench of this Court that where a mortgagee had obtained a decree on his mortgage against a father in a joint Hindu family without impleading the sons, the latter were entitled to a declaration that the decree-holder was not entitled to sell in execution of his decree the interests of the sons, on the sole ground that they were not parties to the suit on the mortgage.

In the course of his judgment in that case the learned Chief Justice remarked :—"I have not yet heard any one suggest that the father in a joint Hindu family is *as such* a trustee, executor, or administrator, within the meaning of section 437 of the Civil Procedure Code, of his son, particularly if that son is alive and *sui juris*. Consequently we may dismiss from the consideration of this case that Pemi in Bhawani Prasad's suit for sale of the interests of the sons in the family property represented his sons or could have been treated by Bhawani Prasad or by the court in that suit as representing them for the purpose of section 85 of Act No. IV of 1882."

[564] It will be noticed that there was no consideration in the above case of the position of the manager of a joint Hindu family and his power to represent the family in the course of any litigation in which it might be involved. In so far as the above ruling may have held that the sons were absolutely necessary parties to the suit against the father, the binding force of it has been considerably decreased by the Full Bench

(1) (1895) I. L. R. 17 All. 537.

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ruling in *Debi Singh* v. *Jia Ram* (1). In the latter suit, the decision in which has since, with perhaps one exception, been regularly followed in this High Court and in other High Courts as well, it was held that where the property had been actually sold, the sons could not succeed, in a suit to recover it, on the sole ground that they were not parties to the suit, but must base their suit on some ground which, under Hindu law, would free them from their liability for the debt incurred by their father. The principle which is the basis of this ruling, it seems to me, must apply whether the property has been sold or not; but, be that so or not, it is a clear instance of a case in which a person interested in the mortgaged property was held bound by the decree and sale thereon, even though he was not a party personally to the suit. In other words, it is a clear decision to the effect that the substantive law to which he was subject was not overriden by the rule of procedure which makes it necessary to bring on to the record all persons interested in the right of redemption or the mortgage security.

Now the general rule of Hindu law is that a joint family is represented by its manager in all its transactions or concerns with the outer world, provided they are for family necessity (*vide* I. L. R. 32 Bom. 375). In certain circumstances the manager has power to mortgage or sell the family property.

" The manager is neither a partner nor a principal, nor an agent of the family, but a sort of representative owner, his independent right being limited on all sides by the correlative rights of others, &c. " (*vide* Cowell's Tagore Law Lectures, 1870, p. 108). Where the manager borrows money on promissory notes for the purpose of a joint family business or to meet a joint family necessity, the creditor can recover the money from all the members of the family, although they have not been parties to the notes. (*Vide* 11 C. W. N. 139, and 7 C. W. N., 725, and 34 Bom. 72.) One **[565]** of the duties of a manager is to get in the income and pay the debts of the family. (See Bhattacharya's Law of the Joint Family, p. 295).

He can give a valid discharge without the concurrence of the minor members of the family. (I. L. R. 25 Mad. 26).

It is difficult to see, therefore, why a manager, if he can represent the family in its transactions and concerns with the outer world, should not be also able to represent the family in its litigations in the courts.

In *Daulat Ram* v. *Mehr Chand* (2) the contention of the co-parceners other than the manager was that, as they had not been made parties to the suit against the manager, they were not affected by the decree, and their shares had not passed by the sale in execution thereof. In the original suit the decree had been obtained against the managing members who had mortgaged the whole estate to pay off the family debt. Their Lordships of the Privy Council held that the other co-parceners were bound by the decree and that the whole estate had passed. The managers had clearly represented the family in the litigation.

In *Lala Surja Prasad* v. *Golab Chand* (3) the two learned Judges differed on this point. GHOSE, J., ruled that the share of the son in the ancestral estate was liable for the satisfaction of the decree notwithstanding the provisions of section 85 of the Transfer of Property Act, the father having incurred the debt in his representative capacity and as managing member of the family and the son having been substantially a

(1) (1903) I. L. R. 25. All. 214.
(2) (1887) I. L. R. 15 Cal. 70.
(3) (1900) I. L. R. 27 Cal. 724.

party to the suit in which the said decree was passed through the representation of his father; that section 85 of the Transfer of Property Act laid down only a rule of procedure, and the words "all persons" in the section could hardly have been intended to include a Mitakshara son in a suit where the father is sued in his representative capacity. He dissented from the ruling in *Bhawani Prasad* v. *Kallu*. Since the above decision, section 85 of the Act has been repealed and the rule laid down therein is now a rule of procedure in the Code of Civil Procedure.

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HARINGTON, J., differed and quoted the case of *Bhawani Prasad* v. *Kallu* in support of his decision, though pointing out that SHEPHARD, J., had dissented from it in *Ramasamayyan* v. [566] *Virasami Ayyar* (1), which was followed in I. L. R. 22 Mad. 207.

It is unnecessary to set forth at length the arguments on which the learned Judges based their opinions. In *Kunj Behari Lal* v. *Kandh Pershad Narain Singh* (2) it was held that if a decree is passed against the manager of a joint Hindu family in respect of a liability properly incurred for the necessities of the family, the binding character of the decree upon the interests of the other members depends not upon their having or not having been parties to the suit, but on the authority of the manager to incur the liability. See also the decision in *Lutchmanen Chetty* v. *Siva Prokasa Modeliar* (3), where the rule of representation was upheld.

In *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (4), it was pointed out that "a Hindu family is regarded as a corporation whose interests are naturally centered in the manager, the presumption being that the latter is acting for the family unless the contrary is shown, and that before the introduction of the Code of Civil Procedure, this was equally so with regard to litigation as to other transactions.

I have already noted the rule of Hindu law as pointed out in *Vithu Dhondi* v. *Babaji* (5). In *Ramkrishna Narain Sindhe* v. *Vinayak Narain Saswadkar* (6) it was held that the rule of procedure laid down in section 85 of the Transfer of Property Act does not interfere with the rule of Hindu Law, that it is open to the manager in a Hindu family to represent the other members (subject to certain conditions) in a suit brought upon a mortgage against him. In *Chimna* v. *Sada* (7) the same rule was approved; dissent was expressed from the decision in *Bhawani Prasad* v. *Kallu*, and SHEPHARD, J.'s decision in *Ramasamayyan* v. *Virasami Ayyar* (8) and the decision in *Debi Singh* v. *Jia Ram* (9) were quoted with approval.

In *Arunachala Pillai* v. *Vythialinga Mudaliyar* (10) it was held that no member of an undivided Hindu family (*except the manager as such*) is entitled to bring a suit to establish a right [567] belonging to the family without making the other members of the family parties to the suit.

But in the case of *Angamuthu Pillai* v. *Kolandavelu Pillai* (11), it was held that the plaintiff could not sue without making his brother, the other member of the undivided family, a party to the suit, though he was suing as the manager to recover certain property for the family. The latest decision of the Madras High Court is to be found in *Sheik Ibrahim Tharagan* v. *Rama Iyer* &c. (12), in which, after an exhaustive consideration of all the rulings on the point, the rule of Hindu Law (*i.e.*, of representation

(1) (1898) I. L. R. 21 Mad. 222.
(2) (1907) 6 C. L. J. 362.
(3) (1899) I. L. R. 26 Cal. 349.
(4) (1883) I. L. R. 7 Bom. 467.
(5) (1908) I. L. R. 32 Bom. 375.
(6) (1910) 12 Bom. L. R. 219.
(7) (1910) 12 Bom. L. R 811.
(8) (1911) I. L. R. 21 Mad. 222.
(9) (1903) I. L. R. 25 All 214.
(10) (1882) I. L. R. 6 Mad. 27.
(11) (1899) I. L. R. 23 Mad. 100.
(12) (1911) 21 M. L. J. 508.

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of the family by the manager) was enforced, and the manager's right to sue as such was maintained.

In this Court in the case of *Shamrathi Singh* v. *Kishan Prasad* (1) it was ruled that the managing members of a joint Hindu family carrying on a joint family business are not entitled to maintain a suit in their own names against the debtors of the family without joining with themselves either as plaintiffs or defendants all the other members of the family. The decision in *Pateshri Partap Narain Singh* v. *Rudra Narain Singh* (2) was distinguished.

Their Lordships of the Privy Council have reversed this decision in I. L. R. 33 All. 272, holding that there was no principle of law or custom applicable to such a case under which the managing members of a Hindu joint family entrusted with the managment of the business could be held incompetent to enforce at law the ordinary business contracts they are entitled to make or discharge in their own names. The decision in *Arunachala Pillai* v. *Vythialinga Mudaliyar* (3) was quoted with apparent approval, and the decision in *Ramsebuk* v. *Ramlall Koondoo* (4) explained, as also was that in *Alagappa Chetti* v. *Vellian Chetti* (5). In respect to the latter their Lordships expressed the opinion that the proposition there laid down to the effect that the manager cannot sue without joining all those interested with him, if literally construed, goes too far.

In *Jaddo Kunwar* v. *Sheo Shankar Ram* (6) this Court also applied the rule of representation and held that the other members [568] of the joint Hindu family were bound by the action of their managing members. It is unnecessary to discuss any further rulings on the subject. While there, no doubt, is a conflict of opinion as to whether the rule of procedure does or does not override the rule of Hindu Law which allows the manager to represent the family under certain conditions in the case of litigation as well as in the other concerns of ordinary life, the weight of opinion seems to me to be in favour of the rule of substantive law.

Prior to the introduction of the Civil Procedure Code and the Transfer of Property Act, this latter rule had full sway. Afterwards the pendulum has swayed both ways. Of late, the rule of Hindu law has been given precedence over the rule of procedure, and the latest decision of the Privy Council in *Kishan Prasad's* case can leave no doubt upon the point. I, therefore, am of opinion that the rule of Hindu Law must be given its full force, and that where the necessary conditions prevail, the manager of the family, when acting as such, can both sue and be sued in his representative capacity, and suits in such circumstances cannot be dismissed simply because the other members of the family are not before the court.

It will always be open to the opposite party to plead that the person alleged to be the manager is, as a matter of fact, not the manager, and the issue as to this fact can be decided. It may also be similarly pleaded that he is not acting within the scope of his authority. The result of this, no doubt, will be to leave it open to the other members of the family to attack the decree on the ground of fraud, &c., in a subsequent suit. This is so even now, and suits by sons against their fathers and persons holding decrees against him are fairly frequent as it is.

It would, therefore, be still advisable for the courts, where the objection of non-joinder is taken, to make the absent members parties to the

(1) (1907) I. L. R. 29 All. 311.
(2) (1904) I. L. R. 26 All. 528.
(3) (1882) I. L. R. 6 Mad. 27.
(4) (1881) I. L. R. 6 Cal. 815.
(5) (1894) I. L. R. 18 Mad. 33.
(6) (1911) I. L. R. 33 All. 71.

suit, if possible, so as to prevent the necessity of further litigation and to decide finally whether or not the action of the manager is within his authority and binding on his co-parcener.

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In the present case Hori Lal and Jaggannath are the managing members. The property was purchased by the joint family with the burden of the plaintiff's mortgage already upon it. There is no defence open to their sons which is not open to them. The [569] sons cannot plead a debt contracted by their fathers for immoral or non-family purposes. The question is as to the validity or otherwise of the mortgage as created by the original mortgagors. There is, therefore, no valid reason in this case for not applying to the parties the rule of substantive law which is binding upon them, and I would, therefore, hold that the decision of the court below is correct and would dismiss the appeal.

CHAMIER, J.—I agree that the appellants cannot be allowed to challenge the finding of the lower appellate court that they are the managers of the joint family to which they belong. The only question which we have to decide in this appeal is whether a suit can be maintained against the manager of a joint Hindu family alone to enforce a mortgage against property belonging to the family.

A somewhat analogous question has arisen in First Appeal No. 91 of 1911, which has been heard by this Bench of four Judges, namely, whether the manager of a joint Hindu family *suing as such*, can maintain a suit for the recovery of a mortgage debt due to the family. I have stated the question in this way because I agree with my learned colleagues that the court below ought to have allowed the plaint to be amended, and that the case should be treated now as if the appellant had from the first sued as the manager of a joint family.

The records of cases decided in these Provinces forty or fifty years ago show that in those days a joint Hindu family ordinarily sued and was sued through the manager of the family or through the more prominent members of the family, and the practice was recognized by their Lordships of the Privy Council as long ago as 1871 (see the remarks made in the case of *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut* (1). But the reports show many instances of cases in which, after a decree had been obtained by or against one or more members of a joint family, attempts were made by members who had not been impleaded to show that they were not bound by the decree which had been passed. Whether on account of the difficulties which resulted from that practice or for any other reason, there is no doubt that in many parts of India a practice has been growing up of impleading as many members of a joint family as possible (see the remarks made in the cases of *Kashinath* [570] *Chimnaji* v. *Chimnaji Sadashiv* (2), *Naranji* v. *Moti Gavanji* (3) and *Harihar Prasad* v. *Mathura Lal* (4). In these Provinces it has been for many years the practice to join all the members of a joint family in a suit relating to the property of a joint family, and there are instances in this Court of suits having been dismissed on account of the non-joinder of subordinate members of a family. But objections on the score of non-joinder of members of a family have generally been met by those members being added as parties or have been overruled as having been taken too late, and I know no case in this Court in which it has been definitely

(1) (1871) 14 Moo. I. A. 367 (376).
(2) (1906) I. L. R. 33 Bom. 477.
(3) (1907) 9 Bom. L. R. 1126.
(4) (1908) 12 C. W. N. 598.

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held that a manager of a joint family cannot sue or be sued on behalf of the family.

An exhaustive review of the case law in the other High Courts will be found in the recent case of *Sheik Ibrahim* v. *K. R. Rama Iyer* (1). It shows, I think, that there has not been any uniform course of decisions in those Courts.

The case of *Kishan Prasad* v. *Har Narain* (2) has been regarded by some courts as deciding that a manager of a joint family can sue and be sued on behalf of the family. It seems to me that all that their Lordships of the Privy Council decided in that case was that managing members of a joint family entrusted with the management of a business are competent to enforce at law the ordinary business contracts which they are entitled to make or discharge in their names; but the language used by their Lordships in more than one place in their judgment suggests that they were of opinion that, apart from the case of a family business, the managing member of a joint family *suing as such* is entitled to maintain a suit to establish a right belonging to the family without making other members of the family parties. Indeed, this seems to be a necessary conclusion from their decisions, in such cases as that of *Dhaulat Ram* v. *Mehr Chand* (3). On principle it would seem that the decision should be the same whether the question of the right of the manager to represent the family is raised in the suit brought by or against the manager, or in a subsequent suit brought by or against a member of the family not impleaded in the former suit to try the effect of the decision in the former suit as against him. The [571] manager of a joint family represents the family in its dealings with outsiders in all the ordinary affairs of life, at all events where he is acting within the scope of his authority or for the benefit of the family, and there seems to be no reason why he should not represent the family in a suit, whether as plaintiff or defendant, unless there is some legislative enactment to the contrary. It has been held more than once that the rule of procedure which is now order VII, rule 4, applies to the case of a manager of joint family suing on behalf of the family. If those decisions are correct, the rule referred to shows that a manager can sue on behalf of a joint family.

Except possibly in a a few cases, there appears to be no presumption that a joint family has a manager or that any particular person is the manager. The question whether a person before the court is the manager of a joint family is usually a question of fact to be dealt with like any other question of fact. In one of the cases now before us the plaintiff claims to be the manager of a joint family and must be allowed an opportunity of proving his allegntion if it is denied. In the other case it has been found that the appellants are the managers of a joint family.

Both on principle and on authority, I am of opinion that the manager of a joint Hindu family *suing as such* can maintain a suit alone for the recovery of a mortgage debt due to the family, and that the suit can be maintained against the manager of a joint family alone to enforce a mortgage against property belonging to the family. If the manager sufficiently represents the family, the provisions of order XXXIV, rule 1, are complied with.

In conclusion I desire to refer to the cases of *Gendan Lal* v. *Babu Ram* (4) and *Nathi Lal* v. *Lala* (5), in the decision of which I took part.

(1) (1911) 21 M. L. J. 508.
(2) (1911) I. L. R. 33 All. 273.
(3) (1887) I. L. R. 15 Cal. 70.
(4) (1912) 9 A. L. J. 86.
(5) (1912) 9 A. L. J. 410.

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In the former it was neither alleged nor proved that the family had a manager who could represent the absent member, and, as my judgment shows, it was not even contended that the absent member was sufficiently represented by any person before the Court, a circumstance which supports what I have said about the practice of this Court in recent years. In the latter case a judgment was delivered which covered several cases. Some members of the families of the plaintiffs had not been made parties. We were disposed to hold that managing members could sue on behalf of the joint families to which they belonged, but none of the [572] plaintiffs had sued as managers, and in some of the cases at all events it was impossible to presume that the managers were before the Court. Consequently we disposed of the appeals on another ground.

I agree with the order proposed by the learned Chief Justice in this case.

BY THE COURT.—The order of the Court is that the appeal be dismissed, but we make no order as to the costs in this Court. We extend the time for payment for six months from this date.

Appeal dismissed.

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Before Sir Henry Richards, Knight, Chief Jutice, Mr. Justice Banerji, Mr. Justice Tudball and Mr. Justice Chamier.

MADAN LAL (*Plaintiff*) *v.* KISHAN SINGH AND OTHERS (*Defendants*).*

[27th May, 1912.]

Hindu Law—Joint Hindu family—Mortgage—Mortgage for benefit of joint family—Suit for sale by managing member alone—Parties—Civil Procedure Code (1908), *order XXXIV, rule* 1.

Where in a suit for sale on a mortgage executed in favour of the manager of a joint Hindu family the plaintiff was the then managing member of the family, it was *held* that he was entitled in that capacity to maintain the suit and that it would not fail by reason of the non-joinder of the plaintiff's son, who was joint with him. *Hori Lal* v *Munman Kunwar* (1) referred to.

[**Fol.** 17 I C. 290; **Ref.** 16 I. C. 392=34 All. 615; 35 All. 428; **Not fol.** 41 Cal. 727. **Ref.** 81 I. C 737; 72 I. C. 722; 79 I. C. 1001]

THIS was a suit on foot of two mortgage bonds bearing date the 11th of July, 1877, and the 8th of August, 1884, respectively. They were executed by one Tori Singh in favour of Ram Prasad. The present suit was by Madan Lal, grandson of Ram Prasad. The plaintiff came into Court alleging himself to be the surviving member of the family. He did not join a son of his, aged four years, in the suit with him. His suit was dismissed in the lower court as he had failed to join the son with him. The plaintiff pleaded that he was suing as head of his family and in the alternative sought leave to amend the plaint to that effect.

The Hon'ble Dr. *Sundar Lal* (Munshi *Girdhari Lal Agarwala* with him), for appellant :—

The head of a family was entitled to maintain a suit like that in his own name as manager. It was an act he was doing for the benefit of the family. Nor need he state in the plaint that he is suing as manager, provided that he makes it clear that he is suing in that capacity. Here he

* First Appeal No. 91 of 1911, from a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 23rd of February, 1911.

(1) *Supra* p. 549.

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made an application to that effect, [573] That the other members are not necessary parties is clear from the fact that it is possible to bring them on the record even if a fresh suit brought against them would be barred ; *Pateshri Partap Narain Singh* v. *Rudra Narain Singh* (1). In that case it was held that the property had ceased to be impartible and both brothers were equally entitled. The younger brother was made a party by the High Court. Again, a co-mortgagee could bring a suit himself to recover the whole amount. At most the others might be made defendants, but he was competent to maintain the suit. According to *Barber Maran* v. *Ramana Goundan* (2) he can give a valid discharge.

[Munshi *Binode Behari*, for the respondents, pointed out that this court had held otherwise in *Ram Chandra* v. *Rajjan Lal* (3).]

To take the first point—the most recent case was *Ramayya* v. *Venkataratnam* (4). In *Adaikkalam Chetti* v. *Marimuthu* (5) and *Nathi Lal* v. *Lala* (6) the other members were made defendants by the High Court. There was a large body of cases where suits were brought by the managing member alone or against him alone ; *Husein Begam* v. *Zia-ul-nisa Begam* (7), *Daulat Ram* v. *Mehr Chand* (8), *Thakurmani Singh* v. *Dai Rani Koeri* (9), *Ram Narain Lal* v. *Bhawani Prasad* (10). The case of *Ghulam Kadir Khan* v. *Mustakim Khan* (11) was wrongly decided. It followed *Matadin Kasodhan* v. *Kazim Husain* (12). The point there was that all persons must be brought on the record to represent the entire property—as the whole of it was sought to be sold. In *Bhawani Prasad* v. *Kallu* (13) the suit was by a son praying that the decree was not binding on him as he was not a party. In old times the manager represented the entire family—later the tendency came in of making every one a party. It was only by reason of difficulties that might arise if a member was not made a party that people tried to implead everyone. There was no change of principle. Another case on the lines of 3 All. was *Phul Chand* v. *Lachmi Chand* (14).

[574] Munshi *Benode Behari*, for the respondents :—

The frame of the suit was governed by the Code of Civil Procedure. The question was if a managing member could sue on behalf of all the others. It would involve considerable difficulties. *Kalidas Kevaldas* v. *Nathu Bhagvan* (15). A debtor would not be satisfied if a managing member gave him a discharge ; he would want the others to join. If one of them was inaccessible, he could say that the manager had no right to give a full discharge and he could reopen the matter. In case the mortgagor wished to pay out of court he could get a discharge from the manager because the son could not ask for accounts. In *Dawarka Nath Mitter* v. *Tara Prosunna Roy* (16) where a managing member brought a suit without making a member a party, it was held that the suit was not maintainable.

The following cases were referred to *Angamuthu Pillai* v. *Kolandavelu Pillia* (17), *Alagappa Chetti* v. *Vellian Chetti* (18), *Gopal* v. *Macnaghten* (19),

(1) (1904) I. L. R. 26 All. 528.
(2) (1897) I. L. R. 20 Mad. 461.
(3) (1909) I. L. R. 32 All. 164.
(4) (1893) I. L. R. 17 Mad. 123.
(5) (1899) I. L. R. 22 Mad. 326.
(6) (1912) 9 A. L. J. 410.
(7) (1882) I. L. R. 6 Bom. 467.
(8) (1887) I. L. R. 15 Cal. 70.
(9) (1906) I. L. R. 33 Cal. 1079.
(10) (1881) I. L. R. 3 All. 443.
(11) (1895) I. L. R. 18 All. 109.
(12) (1891) I. L. R. 13 All. 482.
(13) (1895) I. L. R. 17 All. 537.
(14) (1882) I. L. R. 4 All. 486.
(15) (1888) I. L. R. 7 Bom. 217.
(16) (1889) I. L. R. 17 Cal. 160.
(17) (1899) I. L. R. 23 Mad. 190.
(18) (1894) I. L. R. 18 Mad. 83.
(19) (1881) I. L. R. 7 Cal. 751.

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The Hon'ble Dr. *Sunder Lal*, in reply:—

Most of the cases were discussed in *Kishan Pershad* v. *Har Narain* (1).

18 Mad. was also the case of a firm, and 7 Cal. was the case of coparceners. If a member could be sued through the head of the family and all the property was sold—he could dispute the sale only on the ground of immorality—there was no reason why the manager should not sue for the benefit of the family. He referred to *Krishnama* v. *Perumal* (2), *Jeo Lal Singh* v. *Gunga Pershad* (3), *Daulat Ram* v. *Mehr Chand* (4), *Sheo Pershad Singh* v. *Rajkumar Lal* (5), *Baldeo Sonar* v. *Mabarak Ali Khan* (6), *Deva Sihgh* v. *Ram Manohar* (7), *Phul Chand* v. *Lachmi Chand* (8) *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (9), *Bhana* v. *Chindhu* (10) and *Kunjan Chetti* v. *Sidda Pillai* (11).

[575] RICHARDS, C. J.—This appeal arises out of a suit to realize the amount of a mortgage, dated the 11th August, 1884. It was pleaded by way of defence, amongst other things, that the plaintiff and his minor son, Bisheshar Dayal, were a joint Hindu family, and that the suit could not be maintained because the mortgage was of family property and the son was not made a party. Plaintiff urged against this plea that he was manager and represented the family. Plaintiff also asked that the plaint might be amended by stating therein that he sued as manager. The Court below refused to amend the plaint and dismissed the suit on the ground that the son was a necessary party to the suit.

The appeal has been referred to this Bench because of the conflict of judicial decisions on the question.

Apart from authority, I can see no reason why the son should be a necessary party to the suit. It must be assumed for the purpose of this appeal that the plaintiff is the manager of the family. If, before the suit was instituted, the owners of the equity of redemption had been ready and willing to pay off the mortgage, I think it is absolutely clear that the plaintiff as manager could receive the mortgage money and give the persons paying off the money a good discharge, and I can see no reason why they should require the presence of any other party.

Order XXXIV, rule 1, of the Code of Civil Procedure, no doubt, requires that persons interested in the mortgage security should be parties, but I think, in a case like the present, the son is virtually a party through the manager, and that order XXXIV, rule 1, is substantially complied with.

The same question in principle arose in Second Appeal No. 361 of 1911 (12), which was argued before this Bench. In my judgment in that case I gave my reasons for holding that the manager of a joint family can represent the family. I would allow the appeal and remand the suit.

BANERJI, J.—The point raised in this appeal has practically been decided in Second Appeal No. 361 of 1911 (12), in which judgment has this day been delivered.

In this case the plaintiff omitted to join with him as plaintiff his minor son, who is four years old. For this omission the suit has been dismissed. It is manifest from the plaint that the **[576]** debt which the

(1) (1911) I. L. R. 33 All. 272.
(2) (1884) I. L. R. 8 Mad. 388.
(3) (1884) I. L. R. 10 Cal. 906.
(4) (1887) I. L. R. 15 Cal. 70.
(5) (1892) I. L. R. 20 Cal. 453.
(6) (1902) I. L. R. 29 Cal. 583.
(7) (1880) I. L. R 2 All. 746.
(8) (1882) I. L. R. 4 All. 486.
(9) (1883) I. L. R. 7 Bom. 467.
(10) (1896) I. L. R. 21 Bom. 616.
(11) (1898) I. L. R. 22 Mad. 461.
(12) *Supra* p. 549.

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plaintiff seeks to recover is alleged to be a debt due to the joint family of which he and his minor son are members. The mortgages which form the basis of the claim are in favour of Ram Prasad, the grandfather of the plaintiff and the great-grandfather of his son. This is recited in the plaint. At an early stage of the suit the plaintiff stated to the Court that he was suing in his capacity as manager of the joint family and applied for amendment of the plaint. The Court, in my opinion, improperly rejected this application. The defendants clearly had notice that the plaintiff was suing as manager. I have in my judgment in S. A. No. 361 stated my reasons for holding that where a suit is brought by the manager of a joint Hindu family, the other members of the family must be deemed to be parties to the suit through him, and the omission of the names of those members from the array of parties would not be a defect fatal to the suit. Of course, if in a suit like this the other members wish to join or apply to be added as parties, the Courts should never refuse to add them, but the suit ought not, in any event, to be dismissed if, in fact, it has been instituted by the manager of the joint family for the recovery of debt due to the family. As the manager is competent to give a full discharge to the debtor, the latter can have no reason to complain of the omission of the persons whom the manager represents. In this respect the case of a joint Hindu family is different from that of other joint creditors. The matter is in my opinion concluded by the principle of the decision of their Lordships of the Privy Council in *Kishan Prasad* v. *Har Narain Singh* (1). I would allow the appeal, set aside the decree of the court below, and remand the case to that court for trial on the merits.

TUDBALL, J.—This appeal arises out of a suit for sale on a mortgage against the heirs of the original mortgagor and certain subsequent transferees. It has been dismissed on a preliminary point, the lower court having held that the plaintiff alone is not competent to maintain the suit.

The original mortgagee was Lala Ram Prasad, the plaintiff's paternal grandfather, and the plaintiffs case as disclosed in the plaint was that his grandfather, his father, his uncle and himself formed a joint Hindu family and that the three former having [577] died, he was the sole owner of the mortgage debt by the right of survivorship and entitled to sue. But it is an admitted fact that the plaintiff has an infant son, who is joint with him.

Before the first date fixed for the case the plaintiff applied to the court to be allowed to amend his plaint by adding thereto that he was suing as manager of the joint family (consisting of himself and his son). The court below, without passing any orders on this application, dismissed the suit, holding that the amendment could not improve the position of the plaintiff, because the manager of a Hindu family cannot sue without joining those interested with him. The decision was based on the ruling of this Court in the case of *Shamrathi* v. *Kishan Prasad* (2).

This decision has since been overruled by their Lordships of the Privy Council. In Second Appeal No. 361 of 1911 (3) this Bench has fully discussed the right of the manager of a joint Hindu family to represent the family, and have held that he can sue and be sued as such, so that the decree, under certain circumstances, may be binding on the other co-parceners. It is unnecessary to repeat what has already been said in the judgments in that case.

(1) (1911) I. L. R. 33 All. 272.
(2) (1907) I. L. R. 29 All. 311.
(3) *Supra* p. 549.

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In my opinion the plaintiff ought to have been allowed to amend his plaint, and the suit as amended is maintainable. Of course, it is open to the defendant to plead that he is not the manager, though in the circumstances of the case that appears to be a hopeless plea.

I would, therefore, allow the appeal and remand the suit to the lower court with orders to allow the plaint to be amended and to decide the suit on the merits.

CHAMIER, J.—I agree that the court below ought to have allowed the plaint to be amended. The question for decision in this appeal appears to me to be whether the manager of a joint Hindu family, *suing us such*, can maintain a suit alone for the recovery of a mortgage debt due to the family. For the reasons which I have given in my judgment in Second Appeal No. 361 of 1911 (1) I am of opinion that he can. I agree in the order proposed by the learned Chief Justice.

BY THE COURT.—The order of the Court is that we allow the appeal, set aside the decree of the court below and remand the [578] case to that court with directions to readmit the suit under its original number in the register and to proceed to try it on the merits after allowing the amendment of the plaint as prayed for by the plaintiff. Costs here and heretofore will abide the result.

Appeal allowed. Cause remanded.

34 A. 579 (=39 I. A. 247=23 M. L. J. 330=12 M. L. T. 413=1912 M. W. N. 1065=14 Bom. L. R. 1090=16 I. C. 67=16 C. W. N. 1033=17 C. L. J. 1=10 A. L. J. 335).

[579] PRIVY COUNCIL.

FATEH CHAND AND OTHERS (*Plaintiffs*) *v.* KISHAN KUNWAR (*Defendant*).*

[18th and 19th June and 12th July, 1912.]

[*On Appeal from the High Court at Allahabad.*]

Second appeal—Questions of law and fact—Construction of document—Wajib-ul-arz, construction of—Civil Procedure Code (1882), *sections* 584, 585—*Landholder and tenant—Rights of zamindars in respect of house sites and groves.*

In a suit for a declaration of the proprietary title of the appellants to certain lands in a village, the first court dismissed the suit on the ground that the respondent was the zamindar, and the appellants only tenants of the lands. The Subordinate Judge found on the construction of the wajib-ul-arz of the village and other documentary evidence that the appellants were the owners of the lands in suit. On second appeal to the High Court it was contended that the Court was bound under section 584 of the Civil Procedure Code, 1882, to accept the finding of the Subordinate Judge as conclusive, the question being one of fact; but the High Court rejected that contention.

Held (affirming that decision) that the Subordinate Judge's finding was arrived at by inferences drawn from a misconstruction of the wajib-ul-arz. The right construction of documents was a question of law which the Court on second appeal was not precluded from considering under sections 584 and 585 of the Civil Procedure Code.

On the true construction it was clear from the documentary evidence that the appellants were only tenants of the land, and not proprietors.

[Fol. 25 I. C. 123=1914 M. W. N. 595; Rel: 74 I. C. 793=50 Cal. 292; Ref: 25 I. C. 286=21 C. L. J. 45:]

APPEAL from a judgment and decree (7th November, 1906) of the High Court at Allahabad, which reversed a judgment and decree (25th

*Present.—Lord SHAW, Sir JOHN EDGE and Mr. AMEER ALI.

(1) *Supra* p. 549.

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34 A. 579=39 I. A. 247=23 M. L. J. 330 =12 M. L. T. 413=1912 M. W. N. 1065= 14 Bom. L. R. 1090=16 I. C. 67=16 C. W. N. 1033 =17 C. L. J. 1=10 A. L. J. 835.

July, 1904) of the Subordinate Judge of Aligarh, which latter decree had reversed the decree (22nd September, 1903) of the Munsif of Etah.

The matter in dispute in this appeal was as to the right of the plaintiffs (the present appellants) who were the purchasers, as they alleged, at private sales of the 20th of May, 1900, and the 15th of January, 1901, of certain resumed *muafi*, dwelling houses and groves situate in a village of which the defendant (the present respondent) was the zamindar, to be declared proprietors in possession of the properties and entitled to have their names recorded, as absolute owners, in the revenue papers as against the defendant.

The facts of the case sufficiently appear from the report of the case in the High Court (Sir GEORGE KNOX and RICHARDS, JJ.), [580] which will be found in I. L. R. 29 All. 203; and are also stated in the judgment of their Lordships of the Judicial Committee.

The Munsif dismissed the suit with costs finding that the plaintiffs were at most occupancy tenants without power of sale. The Subordinate Judge on appeal reversed that decision and on the evidence granted the plaintiffs a decree declaring their absolute ownership and giving them possession. On the appeal by the defendant to the High Court it was contended for the plaintiffs that it being a second appeal, the finding of the Subordinate Judge, being a finding of fact with which the court could not interfere, must be taken to be conclusive under sections 584 and 585 of the Civil Procedure Code (XIV of 1882). The High Court rejected this contention on the ground that the decision of the Subordinate Judge was "founded on erroneous inferences of law drawn from certain documents and the wajib-ul-arz, which were given in evidence." The High Court, therefore, allowed the appeal and set aside the decree of the Subordinate Judge.

An application for review by the plaintiffs, and an application for leave to appeal to His Majesty in Council having both been rejected by the High Court, special leave to appeal was granted by His Majesty in Council.

On this appeal—

B. Dube for the appellants contended that they and their predecessors in title were the owners of the lands in dispute, as had been held by the Subordinate Judge on the construction of the wajib-ul-arz and the other evidence in the case. The High Court, it was submitted, was bound by this finding, the case when before that court being a second appeal, on which, under sections 584 and 585 of the Civil Procedure Code, 1882, findings of facts were to be taken as being conclusive. The High Court was therefore wrong in the construction it put on the wajib-ul-arz and in holding that the appellants had no proprietary rights in the lands. Both the Munsif and the Subordinate Judge had found that Rampur was not an agricultural village, but a town to which the wajib-ul-arz of the district, it was contended, did not apply. Assuming that the appellants were merely tenants, they had admittedly exercised heritable and transferable rights of ownership over the lands, which had never been disputed. It was a question of custom and [581] that was a question of fact. Under the circumstances, therefore, the onus was on the respondent to show that the appellants were not entitled to proprietary ownership of the lands in suit. Reference was made to *Lekhraj*

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Kuar v. *Mahpal Singh* (1); *Anant Singh* v. *Durga Singh* (2); Evidence Act (I of 1872), section 35; *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (3); *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani* (4); *Sri Girdhariji Maharaj* v. *Chote Lal* (5); Rule 13 of the Rules of the Allahabad High Court, dated the 13th January 1893; *Parbati Kunwar* v. *Chandarpal Kunwar* (6); *Ramgopal* v. *Shamskhaton* (7); *Lukhi Narain Jagaleb* v. *Jodu Nath Deo* (8), *Nilmoni Singh Deo Bahadur* v. *Kirti Chunder Chowdhry* (9); *Joy Kishen Mookerjee* v. *Doorga Narain Nag* (10); Act IX of 1889 (North-Western Provinces and Oudh Kanungos and Patwaris Act), section 5; *Muhammad Imam Ali Khan* v. *Husain Khan* (11); Act II of 1901 (Agra Tenancy Act); Act III of 1901 (United Provinces Land Revenue Act); Chaukidari Act (XX of 1856); and the United Provinces Gazetteer.

Sir Erle Richards, K.C. and *W.A. Raikes* for the respondent contended that the appellants had entirely failed to prove that they or their predecessors ever had anything beyond tenants' rights in the lands in suit. The lands on which the houses were built had all along been part of the zamindari lands belonging to the respondent's village. Those lands were included in the wajib-ul-arz of the village. They were lands of the zamindar unless something specific was proved as to them which changed the proprietorship. Since 1877 when the question of imposing rent on these lands was considered they had always been assessed with rent. There was no question of fact involved here. The question was as to the true construction of the wajib-ul-arz and other documents. If [582] in that construction the appellants are proprietors, the respondent fails. What is the right construction? Such a question came, it was submitted, if not under the second part of section 584 (usage having the force of law), then under the first part of that section (question of law). [Lord SHAW referred to *Ramgopal* v. *Shamskhaton* (7) per Lord Watson:—"The facts need not be questioned. It is the soundness of the conclusions from them that is in question, and this is a matter of law."] Reference was made to the Civil Procedure Code, 1882, Ed., by Ameer Ali and Woodroffe, page 391. The cases referred to for the appellant dealt with pure questions of fact, and were not applicable to the present case. As to "usage having the force of law," *Kahirla Abbaya* v. *Venkata Subbaya Rao* (12) was cited. Where matters between landlord and tenant were determined by Government in documents, it is on the right construction of those documents that any dispute between them should be decided.

Dube replied.

1912, *July* 12*th*:—The judgment of their Lordships was delivered by Sir JOHN EDGE:—

This is an appeal by special leave from a decree of the High Court of Judicature for the North-Western Provinces of India, dated the 7th of November, 1906, which reversed the decree of the Subordnate Judge of

(1) (1879) I. L. R. 5 Cal. 744 (750): L. R. 7 I. A. 63 (70).
(2) (1910) I. L. R. 32 All. 363: L. R. 37 I. A. 197.
(3) (1890) I. L. R. 18 Cal. 28 (30): L.R. 17 I. A. 122 (127).
(4) (1887) I. L. R. 14 Cal. 740 (747): L. R. 14 I. A. 101 (109).
(5) (1898) I. L. R. 20 All. 218.
(6) (1909) I. L. R. 31 All. 457 (475): L. R. 36 I. A. 125 (131).
(7) (1892) I. L. R. 20 Cal. 93 (99): L. R. 19 I. A. 228 (233).
(8) (1893) I.L.R. 21 Cal. 504 (512, 513) L. R. 21 I. A. 39 (43).
(9) (1893) I. L. R. 20 Cal. 847 (853): L. R. 20 I. A. 95 (97).
(10) (1869) 11 W. R. 348.
(11) (1898) I. L. R. 26 Cal. 81 (92): L. R. 25 I. A. 161 (169).
(12) (1905) I. L. R. 29 Mad. 24.

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Aligarh, dated the 25th of July, 1904, which had set aside the decree of the Munsif of Etah, dated the 22nd of September, 1903, dismissing the suit with costs.

The suit, which related to the proprietary title to lands in Rampur, was brought in the Court of the Munsif of Etah by Lala Fateh Chand, since deceased, and others against Rani Kishan Kunwar and others to obtain the cancellation of an order of the 4th of January, 1902, of a Court of Revenue; for a declaration that the plaintiffs were the proprietors in possession of the lands in the plaint mentioned and as such were entitled to have their names entered in the revenue papers as proprietors, and for consequential reliefs. Some of the lands in question consisted of lands in the *abadi* of Mauza Rampur. Upon those lands in the *abadi* houses had formerly stood. It is not clear from the record whether or not all of those lands in the *abadi* had been cleared of houses and had been [583] brought into cultivation, but apparently they had been brought into cultivation before suit. It is, however, not necessary to ascertain whether or not all of those lands in the *abadi* had been brought into cultivation, as it is the proprietary title to the land, whether covered with houses or not, and not the title to the houses, if any, standing upon those lands which is in question in this suit. The remainder of the lands to which the suit relates were lands under groves. Rani Kishan Kunwar was the zamindar of the whole Mauza Rampur, and she alone defended the suit. By her written statement Rani Kisban Kunwar put in issue the alleged title of the plaintiffs as proprietors.

Fateh Chand, the deceased plaintiff, had applied to the Revenue Court to have his name entered as that of the proprietor of the lands in question in the revenue papers relating to Mauza Rampur. On the 4th of January, 1902, the Assistant Collector rejected that application with costs, and on the 9th of January, 1903, the plaintiffs brought this suit in the Civil Court. The Munsif of Etah, having found as a fact that the defendant Rani Kishan Kunwar was the zamindar of Mauza Rampur, and that the plaintiffs were tenants and were not proprietors of the lands in the plaint mentioned by his decree of the 22nd of September, 1903, dismissed the suit.

From that decree of the Munsif the plaintiffs appealed, and in their grounds of appeal alleged that they were the owners in possession of the plots in suit, and that in Qasba Rampur the zamindar is not the owner of the *abadi*, but the lower class of people, who are her ryots, are the owners. The plaint and the grounds of appeal to which their Lordships have referred put it beyond doubt that the title which the plaintiffs claimed in the Munsif's Court and on appeal from the Munsif's decree was the proprietary title to all the lands mentioned in the plaint, and was not any inferior title. The Subordinate Judge of Aligarh in the appeal found on his construction of the wajib-ul-arz and other documentary evidence that the plaintiffs were the owners of the lands in respect of which the suit was brought, and by his decree declared that the plaintiffs were the owners in possession of the property, and decreed the plaintiffs' claim. From that decree of the Subordinate Judge the defendant Rani Kishan Kunwar appealed to [584] the High Court of Judicature for the North-Western Provinces of India at Allahabad.

At the hearing of the appeal in the High Court it was urged in argument on behalf of the plaintiffs that, the appeal being a second appeal to which sections 584 and 585 of the Code of Civil Procedure applied, the

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High Court was bound to accept as conclusive, and was precluded from questioning, the correctness of the finding of the Subordinate Judge that the plaintiffs were the proprietors of the lands in respect of which the suit was brought. Sir George Knox and Richards, JJ., who heard the appeal, overruled the objection, and on their construction of the wajib-ul-arz and other documents in the suit in their judgment stated and found :—

"From the judgment of the lower appellate Court it appears that it is founded on inferences of law drawn by the learned Subordinate Judge from certain documents and the wajib-ul-arz which were given in evidence. The documents show that the owners of houses in Rampur had been in the habit of selling and transferring their houses. The wajib-ul-arz sets forth that the occupiers of houses had this power, but all through the entries the zamindar is recognised, and it is stated that if a new house is to be built the permission of the zamindar must be obtained. The entry in the wajib-ul-arz as to groves is to the effect that isolated trees and clumps of bamboos planted by the tenant can be cut by him, and as to rent-free groves, if the trees should die out and the land be brought into cultivation, rent must be paid, and that if a new grove was to be planted the leave of the zamindar must be obtained. The inference of law that the Subordinate Judge has drawn from this evidence (about which there is no dispute) is that the occupiers of the groves and of the land which had been the sites of the houses were the absolute property of the persons who occupied and used them. In our judgment this inference is a wrong and impossible inference and the decision of the learned Subordinate Judge based thereon is clearly wrong."

The High Court by its decree allowed the appeal and restored the decree of the Court of the Munsif. From that decree of the High Court this appeal to His Majesty has been brought. The principal ground of this appeal is that the decree of the Subordinate Judge is right and that the plaintiffs are the owners of the lands in dispute.

On the hearing of this appeal the learned counsel on behalf of the appellants contended that the Judges of the High Court should have accepted the findings of the Subordinate Judge on the question of title as correct and as binding on them in second appeal and were not at liberty to find that the plaintiffs were not the proprietors of the lands in question. He also contended that the Judges of the High Court had misconstrued the wajib-ul-arz and [585] the other documentary evidence and had come to a wrong conclusion. He further contended that the wajib-ul-arz of Mauza Rampur, which was made in the settlement which commenced in 1872 and extracts from which are on the record of this suit, cannot be treated as applying to the *abadi* of Mauza Rampur, the contention being that Rampur, owing to the number of its inhabitants, many of whom are not agriculturists, and owing to the fact that the Government has applied the Chaukidari Act (Act No. XX of 1856) to Rampur, must be regarded as a town and not as a purely agricultural village, to which, according to the learned counsel's contention, a wajib-ul-arz is alone applicable. The answer to the contention that the wajib-ul-arz does not apply to the *abadi* of Mauza Rampur appears to their Lordships to be that the wajib-ul-arz to which reference has been made was prepared by the settlement officer for the whole Mauza Rampur including the *abadi*, and that all those who were interested were at the time given the opportunity of objecting to the statements contained in it, and further that the Government by applying the Chaukidari Act to Rampur did not alter and could not have altered proprietary rights in Mauza Rampur or in any part of the mauza. The wajib-ul-arz is in their Lordships' opinion cogent evidence of the rights as they existed when it was made of those holding proprietary or other rights of property within the mauza, and it has not been shown that the wajib-ul-arz to which reference has been made in this suit differs in any material respect from the wajib-ul-arz

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which their Lordships have been informed by counsel was made in the mose recent settlement.

The Judges of the High Court rightly overruled the objection that they were bound to accept as correct the finding of the Subordinate Judge that the plaintiffs were the proprietors of the lands to which this suit referred. That finding of the Subordinate Judge was the result of his having misconstrued the wajib-ul-arz. The right construction of documents is a question of law which Judges in second appeals are not, by sections 584 and 585 of the Code of Civil Procedure, precluded from considering by any finding of a lower appellate Court, based upon such documents. The Subordinate Judge arrived at his finding by inferences drawn upon an incorrect construction of the wajib-ul-arz, and the Judges in second [586] appeal consequently were not bound by his finding that the plaintiffs were the proprietors of the lands.

In the wajib-ul-arz it is stated that Mauza Rampur "is a mahal of Zamindari Khalis (held by a single person), and Raja Ram Chandar Singh is the only proprietor withot any co-sharer." Raja Ram Chandar Singh was the husband of the defendant Rani Kishan Kunwar, the present zamindar. There is no documentary evidence to show that the plaintiffs or their predecessors in title ever were proprietors of any of the lands to which this suit relates; on the other hand, the *jamabandi* shows that predecessors in title of the plaintiffs paid rent as tenants for some of those lands, and in the *khasra* for 1297 Fasli the defendant Rani Kishan Kunwar is entered as the proprietor of some of these lands, and predecessors in title of the plaintiffs are entered as the tenants. The zamindar was not affected by any transfer of lands to which he was not a party, and in the wajib-ul-arz neither the plaintiffs nor any predecessors of theirs are shown as tenants who had special rights which were heritable and transferable.

The following paragraphs of Chapter IV of the wajib-ul-arz relate to groves and houses, and are important:—

"Paragraph 3.—Relating to the rights of tenants in respect of groves and scattered trees.

"A tenant has power to cut down the grove or the scattered trees planted by him in his neighbourhood.

"If the land is rent-free and the trees have been removed therefrom and the land is brought under cultivation, the tenant shall have to pay the rent. If in future a grove is planted, it can be planted with the permission of the zamindar.

"Paragraph 4.—Relating to the rights of the tenants in respect of the houses in the village and of those which are built.

"A person residing in a house is owner thereof and he has power to transfer it; but in future a new house shall be built with the consent of the zamindar.

"The tenants of the lower class have no power to tranfer their houses.

There is evidence on the record that when land in the *abadi* is brought under cultivation the tenant has to pay rent for it. In their Lordships' opinion the Judges of the High Court rightly construed the wajib-ul-arz and drew the legitimate inference from it and the other documentary evidence in the suit.

On behalf of the plaintiffs appellants in their appeal the learned counsel who appeared for them pressed their Lordships to advise that the plaintiffs appellants should be declared to have heritable [587] and transferable rights in the lands in suit and for that purpose admitted that the plaintiffs appellants were tenants of those lands. Apart from other

considerations it is sufficient for their Lordships to say that that is not the claim in respect of which this suit was brought.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed and the decree of the High Court be affirmed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants :—*Barrow, Rogers & Nevill.*

Solicitors for the respondent :—*T. C. Summerhays & Son.*

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34 A. 587 (=16 I. C. 631=10 A. L. J. 117).

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

KUBER NATH AND OTHERS (*Plaintiffs*) *v.* MAHALI RAM AND ANOTHER (*Defendants*).*

[31st May, 1912.]

Act No. IX of 1872 (*Indian Contract Act*), *sections* 23, 27—*Agreement between several firms to fix rates for ginning and baling cotton and to share profits—Agreement neither in restraint of trade nor against public policy.*

Held that an agreement, whereby certain firms fixed the rates to be charged for ginning and baling cotton, and further as to the manner in which the profits should be shared by the parties thereto, was an agreement neither in restraint of trade nor opposed to public policy.

Haribhai Maneklal v. *Sharafali Isabji* (1) and *Fraser & Co.* v. *The Bombay Ice Manufacturing Co.* (2) followed.

THE facts of this case were as follows :—

The managers of five ginning firms came to an agreement, whereby they fixed the rates to be charged for ginning and baling cotton, thus forming a combination, and agreed that for a certain definite period the profits of ginning would be 7 annas 6 pies and of baling 1 anna 6 pies per maund. They further agreed that the profits were to be divided, and that those for baling were to be divided equally, while those for ginning were to be divided in proportion to the ginning capacity of the various factories. A dispute as to the ginning capacity of the factories arose and the suit was instituted by the [588] plaintiffs for their share of the profits according to the ginning capacity of their mills. The court of first instance decreed the claim. On appeal, the decree was slightly modified by the lower appellate court as to the amount to which the plaintiffs were entitled.

The plaintiffs appealed to the High Court.

The Hon'ble Dr. *Sundar Lal* for the appellants.

Mr. *B. E. O'Conor* and Dr. *Tej Bahadur Sapru*, for the respondents.

KARAMAT HUSAIN and TUDBALL, JJ.—The managers of five ginning firms came to an agreement, whereby they fixed the rates to be charged for ginning and baling cotton, thus forming a combination, and agreed that for a certain definite period the profits of ginning would be 7 annas 6 p es and of baling 1 anna 6 pies per maund. They further agreed that the profits were to be divided, and that those for baling were to be divided

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* Second Appeal No. 840 of 1911 from a decree of H. M. Smith, Additional Judge of Aligarh, dated the 3rd of May, 1911, modifying a decree of Shikhar Nath Banerji, Additional Subordinate Judge of Aligarh, dated the 8th of August, 1910

(1) (1897) I. L. R. 22 Bom. 861. (2) (1904) I. L. R. 29 Bom. 107.

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34 A. 587=16 I. C. 631=10 A. L. J. 117.

equally, while those for ginning were to be divided in proportion to the ginning capacity of the various factories. A dispute as to the ginning capacity of the factories arose and the suit was instituted by the plaintiffs for their share of the profits according to the ginning capacity of their mills. The court of first instance decreed the claim. On appeal, the decree was slightly modified by the lower appellate court as to the amount to which the plaintiffs were entitled. In second appeal to this Court the only point pressed before us is that the agreement relied on was contrary to public policy and void in law. There are two cases decided by the Bombay High Court—*Haribhai Maneklal* v. *Sharafali Isabji* (1) and *Frazer & Co.* v. *The Bombay Ice Manufacturing Company* (2)—which show that such a contract is neither in restraint of trade nor opposed to public policy. We agree with these rulings. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

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34 A. 589 (=16 I. C. 513=13 Cr. L. J. 705=10 A. L. J. 82).

[589] REVISIONAL CRIMINAL.

Before Mr. Justice Chamier.

EMPEROR *v.* MADAN GOPAL.*

[7th June, 1912.]

Act No. XLV of 1860 (*Indian Penal Code*), *section* 498—*Enticing away a married woman—Marriage—Hindu law—Whether marriage legal between a Banya and the illegitimate daughter of a Brahman and a Banya woman.*

Held that there was no reason why a marriage between a Banya and the illegitimate daughter of a Brahman father and Banya mother should not be valid according to Hindu law, especially when the marriage was recognized by the caste to which the husband belonged.

Padam Kumari v. *Suraj Kumari* (3) and *In the matter of Ram Kumari* (4) referred to.

THE facts of this case were as follows :—

One Madan Gopal was convicted by a magistrate of the second class in the Benares district under section 498 of the Indian Penal Code of having enticed away Musammat Kharag Kumari, the wife of Gokul Prasad. Madan Gopal appealed to the District Magistrate, but without success. He then applied to the High Court in revision upon two grounds, first, that it was not satisfactorily proved that he had enticed away Musammat Kharag Kumari, and secondly, that the marriage of Kharag Kumari with Gokul Prasad was according to the Hindu law invalid.

Mr. *R. K. Sorabji*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

CHAMIER, J.—The applicant was convicted by a Magistrate of the second class in the Benares district under section 498, Indian Penal Code, of having enticed away Musammat Kharag Kumari, who was the wife of the complainant, Gokul Prasad. The applicant appealed to the District Magistrate without success. He has now applied to this Court to set aside the conviction on two grounds, namely, that there is no evidence that

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* Criminal Revision No. 250 of 1912 from an order of C. A. C. Streatfeild, District Magistrate of Benares, dated the 2nd of April, 1912.

(1) (1897) I. L. R. 22 Bom. 861.
(2) (1904) I. L. R. 29 Bom. 107.
(3) (1908) I. L. R. 28 All. 458.
(4) (1891) I. L. R. 16 Cal. 264.

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34 A. 589=
13 I. C. 513=
13 Cr. L. J.
705=10 A. L.
J. 82.

he enticed the woman away and that she is not the lawfully married wife of the complainant. On the first point there are the concurrent findings of the courts below, and having looked into the evidence I see no reason to think that they are erroneous. On the second point it is conceded that the prosecution had to establish that Kharag Kumari was the [590] wife of the complainant. The prosecution proved that the complainant married Kharag Kumari eleven or twelve years ago in Nepal, to which country both parties seem to have originally belonged. The prosecution also proved that complainant and Kharag Kumari had lived together as husband and wife ever since the marriage, and that they had been recognized as husband and wife by their caste-fellows. There is also definite evidence that all the usual ceremonies were performed at the marriage. In these circumstances it seems to me that it must be presumed till the contrary is shown that Kharag Kumari is the lawful wife of the complainant. The applicant contended that she could not be the lawful wife of the complainant because she was the daughter of a Brahman by a mistress of the Banya caste, whereas complainant is a Banya of legitimate birth. Counsel for the applicant relied upon the decision of this Court in *Padam Kumari* v. *Suraj Kumari* (1), that whatever may have been the case in ancient times, a marriage between a Brahman and Kshatrya woman is now invalid, and upon the opinions expressed by Mayne and other writers on the Hindu law that marriages between persons of different castes have long since become obsolete. It is not clear how far the prohibition of inter-marriage between castes applies to marriages between persons of hybrid caste or marriages between a person of hybrid caste and a Brahman or a Kshatrya or a Vaisya or a Sudra. According to Manu, Chap. X, verse 8, Kharag Kumari should be called Ambasht'ha or Vaisya. In practice, however, it seems that a child born of parents of different castes, though an outcaste in the strict sense, is regarded for many purposes as belonging to the caste either of its father or of its mother. There is no evidence as to whether Kharag Kumari was regarded as a Brahman or a Banya, but if, as is possible, even probable, she was regarded as belonging to the Banya caste, there would, even according to modern usage, be no obstacle to a marriage between her and the complainant, though the latter would perhaps be lowered in social estimation by such a marriage. Dr. Gurudas Banerjee in his work on the Hindu law of marriage, 2nd Edition, p. 73, says:—"At the present day when caste has become so elastic and loss of caste so rare, the general question whether an outcaste is eligible for marriage at all, and, if so, in what caste is not of much practical importance. [591] The only case of some difficulty is that of a person who is born of parents belonging to two different castes. But even in these cases which, however, are by no means common, the child if recognized by relatives and others as belonging to the caste of either parent and is married in that caste.....And it may, perhaps, be laid down as a general rule that so far as prohibition of inter-marriage between different castes is concerned, a marriage would be valid or void according as the parties to it are or are not in the point of fact recognized as belonging to the same caste." According to this view of the law the marriage between the complainant and Kharag Kumari has been valid. If the rule against inter-marriage between persons of different castes were applied strictly, it is doubtful whether a person born of an illicit union between two Hindus, could contract a valid

(1) (1903) I. L. R. 28 All. 458.

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34 A. 589=13 I. C. 513=13 Cr. L. J. 705=10 A. L. J. 82.

marriage at all. In the case of *Ram Kumari* (1) the illegitimate child of Chhattri parents had been married according to Hindu rites to a man who was by caste a Chhattri. The High Court held as the parties to the marriage had been recognized by their castemen as belonging to the same caste, the marriage was lawful, and they also laid it down that illegitimacy was no absolute disqualification for marriage in the case of Hindus. There is the further consideration in the present case that the parties belonged to Nepal where the Hindu Law of marriage may not be so strictly followed as it is in these Provinces. I have been referred to no authority which requires me to hold that the marriage in the present case was invalid. The applicant has failed to rebut the presumption that there was a valid marriage. In my opinion he was rightly convicted under section 498 of the Indian Penal Code.

I am asked to reduce the sentence on the ground that the applicant may have supposed that he was justified in regarding Kharag Kumari as the mistress, not the wife of the complainant. But there is nothing to show that the complainant or any one else has ever regarded her as a mistress. The application is rejected.

Application rejected.

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34 A. 592 (=10 A. L. J. 130=16 I. C. 1).

[592] REVISIONAL CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

NAND RAM (*Applicant*) *v.* BHOPAL SINGH (*Opposite Party*).*

[8th June, 1912.]

Civil Procedure Code (1908), *section* 115—*Revision—Interlocutory order—Scope of section.*

Held by KARAMAT HUSAIN, J.—that an application under section 115 of the Code of Civil Procedure cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by section 105, which provides that they may be made a ground of objection in appeal against the final decree. *Moti Lal Kashibhai* v. *Nana* (2) followed.

Inasmuch as an order under order IX, rule 13, setting aside an *ex parte* decree can be attacked in appeal from the final decree, no application will lie for revision of such an order. *Gopala Chetti* v. *Subbier* (3) followed.

[Ref. 16 M. L. T. 101=25 I. C. 191 ; 24 I. C. 982 ; 59 I. C. 676 ; 64 I. C. 303 ; **Fol.** 38 I. C. 206 ; **Dist.** 18 A. L. J. 486 ; **Rel.** 71 I C. 587 ; **Ref.** 79 I. C. 69.]

THE facts of this case were as follows :—

The plaintiff, in 1910, sued on a mortgage made by two joint brothers, Bhopal and Bahadur. Bhopal, his son Baddari, grandson Harnarain Singh, and nephew Sham Lal, were defendants. Baddari was appointed guardian *ad litem* of his minor son Harnarain, and notice was served upon him on the 14th of August, 1910. Bhopal signed it as a witness. Notice was not served on Bhopal personally, but the summons was affixed to the door of his house. The record does not show if this was deemed by the Munsif to be sufficient service. The suit was decreed on the 19th of December 1910. The decree against Bhopal was *ex parte*. An application for an order absolute was made on the 16th of July, 1911, and granted.

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* Civil Revision No. 34 of 1912.

(1) (1891) I. L. R. 18 Cal. 264.
(2) (1892) I. L. R. 18 Bom. 35.
(3) (1903) I. L. R. 26 Mad. 604.

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REVISIONAL CIVIL.

34 A. 592=10 A. L. J. 130=16 I. C. 1.

Bhopal, on the 1st of August, 1911, applied under order IX, rule 13, to have the *ex parte* decree set aside, stating in the affidavit that on the date on which the case was heard, he was in Allahabad. The Munsif, holding that there was sufficient reason for his absence, set aside the *ex-parte* decree on the 18 of December, 1911, and made another decree at variance with the *ex parte* decree on the 13th of February, 1912.

The decree-holder, on the 19th of February, 1912, came to the High Court in revision against the order, dated the 18th of December, 1911, but never appealed against the decree, dated the 13th of February, 1912.

Mr. *A. E. Ryves*, for the applicant.

[593] Mr. *A. H. C. Hamilton* and Munshi *Benode Behari* for the opposite party.

KARAMAT HUSAIN, J.—The plaintiff, in 1910, sued on a mortgage made by two joint brothers, Bhopal and Bahadur. Bhopal, his son Baddari, grandson Harnarain Singh, and nephew Sham Lal, were defendants. Baddari was appointed guardian *ad litem* of his minor son Harnarain and notice was served upon him on the 14th of August, 1910. Bhopal signed it as a witness. Notice was not served on Bhopal personally, but the summons was affixed on the door of his house. The record does not show if this was deemed by the Munsif to be sufficient service. The suit was decreed on the 19th of December, 1910. The decree against Bhopal was *ex parte*. An application for an order absolute was made on the 16th of July, 1911, and granted.

Bhopal, on the 1st of August, 1911, applied under order IX, rule 13 to have the *ex parte* decree set aside, stating in the affidavit that on the date on which the case was heard, he was in Allahabad. The Munsif, holding that there was sufficient reason for absence, set aside the *ex parte* decree on the 18th of December, 1911, and made another decree at variance with the *ex parte* decree on the 13th of February, 1912.

The decree-holder, on the 19th of February, 1912, came to this court in revision against the order, dated the 18th of December 1911, but never appealed against the decree, dated the 13th of February, 1912.

In support of the application it is argued that under order IX, rule 13, corresponding to section 108, Code of Civil Procedure of 1882, a court has power to set aside an *ex parte* decree "only when he (the applicant) satisfied the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the case was called on for hearing," and as no cause is alleged for absence and nothing on the record to show that summons was not duly served the Munsif had no jurisdiction to set aside the *ex parte* decree. The reply of the learned counsel for the other side is that the remedy open to the applicant was to attack the order in appeal from the decree, dated the 13th of February, 1912, and as he allowed it to become final, he could not be heard in revision. He also urges that the result [594] of interference would be to set aside a final decree. The contention that the Munsif acted without jurisdiction is not an accurate statement of what took place. He wrongly considered what was no cause to be a sufficient cause for absence, but did not act without jurisdiction. The order can, therefore, not be a fit subject for revision. Assuming that he acted with material irregularity though not without jurisdiction, the remedy of the applicant was to attack the order in appeal from the decree of the 13th of February, 1912, under section 105, Code of Civil Procedure

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34 A. 592=10 A. L. J. 130=16 I. C. 1.

and as he failed to appeal, he cannot be allowed to come up in revision. In *Farid Ahmad* v. *Dulari Bibi* (1) it was held that an order made under section 25, Code of Civil Procedure, transferring a suit in which an appeal would lie from the decree made therein was not subject to revision by the High Court under section 622. In *Sheo Prasad Singh* v. *Kastura Kuar* (2) it was remarked that the revisional powers of this court should not be exercised unless as a last resort for an aggrieved litigant. Even when there is a remedy by a fresh suit, there can be no revision. See *J. J. Guise* v. *Jaisraj* (3). Regarding this case, KNOX, J., in *Debi Das* v. *Ejaz Husain* (4) said:—"Ordinarily I am prepared to subscribe to that, but in this matter each case must be judged upon the circumstances peculiar to it."

I adopt the following remarks in *Moti Lal Kashibai* v. *Nana* (5) substituting section 115 for section 622 and section 105 for section 591:—"An application under section 622 cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by section 591, which provides that they may be made a ground of objection in the appeal against final decree. The purpose with which section 622 was passed was to enable a party to a suit to get rid of a decision or order of a lower court rectified by the High Court where there would otherwise be no remedy."

There is, however, a conflict of opinion as to whether an order setting aside an *ex parte* decree is or is not attackable in appeal from a final decree. A Bench of the Calcutta High Court held that it is not and that only such orders are within the purview of the [595] section as are "affecting the decision of the case" *with reference to its merits*: *Chintamony Dassi* v. *Raghoonath Sahoo* (6) and *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (7). According to that court the order can be reversed under section 622, Code of Civil Procedure of 1882—section 115, Code of Civil Procedure of 1908—if the requirements of the section are satisfied, *Mahomed Hamidulla* v. *Tohurennissa Bibi* (8). A Bench of the Madras High Court in *Gopala Chetti* v. *Subbier* (9) has taken the opposite view, holding that on order setting aside an *ex parte* decree could be attacked in appeal from the final decree. With due respect to the learned Judges who decided the cases reported in I. L. R. 22 Cal. 981 and 9 C. W. N. 584. I agree with the learned Judges who decided the case I. L. R. 26 Mad. 604. There were no words in section 622, Code of Civil Procedure of 1882, nor are there any in section 115, Code of Civil Procedure of 1908, limiting the right of attack to such orders only as are "affecting the decision of the case" *with reference to its merits*, and in the absence of any such limitation a court has no power to read such a limitation into the section.

The contention that in order to destory the right to apply for revision, some other remedy must exist on the date on which the order sought to be revised is made has no force. All interlocutory orders, which can be attacked in appeals from final decrees, under section 105, are always passed before the final decree, and if the contention was right, all orders which might be attacked in appeal from final decree, would furnish grounds for applications in revision, and the object for which the section is enacted would be defeated.

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(1) (1884) I. L. R. 6 All. 233.
(2) (1889) I. L. R. 10 All. 119.
(3) (1893) I. L. R. 15 All. 405.
(4) (1905) I. L. R. 28 All. 72.
(5) (1892) I. L. R. 18 Bom. 35.
(6) (1895) I. L. R. 22 Cal. 981.
(7) (1905) 9 C. W. N 584.
(8) (1897) I. L. R. 25 Cal. 155.
(9) (1903) I. L. R. 26 Mad. 604

For the above reasons I would reject the application.

KNOX, J.—I agree in rejecting the application. Sufficient ground has not been shown for interference.

BY THE COURT.—The application is rejected with costs.

Application rejected.

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JUNE 8.

REVISIONAL CIVIL.

34 A. 592=10 A. L. J. 130=15 I. C. 1.

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34 A. 596 (=10 A. L. J. 153=15 I. C. 337).

[596] APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

ALI HUSAIN (*Decree-Holder*) *v.* AMIN-ULLAH (*Judgment-Debtor*).*

[10th June, 1912.]

Pre-emption—Conditional decree—Decretal amount deposited in court—Decree enhanced in appeal—Additional payment made not covering amount withdrawn as costs.

A successful plaintiff pre-emptor deposited in court the amount of the decree in his favour, but subsequently withdrew therefrom the amount of the costs decreed in his favour, on the amount payable being enhanced on appeal he paid into Court the difference between the original and appellate decrees. *Held* that the decree had been fully complied with. *Ishri* v. *Gopal Saran* (1), *Balmukand* v. *Pancham* (2), *Parmanand Raot* v. *Gobardhan Sahai* (3) and *Bechai Singh* v. *Shami Nath* (4) followed.

[Ref. 42 All. 181=54 I. C. 395; Dist. 69 I. C. 516; 74 I. C. 558; 77 I. C. 116.]

THE facts of this case were as follows :—

This was a suit for pre-emption. The pre-emptor succeeded in his suit. The first court ordered him to deposit Rs. 6, 800. He carried out the order of the court. Subsequently, in execution of his own decree for costs, he attached and received from the Court a sum of Rs. 314-8-0 out of the amount deposited by him. There was an appeal in the pre-emption suit to the High Court, and the Court modified the decree of the first court by ordering the pre-emptor to pay a sum of Rs. 10,000, instead of Rs. 6,800. He deposited in compliance with this order an extra sum of Rs. 3,200. This deposit was made in time. The judgment-debtor took objection to this deposit on the ground that it was not a compliance with the order of the High Court, inasmuch as the decree-holder had taken out the sum of Rs. 314-8-0 out of the sum previouly deposited by him. The court below disallowed the objection. The judgment-debtor appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellant.

The Hon'ble Dr. *Sundar Lal* and Maulvi *Shafi-uz-zaman*, for the respondent.

KARAMAT HUSAIN and TUDBALL, JJ :—The pre-emptor succeeded in his suit for pre-emption. The first court ordered him to deposit Rs. 6,800. He carried out the order of the court. Subsequently, in execution of his own decree for costs, he attached and [597] got a sum of Rs. 314-8-0, out of the sum deposited by him. There was an appeal in the pre-emption suit to this Court, and this Court modified the decree of the first court by ordering the pre-emptor to pay a sum of Rs. 10,000, instead of Rs. 6,800. He deposited in compliance with the order of this Court an extra sum of Rs. 3,200. This deposit was made in time. The

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* First Appeal No. 130 of 1912, from a decree of Murari Lal, Officiating Subordinate Judge of Cawnpore, dated the 18th of September, 1911.

(1) (1884) I. L. R. 6 All. 951.
(2) (1888) I. L. R. 10 All. 400.
(3) (1906) I. L. R. 28 All. 676.
(4) (1910) 8 A. L. J. Notes, p. 27.

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JUNE 10.

APPELLATE CIVIL.

34 A. 596=10 A. L. J. 153 =15 I. C. 337.

judgment-debtor took objection to this deposit on the ground that it was not a compliance with the order of the High Court, inasmuch as the decree-holder had taken out the sum of Rs. 314-8-0 out of the sum previously deposited by him. The court below disallowed the objection. Hence this appeal. There is a series of decisions of this Court; see *Ishri* v. *Gopal Saran* (1), *Balmukand* v. *Pancham* (2) *Parmanand Raot* v. *Gobardhan Sahai* (3), and *Bechai Singh* v. *Shami Nath* (4). In all these cases it has been ruled that such a deposit as was made by the pre-emptor in this case, was a complete compliance with the order of the court. Mr. Justice TYRRELL in *Balmukand* v. *Pancham* no doubt, took a different view. But we are bound to follow the other rulings of this Court with which we ourselves agree. The appeal fails and is dismissed with costs.

Appeal dismissed.

34 A. 597 (=16 I. C. 524=10 A. L. J. 169=13 Cr. L. J. 716).

REVISIONAL CRIMINAL.

Before Mr. Justice Chamier.

EMPEROR *v.* ABBU SINGH AND OTHERS.*

[24th June, 1912.]

Act No. III of 1867 (*Public Gambling Act*), *section* 5—*Jurisdiction—Power to issue search warrant—"Officer invested with the full powers of a Magistrate"—Sub-divisional officer issuing warrant for search outside his sub-division.*

Held that a search-warrant issued under section 5 of the Public Gambling Act, 1867, by a first class magistrate was not invalid by reason of the fact that the house to be searched was situated outside the limits of the tahsils in respect of which such magistrate had been appointed sub-divisional officer.

THIS was an application for revision of an order convicting and sentencing the applicants under sections 3 and 4 of the Public Gambling Act, 1867. The only point taken in revision was that [598] the warrant under which the suspected house had been searched was issued by a sub-divisional officer, and the house in question was outside the limits of his sub-division. It was therefore contended that the magistrate, who was a magistrate of the first class, had no jurisdiction to issue the warrant.

Mr. *W. Wallach*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

CHAMIER, J.—The applicants have been convicted under sections 3 and 4 of the Public Gambling Act, 1867. The only point taken in revision is that the warrant under which the police searched the house of the first applicant was issued by a magistrate who was not competent to issue it, and, therefore, the discovery of instruments of gaming in the house did not give rise to the presumption that the house was a 'common gaming house,' as defined in the Act. Section 5 of the Act provides that a search warrant may be issued by the Magistrate of the District or 'other officer invested with the full powers of a magistrate.' This expression means a magistrate of the first class,—see section 3 (2) of the Code of Criminal Procedure. The warrant in the present case was issued by M. Muhammad Shafi Khan, a magistrate of the first class in the Farrukhabad district. In

* Criminal Revision No. 358 of 1912, from an order of H. Dupernex, Sessions Judge of Farrukhabad, dated the 13th of April, 1912.

(1) (1884) 6 All. 351.
(2) (1888) I. L. R. 10 All. 400.
(3) (1906) I. L. R. 28 All. 676.
(4) (1910) 8 A. L. J. Notes, p. 27.

November last, he was appointed to be sub-divisional officer of two tahils in the district. The house searched is not in either of those tahsils, and it is on this account that the warrant is said to be illegal. It appears to me that there is no force in the contention. The officer in question was a magistrate of the first class with jurisdiction extending throughout the district when he was appointed to be a sub-divisional officer. The appointment gave him certain additional powers in the area of which he became sub-divisional officer, but did not deprive him of all his powers as a magistrate. A Sub-divisional Magistrate exercises magisterial powers in matters which do not concern his sub-division, and I find nothing in the Code which suggests that this practice is contrary to law. It is true, as pointed out by counsel for the appellants, that some of the ordinary powers of a magistrate of the first or second class, who has been appointed to be a sub-divisional officer, cannot be exercised by him except in cases arising in his sub-division or [599] transferred to him by higher authority, but that is on account of the nature of those powers. There are other powers which any magistrate can exercise anywhere in the district, for example, the power to command an unlawful assembly to disperse or the power to record a confession. All that section 5 of the Public Gambling Act requires is that the search warrant shall be issued by the magistrate of a district or a magistrate of the first class. It is impossible to hold that the magistrate who issued the warrant in the present case was not a magistrate of the first class. The application is rejected.

Application rejected.

1912
JUNE 24.

REVISIONAL CRIMINAL.

34 A. 597=16 I. C. 524=10 A. L. J. 169=13 Cr. L. J. 716.

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34 A. 599 (=10 A L. J. 244=16 I. C. 8).

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

GAJADHAR TELI (*Plaintiff*) *v.* BHAGWANTA AND ANOTHER (*Defendants*).*

[26th June, 1912.]

Mortgage—Prior and subsequent mortgages—Suit for sale on second mortgage, first mortgagees being made parties—Rights of first mortgagees not set up—Subsequent suit by first mortgagees barred—Res judicata—Civil Procedure Code (1908), *section* 11.

Certain puisne mortgagees brought a suit for sale on their mortgage in which, although they impleaded the prior mortgagees, they simply asked for the sale of the property mortgaged, neither claiming to have their mortgage redeemed nor asking for sale subject to the prior mortgage. The prior mortgagees on their part did not set up their rights under the prior mortgage. *Held* that section 11 of the Code of Civil Procedure was a bar to the prior mortgagees afterwards suing for sale on their mortgage. *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh* (1) followed. *Surji Ram Marwari* v. *Barhamdeo Prasad* (2) distinguished.

[Dist. 24 I. C. 17; Fol. 1917 M. W. N. 336=38 I. C. 184.]

THE facts of this case are fully stated in the judgment of the Court.

Babu *Surendra Nath Sen*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

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* Second Appeal No 962 of 1911, from a decree of Rama Das, Additional Subordinate Judge of Azamgarh, dated the 20th of July, 1911, modifying a decree of Raghunath Prasad, City Munsif of Azamgarh, dated the 19th of December, 1910.

(1) (1912) I. L. R. 39 Cal. 527. (2) (1905) 1 C. L. J. 337.

1912
JUNE 26.

APPELLATE CIVIL.

34 A. 599=10 A. L. J. 244=16 I. C. 8.

KARAMAT HUSAIN and TADBALL, JJ. :—The facts of the case out of which this appeal has arisen are as follows :—On the 20th of June, 1885, Husain Ali and Jawwad Husain mortgaged 6 bighas, 1 biswa and 18 dhurs of zamindari to Radhe and Chirkil. [600] On the 19th of January, 1889, Husain Ali sold 3 bighas, 19 dhurs out of the same to Abid and Shafi, a part of the sale consideration being left with the vendees to pay off the mortgage (which they failed to do).

On the same date, Abid and Shafi and their two brothers, Nadir and Yusuf, mortgaged several properties to Mahadeo Prasad. Among these was the 3 bighas, 19 dhurs, zamindari purchased by Abid and Shafi alone. On the 4th of January, 1890, Radhe and Chirkil sold their mortgagee rights under the deed of the 20th of June, 1885, to Nadir. In 1897, Madadeo Prasad brought a suit for sale on his mortgage. Nadir was then dead and in his place Ashraf and Musharraf, his sons, were impleaded as his heirs.

An examination of the plaint shows that Mahadeo Prasad, among other reliefs, asked for sale of the 3 bighas, 19 dhurs zamindari in default of payment. He did not seek to sell it subject to the prior mortgage. He sought the sale of the property, plain and simple, and made no mention of the prior mortgage. Ashraf and Musharraf, though they were parties to the suit, did not put forward their prior mortgage and did not claim either to have their mortgage redeemed or to have the property sold subject to that mortgage.

Mahadeo Prasad's suit was decreed, and this property was sold and purchased by the decree-holder. It was not sold subject to the mortgage. On the 15th of October, 1909, Ashraf and Musharraf sold their rights as mortgagees of Gajadhar Teli, who therefore brought the present suit for sale of the 6 bighas, 1 biswa, 12 dhurs, which were mortgaged under the deed of 1885. Mahadeo Prasad being dead, his heirs, Musammat Bhagwanta and Musammat Basanta, have been impleaded as the purchasers of the 3 bighas, 19 dhurs. Among other defences, they pleaded that the claim of the mortgagee for the sale of this 3 bighas, 19 dhurs, was barred by the rule of *res judicata*. They urged that as Ashraf and Musharraf were parties to the suit by Mahadeo Prasad, they might and ought to have put forward the mortgage of 1885 in defence of Mahadeo Prasad's claim for sale of the property in question, and that having failed to do so, they or their transferee cannot now enforce the mortgage against that property.

[601] The court of first instance held against them on the ground that the heirs of Nadir Ali were only impleaded in Mahadeo Prasad's suit as mortgagors and not also as prior mortgagees.

The two ladies appealed and the lower appellate court held in their favour and dismissed the suit as against them and the 3 bighas, 19 dhurs.

The plaintiff comes here on second appeal and urges that the decision of the first court was correct. The question is, whether the heirs of Nadir Ali in the suit of Mahadeo Prasad not only might but also ought to have put forward their prior mortgage in defence to the claim of Mahadeo Prasad to put the property to sale in satisfaction of his debt. As we have already pointed out, Mahadeo Prasad did not admit the prior mortgage and seek to sell the property subject thereto.

A prior mortgagee, no doubt, is not a necessary party to a suit, wherein a puisne mortgagee seeks to sell the property subject to the prior mortgage, but in the present case, though the prior mortgagee was impleaded as a mortgagor of other properties, he was actually a party to the suit

and was aware of the fact that the mortgagee, Mahadeo Prasad, was seeking to sell the property without the burden of the prior mortgage upon it.

In our opinion, in these circumstances, they ought to have put forward their prior mortgage upon it in defence of the claim.

A large number of rulings have been called to our attention. The majority do not assist us. The principle, however, to be found in the decision of their Lordships of the Privy Council in *Mahomed Ibrahim Hossain Khan* v. *Ambika Perashad Singh* (1) is clearly applicable.

In that case a mortgagee was made a defendant to a suit on a mortgage prior to his own. He omitted to set up his rights under his mortgage and also under another which was prior to the one sued on and which he had paid of.

It was held that a suit subsequently brought by him to enforce those rights was barred under the Code of Civil Procedure (Act XIV of 1882, section 13, Expl. II). The case of *Surji Ram Marwari* v. *Barhamdeo Persad* (2) is distinguishable. The judgment of MOOKERJEE, J., at the bottom of page 349 runs as follows:—

The appellants, in that suit sought not to redeem any prior [602] encumbrances but merely to sell the property subject to all prior charges."

In the case before us, Mahadeo Prasad did not in his suit seek to sell the property subject to any prior charges. It is true that the heirs of Nadir Ali were impleaded as mortgagors under the deed of Mahadeo Prasad but they were parties to the suit. Admittedly, they might have pleaded their prior mortgage in defence, and, in our opinion, when they saw that Mahadeo Prasad was seeking to sell this property without regard to the prior mortgage, they ought to have pleaded their rights under the deed of 1885. Not having done so, the present suit is barred under the terms of section 11, Civil Procedure Code.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

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34 A. 602 (=16 I. C. 525=10 A. L. J. 174=13 Cr. L. J. 717).

REVISIONAL CRIMINAL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

CHADAMMI v. LALTA PRASAD AND ANOTHER.*

[27th June, 1912.]

Criminal Procedure Code, sections 195, 476—*Sanction to prosecute—Sanction set aside by superior court and order for prosecution under section* 476 *substituted—Jurisdiction.*

Held that a court hearing an application under section 195 of the Code of Criminal Procedure to revoke sanction for a prosecution granted by a subordinate court has jurisdiction to set aside the order of the subordinate court and direct a prosecution under section 476 of the Code. *In the matter of the petition of Mathura Das* (3) overruled.

[Ref. Pat. L. J. 607. Fol. 77 I. C. 435.]

IN this case sanction to prosecute one Chadammi for offences under sections 193 and 211 of the Indian Penal Code was granted by a magistrate to Lalta Prasad and another. Chadammi applied under section 195

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* Criminal Revision No. 841 of 1912, from an order of E.O. Allen, Sessions Judge of Mainpuri, dated the 4th of May 1912.

(1) (1912) I. L. R. 39 Cal. 527.
(2) (1905) 1 C. L. J. 337.
(3) (1892) I. L. R. 16 All. 80.

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of the Code of Criminal Procedure to the Assistant Sessions Judge to revoke the sanction so granted. The Assistant Session Judge revoked the sanction; but, taking action under section 476 of the Code, directed the prosecution of Chadammi and sent the record to the District Magistrate with the request that the complaint might be made over to a competent magistrate for disposal according to law. Against this order Chadammi applied in revision to High Court.

[603] Mr. *E. A. Howard*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

KARAMAT HUSAIN and TUDBALL, JJ.:—In this case sanction for prosecution under sections 193 and 211, Indian Penal Code, was granted by a Magistrate and the Assistant Sessions Judge on revision revoked the sanction, but taking action under section 476 of the Code of Criminal Procedure, directed the prosecution of the applicant and sent the record to the District Magistrate with the request that the complaint be made over to a competent Magistrate for disposal according to law. The applicant comes here in revision, and his learned counsel urges that the learned Sessions Judge had no jurisdiction to take action under section 476 of the Code of Criminal Procedure. In support of this contention he relies upon the case *In the matter of the petition of Mathura Das* (1). The case, no doubt, supports the contention. In that case a learned Judge of this Court was of opinion that when a matter is taken up in revision to a higher court under section 195 of the Code of Criminal Procedure, the proceedings in the higher court cannot be deemed to be judicial proceedings. The learned Judge who decided that case in the course of his judgment said :—" It is evident that the offences were not committed in the court of the District Judge, so that he has no jurisdiction under section 476, unless it can be held that they were brought under his notice in the course of a judicial proceeding. Even if an application under section 195 can be held to be a judicial proceeding, I do not think it could be held without straining the language of the section that when an application is presented for sanction to prosecute for an offence, that offence is brought to the notice of the court in the course of a judicial proceeding, there being no other judicial proceeding before the court than the application for sanction. Taking this view of the case, I am of opinion that the District Judge had no power to take action under that section." With due respect to the learned Judge, we are of opinion that when a case under section 195 of the Code of Criminal Procedure is taken up to a higher court in revision, the proceedings in the higher court relating to sanction are undoubtedly judicial proceedings. These proceedings, in no way, can be regarded as other than judicial **[604]** proceedings. The function exercised by the higher court in upholding the order of the court below or reversing it is beyond doubt a judicial act. Besides, it seems highly improbable that the higher court, when a case under section 195 of the Code of Criminal Procedure comes before it in revision, should not have the power to rectify the mistake, if any, committed by the court below. There are many cases in which the sanction for prosecution obtained by an applicant from the court of first instance is not utilized for the benefit of the public. It is often used as the means of gaining some private object, and that being so, it is highly desirable that the higher court should take away that power from the

(1) (1892) I. L. R. 16 All. 80.

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hands of a private person and give it to the public authorities or institute the complaint itself. This being our view, we are of opinion that the learned Sessions Judge had jurisdiction to take action under section 476 of the Code of Criminal Procedure, because the offence was brought to his notice in the course of a judicial proceeding. We, therefore, reject the application.

Application rejected.

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34 A. 604 (=10 A. L. J. 183=17 I. C. 89).

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Muhammad Rafiq.

ABDUL AZIZ (*Plaintiff*) *v.* BASDEO SINGH AND OTHERS (*Defendants*).*

[2nd July, 1912.]

Land-holder and tenant—Fixed-rate tenant—Liability of fixed-rate tenants for rent joint and several and not joint merely—Act No. IX of 1872 (*Indian Contract Act*), *section* 43.

Held that liability of joint holders of a fixed-rate tenancy to payment of rent is joint and several, and not joint only. The failure, therefore, of the plaintiff in a suit for rent against several fixed-rate tenants jointly to bring upon the record the representatives of a deceased defendant is no bar to the continuance of the suit against the remaining defendants. *Joy Gobind Laha* v. *Monmotha Nath Banerji* (1) followed. *Muhammad Askari* v. *Radhe Ram Singh* (2) referred to.

This was a suit for the recovery of rent brought against several joint holders of a fixed-rate tenancy. The suit was dismissed by the court of first instance. The plaintiff appealed to [605] the District Judge, and during the pendency of the appeal one of the defendants respondents died. The plaintiff appellant failed to apply to the Court within the prescribed time to bring on the record the legal representatives of the deceased respondent. The court then held that the appeal was not maintainable against the remaining respondents and accordingly dismissed it. The plaintiff appealed to the High Court.

Mr. *W. K. Porter*, Babu *Surendra Nath Sen* and Maulvi *Muhammad Ishaq*, for the appellant.

Mr. *A. H. C. Hamilton*, *A. E. Ryves*, Babu *Satya Chandra Mukerji* and Dr. *Satish Chandra Banerji*, for the respondents.

CHAMIER and MUHAMMAD RAFIQ, JJ. :—This appeal arises out of a suit brought against several persons for the rent of a fixed rate holding. The suit was dismissed by the court of first instance, and the plaintiff appealed to the District Judge. While the appeal was pending, one of the defendants respondents died, and the plaintiff appellant failed to apply to the court within the prescribed time to make his heirs respondents in his place. The court then held that the appeal was not maintainable against the remaining respondents, and with reference to a prayer that the court should consider the case under section 5 of the Limitation Act, the court held that that section did not apply to the appeal. The result was that the appeal was dismissed. This is a second appeal by the plaintiff, on whose behalf it is contended (1) that the liability of the defendants to the suit

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* Second Appeal No. 311 of 1911 from a decree of J. H. Cuming, District Judge of Jaunpur, dated the 17th of December 1910, confirming a decree of Mahesh Bal Dikshit, Assistant Collector, first class of Jaunpur, dated the 19th of May, 1909.

(1) (1906) I. L. R. 33 Cal. 580. (2) (1900) I. L. R 22 All. 307.

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was joint and several and not joint only, and therefore the appeal should have been allowed to proceed against the surviving respondents: (2) that section 5 of the Limitation Act applied to the case. On the first point the case seems to be covered by the decision of the Calcutta High Court in *Joy Govind Laha* v. *Monmatha Nath Benerji* (1). That was a suit against several persons for the recovery of the rent of a holding. After an appeal had been filed by the plaintiff, one of the defendants respondents died, and no attempt was made by the appellant to get the legal respresentatives of the deceased respondent substituted on the record. The remaining respondents objected that the appeal could not proceed. The court held that as the liability of the holders of the tenure was joint [606] and several, the appeal could proceed against the surviving respondents, and that it abated only as far as the deceased respondent was concerned. There seems to be no reason for distinguishing between the liability of several holders of a fixed-rate tenure and the liability of several tenants of any other holding. The liability of fixed rate tenants in respect of the rent of their holding appears to be joint and several. The case is, therefore, on all fours with the case decided by the Calcutta High Court. In this connection, we may refer to the case of *Muhammad Askari* v. *Radhe Ram Singh* (2), where the court held that the effect of section 43 of the Indian Contract Act was to exclude the right of a joint contractor to be sued along with his co-contractors. We allow this appeal set aside the decree of the lower appellate court, and remand the case to that court to be restored to the pending file and disposed off according to law. Costs in this Court will be costs in the cause.

Appeal decreed—Cause remanded.

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34 A. 606 (=16 I. C. 401=10 A. L. J. 211).

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

JUGAL KISHORE SAHU AND ANOTHER (*Plaintiffs*) *v.* KEDAR NATH AND ANOTHER (*Defendants*).*

[4th July, 1912.]

Mortgage—Prior and subsequent mortgagees—Release of part of mortgaged property for less than its value—Suit for recovery of entire balance of mortgage debt from the residue of the mortgaged property.

Held that a first mortgagee cannot be allowed to release part of the mortgaged property for less than its due proportion of the mortgage money and then claim a decree against the mortgagor and a puisne mortgagee for the recovery of the whole of the balance of the mortgage money out of the remainder of the property. *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee* (3) *Hari Kisson Bhagat* v. *Velait Hossein* (4) and *Ponnusami Mudaliar* v. *Srinivasa Naicken* (5) referred to.

[Ref. 40 Mad. 968=42 I. C. 352; 64 I. C. 451=19 A. L. J. 917.]

THE facts of this case were as follows :—

This was a suit upon a mortgage made in January, 1888, in favour of the predecessor of the appellants. The mortgage covered shares in several

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* Second Appeal No 1159 of 1911, from a decree of F D. Simpson, District Judge of Gorakhpur, dated the 3rd of August, 1911, reversing a decree of Harbandhan Lal, Additional Subordinate Judge of Gorakhpur, dated the 25th of March, 1911

(1) (1906) I. L. R. 33 Cal. 580.
(2) (1900) I. L. R. 22 All. 307.
(3) (1910) 15 C. W. N. 800.
(4) (1903) I. L. R 30 Cal 755.
(5) (1908) I. L. R. 31 Mad. 333.

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villages, including a two-anna share in a village called Haria. In May, 1895, the mortgagors, sold [607] a one anna six pie share in Haria to one Asuda Bibi, leaving with her Rs. 500, part of the purchase money, to be paid to the appellants. That sum was paid to the appellants in July, 1896, and a receipt was given by them, which shows that they accepted the money in reduction of the amount due on the mortgage. In 1906, the appellants released the one anna six pie share from the mortgage, stating that they did so in consideration of the payment made to them in 1896. In the present suit, instituted in 1910, the appellants claim to be entitled to bring the remainder of the mortgaged property to sale for the recovery of the whole amount remaining due upon the mortgage, after giving credit for the sum of Rs. 500 paid in 1896. The principal defence to the suit was that of certain puisne mortgagees who had taken a mortgage of the property in September, 1895. They said that the share sold to Asuda Bibi was, roughly speaking, half the mortgaged property in value, and that the appellants were entitled to proceed against the remainder of the mortgaged property for only so much of the mortgage money as was rateably due from it.

The court of first instance (Additional Subordinate Judge of Gorakhpur) decreed the claim in full. On appeal the District Judge sustained the defence set up and granted a decree to the plaintiffs for an amount proportionate to the value of the property not released by them. The plaintiffs appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Dr. *Satish Chandra Banerji*, for the appellants.

Mr. *M. L. Agarwala* and Munshi *Govind Prasad*, for the respondents.

CHAMIER and PIGGOTT, JJ.:—This was a suit upon a mortgage made in January, 1888, in favour of the predecessor of the appellants. The mortgage covered shares in several villages, including a two anna share in a village called Haria. In May, 1895, the mortgagors sold a one anna six pie share in Haria to one Asuda Bibi, leaving with her Rs. 500, part of the purchase money, to be paid to the appellants. That sum was paid to the appellants, in July, 1896, and a receipt was given by them, which shows that they accepted the money in reduction of the amount due on the mortgage. In 1906, the appellants released the one anna six pie share from the mortgage, stating that they did so in consideration of the payment made to them in 1896. In the present suit [608] instituted in 1910, the appellants claim to be entitled to bring the remainder of the mortgaged property to sale for the recovery of the whole amount remaining due upon the mortgage, after giving credit for the sum of Rs. 500 paid in 1896. The only defence with which we are concerned now is that of the respondents who took a mortgage of the property in September, 1895. They said that the share sold to Asuda Bibi was, roughly speaking, half the mortgaged property in value, and that the appellants were entitled to proceed against the remainder of the mortgaged property for only so much of the mortgage money as was rateably due from it. The Subordinate Judge rejected this defence and decreed the claim in full, but on appeal the District Judge held that the defence was well founded and he gave the appellants a decree for an amount proportionate to the value of the property not released by them. The Subordinate Judge had relied upon the decisions of this Court in *Jai Govind* v. *Jas Ram* (1) and *Sheo Tahal Ojha* v. *Sheodan Rai* (2). The District Judge

(1) Weekly Notes, 1898, p. 120.

(2) (1905) I. L. R. 28 All. 174.

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followed the decisions of the Calcutta High Court in *Hari Kissen Bhagat* v. *Velait Hossein* (1) and the Madras High Court in *Ponnusami Mudaliar* v. *Srinivasa Naicken* (2), and he distinguished the other cases on the ground that in them the mortgagee had merely refrained from proceeding against part of the mortgaged property, whereas in the present case the appellant had definitely released part of the property from the mortgage, and he held that the release had the same effect as a purchase of that part by the appellants would have had.

In second appeal the appellants contend that the case is covered by the decisions of this Court mentioned above and also by the decision in *Sheo Prasad* v. *Behari Lal* (3), *Ghafur Hasan Khan* v. *Muhammad Kifait-ullah* (4) and *Pirbhu Narain Singh* v. *Amir Singh* (5), and that we should follow those cases in preference to the decisions of the Calcutta and Madras High Courts.

In the Calcutta and Madras cases the mortgagee had released part of the mortgaged property from the mortgage in favour of a person who had purchased that part from the mortgagor, and it was assumed in the Calcutta case and decided in the Madras case **[609]** that the mortgagee was bound to abate a part of the mortgage money proportionate to the value of the property released and could only recover the balance from the property not released. With the possible exception of the case of *Jai Gobind* v. *Jas Ram* (6) the cases in this Court which have been referred to do not in any way touch the question which we have to decide. In *Sheo Prasad* v. *Behari Lal* (3) the mortgagee had asked for and obtained a decree for sale of part only of the mortgaged property. It was held that he was entitled to a decree under section 90 of the Transfer of Property Act after bringing that part to sale. The only defendant to the suit was the mortgagor. In *Ghafur Hasan Khan* v. *Muhammad Kifait-ullah Khan* (4) a mortgagee obtained a decree *nisi* for sale of the whole of the mortgaged property, but took an order absolute for sale of a part only of it. It was held that after bringing that part to sale he was entitled to a decree under section 90 of the Transfer of Property Act. These two cases obviously have no bearing upon the present case. In *Sheo Tahal Ojha* v. *Sheodan Rai* (7) part of the mortgaged property was found to belong to persons who had not joined in the mortgage, and the mortgagee withdrew his claim against that part. It was held that a mortgagee suing for sale of part of the mortgaged property was not bound to implead the persons interested in the remainder of the property. In that case there were no puisne mortgagees or subsequent purchasers from the mortgagors. RICHARDS, J., pointed out that the effect of a release by the mortgagee of one of the mortgagors and of his share of the property behind the backs of the other mortgagors was not in question. In seems to us that that case also has no bearing upon the present case. In *Pirbhu Narain Singh* v. *Amir Singh* (5) a mortgagee obtained a decree for sale of the whole of the mortgaged property. After he had brought part of it to sale, it was discovered that the remainder was not saleable, being an occupancy holding. It was held that the mortgagee was entitled nevertheless to a decree under section 90 of the Transfer of Property Act. That case in no way affects the present case. In *Jai Gobind* v. *Jas Ram* (6) a mortgagee sued

(1) (1903) I. L. R. 30 Cal. 755.
(2) (1908) I. L. R. 31 Mad. 383.
(3) (1902) I. L. R. 25 All. 79.
(4) (1905) I. L. R. 28 All. 19.
(5) (1907) I. L. R. 29 All. 369.
(6) Weekly Notes, 1898, p. 120.
(7) ((1905) I. L. R. 28 All. 174.

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his two mortgagors, *A* and *B*, and a puisne mortgagee [610] from *B*, for sale of the whole of the mortgaged property, but at the hearing he asked for a decree against the share of *A* only. It was held that he was entitled to a decree for the whole of the mortgage money against the share of *A*. That case is distinguishable from the present case, for in this case the plaintiff mortgagee has definitely released part of the property from the mortgage, whereas in that case the plaintiff merely abstained from asking for relief against part of the property, and if the defendant *A* redeemed the plaintiff's mortgage, there was nothing to prevent him from claiming contribution from B's share of the property.

While mortgaged property remains in the hands of the mortgagor, the mortgagee may enforce his mortgage against any part of the property, and so long as there are no other persons interested in the property, the mortgagee may, as between himself and the mortgagor, release any part of the property from the mortgage. But when an estate subject to a mortgage belongs to or subsequently becomes the property of several co-sharers and one of those persons pays off the debt, he can call upon the other co-sharers to contribute rateably out of their shares to the payment of the debt, and when, after a mortgage has been made, another person purchases or takes in mortgage part of the property, the prior mortgagee cannot even with the consent of the mortgagor release any part of the property from the first mortgage to the prejudice of that person, that is to say, notwithstanding the release, the part released remains liable to contribute rateably to the payment of the mortgage debt.

The question is whether a mortgagee who releases part of the property from the mortgage without receiving from the releasee his proper share of the mortgage money, can, in a suit against a subsequent purchaser or mortgagee, obtain a decree against the rest of the mortgaged property for the balance of the mortgage money. The Calcutta and Madras High Courts hold that he cannot do so against purchasers of the property. Their view appears to be that the right to contribution between several properties rests upon the principle of subrogation. In the recent case of *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee* (1) the Calcutta High Court quote with approval the following statement of the law from an American case (2) :—" While the whole of the debt is secured by the whole [611] of the land, each parcel of the land as between the different properties is equitably subject to so much of the debt as corresponds to the proportion between its value and the value of all the land, and if its owner should be compelled to redeem the mortgage, he can resort to the others for a contribution, and for that purpose is entitled to the benefit of subrogation to the mortgage title. To release any particular parcel from the mortgage encumbrance is to make as respects that any subrogation impossible. The mortgagee, therefore, releases at his peril if he had notice of the conveyance out of which the equities arise, and if he does so without receiving from the releasee his proper contributory share of the debt, he is still chargeable with the residue of that share in favour of the owners of the remaining parcels." Whether this view is correct or not, it seems clear that a mortgagee cannot release part of the mortgaged property for less than its proportion of the mortgage debt and then sue the mortgagor and a puisne mortgagee for the whole of the balance of the mortgage money. Under section 74 of the Transfer of Property Act a puisne mortgagee is entitled to redeem the next prior mortgagee as soon as

(1) (1910) 15 C. W. N. 800.

(2) *Brooks* v. *Benham*, 66 Am. St. Rep. 87.

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the amount due on that mortgage has become payable, and when he has done so, he acquires all the rights and powers of the prior mortgagee as such. In England in a suit by a prior mortgagee against the mortgagor and puisne mortgagees the decree may provide for the exercise by the puisne mortgagees of their successive rights of redemption or for working out the rights of the parties in the event of any puisne mortgagee in front of the mortgagor redeeming the mortgaged property. A form for this purpose is to be found in Seton on Decrees, Volume, 5th Edition, p. 1641, 6th Edition, p. 1979, and was recommended for use in India by their Lordships of the Privy Council in the case of *Gopi Narain Khauna* v. *Bansidhar* (1). It has not hitherto been the practice for courts in these Provinces to make such decrees, probably because there was till recently no form prescribed for the purpose, but such a form has been provided in Appendix D to the first schedule to the Code of Civil Procedure, 1908. It is clear, therefore, that a puisne mortgagee may in a suit by a prior mortgagee be given, not only the right to redeem the prior mortgage, but the right, when he has done so, to go on and enforce his own and the prior mortgage against the property. The [612] puisne mortgagee might be seriously prejudiced if the prior mortgagee had released part of the property from his mortgage for less than its due proportion of the mortgage money and had nevertheless obtained a decree for the whole of the balance due on the mortgage.

It seems to us that the decisions of the Calcutta and Madras High Courts cited above are correct, and that whether they are correct or not, a first mortgagee cannot be allowed to release part of the mortgaged property for less than its due proportion of the mortgage money and then claim a decree against the mortgagor and a puisne mortgagee for the recovery of the whole of the balance of the mortgage money out of the remainder of the property. It may be suggested that this should be the rule only where the mortgagee has notice of the puisne mortgage when he gives the release. It is unnecessary to consider this, for there is no question that the appellants had notice or must be deemed to have had notice of the puisne mortgages when they gave the release. In our opinion, the decision of the District Judge is correct. We dismiss this appeal with costs.

Appeal dismissed.

34 A. 612 (=10 A. L. J. 190=17 I. C. 94).

APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

HABIB-ULLAH KHAN AND ANOTHER (*Defendants*) *v.* LALTA PRASAD AND ANOTHER (*Plaintiffs*).*

[12th July, 1912.]

Civil Procedure Code (1908), *order XXI, rule 23—Remand—Finding that burden of proof has been wrongly laid, without finding that the decision of the first court is wrong.*

It is not a good ground for passing an order of remand under order XLI, rule 23, of the Code of Civil Procedure, to say that the preliminary issue has been decided by the court of first instance on a wrong view of the burden of proof, unless the appellate court also finds that that decision is wrong.

* First Appeal No. 55 of 1912, from an order of I. B. Mundle, Additional Judge of Bareilly, dated the 1st of March, 1912.

(1) (1905) I. L. R. 27 All. 325.

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C. 94.

THIS was a suit for possession of certain alluvial land, the question at issue being whether the land accrued to a certain village as a whole so as to become the property of the zamindars (the plaintiffs) or whether it accrued specially to certain *muafi* land of the defendants. The court of first instance held that the plaintiffs were bound to prove their possession within limitation in respect of this land, and finding that they had failed to do so [613] dismissed the suit on this ground only. In appeal the Additional District Judge did not determine whether the suit was or was not barred by limitation, but on the finding that the court of first instance had laid the burden of proof on the wrong party, decreed the appeal and remanded the suit under order XLI, rule 23, of the Code of Civil Procedure. From this order of remand the defendants appealed to the High Court.

Mr. *B. E. O'Conor*, for the appellants.

Mr. *J. M. Banerji* (for Dr. *Satish Chandra Banerji*), for the respondents.

MUHAMMAD RAFIQ and PIGGOTT, JJ.—The plaintiffs in this case are the proprietors of village Bakhshpur in the Pilibhit district, and the defendants are the holders of certain *muafi* lands situated within the same village. It appears that the *muafi* lands held by the defendants are on the boundary of the village, at a point where it is subject to fluvial action by the Khakhra river. The real dispute between the parties is whether certain land, accreted to village Bakhshpur by alluvion through the action of the Khakhra river at this point, accrues to the *muafi* lands of the defendants and becomes a part of their *muafi* holding, or accrues to the village of Bakhshpur as a whole and becomes portion of the village lands of which the plaintiffs are proprietors. This was the first point raised by the pleadings. The defendants further pleaded that the plaintiff's suit was barred by limitation, as they had never been in possession within 12 years of the institution of the suit of any portion of the land claimed. The court of first instance held that the plaintiffs were bound to prove their possession within limitation in respect of this land, and, finding that they had failed to do this, dismissed the suit on the issue of limitation only. On appeal the learned Additional Judge has neither held that the suit is barred by limitation nor that it is not so barred. He says that the court of first instance has mislaid the burden of proof and that it was for the defendants to show that they had been in possession for more than 12 years before the institution of the suit. On this he has decreed the plaintiff's appeal, and remanded the case under order XLI, rule 23, of the Code of Civil Procedure, for disposal on the merits, the effect of his order is to put the parties in a difficulty as it is open to question whether the learned Munsif accepting the directions of the lower appellate court regarding the burden of [614] proof, could still find that the suit is barred by limitation. In any case, it is not a good ground for passing an order of remand under order XLI, rule 23, to say that the preliminary issue has been decided by the court of first instance on a wrong view of the burden of proof, unless the appellate court also finds that that decision was wrong. Regarding this question of the burden of proof we have heard both parties, and we think it desirable to make one or two remarks. The suit as framed was undoubtedly one to which article 142 of the first schedule of the Indian Limitation (Act No. VIII of 1908) would apply, and the learned Munsif was right in saying that on the suit thus framed, it lies on the plaintiffs to prove both title and possession within limitation. We

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think, however, that the first court did not fully realize the sort of evidence which might, perhaps, have been sufficient to discharge the burden of proof laid on the plaintiff in this matter. If the suit is to be disposed of on the limitation issue alone without any finding on the question of title (and we are not sure that this is, in fact, a suitable way of disposing of the present case), that issue will have to be disposed of on the assumption that the plaintiffs are right and the defendants are wrong on the issue of title. Looking at the case in this way, it could be open to the plaintiffs to prove that the land in suit had accrued by alluvion within limitation, or that although it had accreted more than 12 years before the institution of the suit it had remained within the limitation period, waste or jungle land, in respect of which the presumption would arise that possession went with title. The law on this point is laid down in *Jagadindra Nath Rai* v. *Hemanta Kumari Devi* (1). We may remark on this point that the evidence of the settlement papers as to actual possession does not seem to have been considered at all by the lower appellate court, there is a presumption that the possession of the parties was correctly shown in those records until the contrary is proved.

We set aside the order of the Additional Judge and direct that court to readmit the appeal to its file of pending cases and dispose of it according to law, with due regard to the remarks made in this order. If the lower appellate court is of opinion that the case cannot be disposed of on the question of limitation without a finding on some other issue, it will, of course, be open to it to exercise **[615]** its powers under order XLI, rule 25, of the Code of Civil Procedure. But the case should not be remanded under rule XXIII of that order unless the finding on the question of limitation is definitely reversed. Costs here and hitherto will abide the event.

Appeal allowed—Cause remanded.

34 A. 615 (=16 I. C. 392=10 A. L. J. 217).

APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

KRISHNA JIVA TEWARI AND OTHERS (*Defendants*) *v.* BISHNATH KALWAR AND OTHERS (*Plaintiffs*).*

[15th July, 1912.]

Act No. I of 1872 *(Indian Evidence Act), section* 69*—Proof of document—Document required by law to be attested—Death of attesting witnesses—Hindu law—Joint Hindu family—Parties.*

On execution of a deed of mortgage the names of two out of the four attesting witnesses were written by the scribe, who also signed the document himself. *Held* that, it being necessary to prove the deed of mortgage after the death of all the attesting witnesses and the scribe, it was sufficient to prove the handwriting of the scribe, *Radha Kishen* v. *Fateh Ali Ram* (2) referred to.

Where all the adult members of a joint Hindu family appear on the record as plaintiffs or defendants, it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit. *Hori Lal* v. *Munman Kunwar* (3) and *Nathu Lal* v. *Lala* (4) referred to.

[Rel. 79 I. C. 1001=22 A. L. J. 702; Ref. 72 I. C. 722=36 C. L. J. 234.]

* Second Appeal No. 1175 of 1911, from a decree of Sri Lal, District Judge of Ghazipur, dated the 28th of June, 1911, modifying a decree of Chajju Mal, Subordinate Judge of Ghazipur, dated the 17th of March, 1911.

(1) (1912) 8 A. L. J. 1176.
(2) (1898) I. L. R 20 All. 532.
(3) (1912) I. L. R. 34 All. 549.
(4) (1912) I. L. R. 34 All. 572.

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The plaintiffs in the case sued as heirs of the original mortgagee of a mortgage executed on the 9th of August, 1883, for sale of the mortgaged property. The defendants were the representatives of the original mortgagors, who were four out of five brothers, members of a joint Hindu family, and certain subsequent transferees. The court of first instance (Subordinate Judge of Ghazipur) decreed the plaintiffs' claim, exempting, however, a one-fifth share from the operation of the decree. The defendants appealed, but their appeal was dismissed by the District Judge. Some of the defendants then appealed to the High Court.

Mr. *Muhammad Ishaq Khan* and Babu *Surendro Nath Sen*, for the appellants.

Mr. *M. L. Agarwala* and Munshi *Gobind Prasad*, for the respondents.

MUHAMMAD RAFIQ and PIGGOTT, JJ. :—This was a suit for sale upon a mortgage of August the 9th, 1883, brought by the heirs **[616]** and representatives of the original mortgagee against the heirs and representatives of the four mortgagors, together with some subsequent transferees. The Court of first instance decreed the plaintiffs' claim, exempting a one-fifth share in the property originally mortgaged from the operation of the decree. An appeal by the defendants was dismissed by the District Judge of Ghazipur. Coming to this Court in second appeal, the defendants or rather six defendants out of a large number who were impleaded in the court of first instance, have raised substantially five points. For convenience sake, we deal with them in the order in which they were raised. The first point taken is that the evidence on the record is not legally sufficient to prove the execution of the deed in suit, regard being had to the provisions of section 59 of the Transfer of Property Act, No. IV of 1882, and sections 68 and 69 of the Indian Evidence Act, No. I of 1872. This point was not taken in the court of first instance, and there was nothing in the memorandum of appeal in the lower appellate court to warn the plaintiffs that objection was being taken to the technical sufficiency of their evidence. The deed in suit purports to be signed by four marginal witnesses, of whom two are literate and two are illiterate. The scribe of the deed has signed his own name at the foot, and has written the names of the two illiterate witnesses. The plaintiffs produced one witness to prove execution of the deed in suit by the mortgagors, who has been accepted as a reliable witness by the courts below, and we must hold that his deposition sufficiently meets the requirements of section 69 of the Evidence Act far as concerns proof of the signatures of the executants. There is evidence that all the marginal witnesses and also the scribe, are dead, and we must presume that this evidence has been accepted by the courts below, as it would have been impossible for them, otherwise, to hold the document proved. The plaintiffs have proved the handwriting of the scribe, both as regards his own signature at the foot of the deed, and as regards the signatures of the witnesses, Babu Lal and Sundar Rai, which are in the handwriting of the said scribe. In the case of *Radha Kishen* v. *Fateh Ali Ram* (1) it was held by this Court that the scribe of a deed who had signed his name at the foot thereof, though not explicitly described as an attesting witness, **[617]** could give evidence on the same footing as an attesting witness, provided he could prove that the deed was, in fact, executed in his presence. There is a fair presumption to be drawn from the fact that the signatures of two of the attesting witnesses in this case were written by the pen of the scribe that the said scribe was present at the execution of the

(1) (1898) I. L. R. 20 All. 532.

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deed. We are of opinion, therefore that the requirements of section 69 of the Indian Evidence Act with reference to proving the attestation of at least one attesting witness when all the attesting witnesses are dead, have been sufficiently complied with in this case by proof of the handwriting of the scribe and by the fact that two of the attesting witnesses appear to have signed by the pen of the said scribe.

The second point taken is the most substanial point in this case The bond in suit was executed by four brothers, Umrao, Sheoperson, Hari and Gopal. It is an admitted fact that at the date of the execution these four were members of a joint undivided Hindu family. It is also admitted that there was living at that time a fifth brother, named Bhondu, who was also a member of the joint Hindu family. Some evidence has been offered, on behalf of the plaintiffs, to prove that Bhondu would have been asked to join in the execution of the deed, but for the accident that he was lying ill at the time. The contention for the defendants appellants is that four of the brothers had no right to hypothecate any portion of the joint family property without the authority of the fifth, and that, in consequence of Bhondu's not having joined in the execution of this deed the mortgage in suit is not binding even as against the interests of the four mortgagors in the joint family property. There are two circumstances in the case which appear to us decisive. In the first place, the deed in suit was executed for legal necessity, namely, to pay off an antecedent debt due from the father of the four executants, a debt for the payment of which the four mortgagors and their brother, Bhondu, were all liable because of their pious duty as Hindu sons. In the second place, it is to be noticed that the suit as now brought is not against a joint family. The joint family has been broken up, and the defendants who are the legal representatives of the original motgagors, form a number of separate groups, the members of which are joint amongst themselves but separate from the rest. Without any general discussion of the questions of law that have been argued [618] before us, we are content to say that under these circumstances we are satisfied that the mortgage in suit is enforceable at least against the shares of the four executants of the mortgage deed. The question whether the courts below were right in exempting Bhondu's one-fifth share is not before us, as the plaintiffs never challenged the correctness of the decree of the court on this point.

It appears that one of the groups of defendants before us included a father and son, and that one Ram Prasad, a minor son of the latter defendant, was not impleaded in the suit at all. It is contended on behalf of the appellants that this omission is fatal to the entire suit, it being conceded that Ram Prasad cannot now be added as a defendant, the period of limitation for a suit against him having expired. On the principles laid down by the fatest rulings of this Court in *Hori Lal* v. *Munman Kunwar* (1) and *Nathu Lal* v. *Lala* (2), it appears to us that the courts below were right in holding that the minor Ram Prasad was sufficiently represented in the suit by his father and grandfather. We would refer to the remarks of Mr. Justice CHAMIER, on page 417 of the report in the second of the rulings above referred to. In cases in which all the adult members of a family appeared on the record as plaintiffs, it was held that this alone justified the presumption that they were acting as managers on behalf of themselves and of the minor members of their family who had

(1) (1912) I. L. R. 34 All. 549. (2) (1912) I. L. R. 34 All. 572.

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not joined in the suit. We think the same principle applies to the case of defendants.

The fourth point taken refers to a payment of Rs. 125, admitted in the plaint. It is sufficiently met by the fact that the interest claimed in the plaint is simple and not compound, and there is nothing in the pleadings or evidence to suggest that this payment of Rs. 125 could or ought to have been credited to principal.

The fifth point is the last point taken on behalf of the appellants, and it refers to an issue raised in the written statement of Baijnath Rai, defendant No. 23. The scanty information available on the record makes it difficult for us to understand the precise circumstances on which this plea is based. Baijnath Rai was impleaded in the plaint simply as a subsequent mortgagee, no details being given of his mortgage. In his written statement [619] this defendant pleaded that a portion of the property in suit had been hypothecated to one Bija or Bijai Rai under a deed of August the 1st, 1886. He added that the said Bijai Rai had brought a suit upon his mortgage in the year 1898, impleading Raja Ram, whom he described as the ancestor of the plaintiffs, as a mortgagee subsequent to himself. The contention is that, as the said Raja Ram made no defence to that suit, the plaintiffs are estopped in the present suit from claiming priority for their mortgage as against that in favour of Bijai Rai The courts below have contented themselves with remarking that, even if this plea were effective as against Raja Ram, there was nothing to show that Raja Ram represented all the present plaintiffs in that suit of 1898, and that there were still remaining a number of plaintiffs entitled to maintain the suit as brought. So far as we can gather from the materials on the record, this finding appears to be correct. There does not seem to be anything on the record to show how the defendant, Baijnath Rai, comes to have any interest in the mortgage in favour of Bijai Rai, or that he was impleaded as defendant because of this mortgage of August 1st, 1886. Again, the decree of September the 9th, 1898, which is the only evidence on the record on this point, merely shows that Raja Ram was impleaded as son and heir of Amrit Lal, and that the suit brought by the plaintiff, Bijai Rai, was decreed. It does not even show in what capacity Raja Ram was impleaded, or what interest he had in the subject-matter of the suit. It is incumbent on a defendant who raises the plea of *res judicata* to lay before the court adequate materials for a full and proper appreciation of that plea and a proper decision thereon. This has certainly not been done in the present case. For these reasons we overrule all the objections taken on behalf of the appellants and dismiss the appeal with costs.

Appeal dismissed.

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[620] PRIVY COUNCIL.

SHANKAR DIN AND OTHERS (*Plaintiffs*) *v.* GOKAL PRASAD AND OTHERS (*Defendants*).*

[21st and 25th June and 18th July 1912.]

[*On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.*]

Mortgage—Redemption—Subsequent agreement qualifying right to redeem—Loss of deed—Onus of proof of terms of mortgage—Act No. I of 1869 (*Oudh Estates Act*), *section* 6—*Limitation—Compromise barring right to redemption.*

There is nothing in law to prevent the parties to a mortgage from coming to a subsequent arrangement qualifying the right to redeem.

In this case the mortgage which it was sought to redeem was dated in 1846, and in 1870, the mortgagors had, in consideration of certain additional benefit reserved to them under a compromise, agreed to subject their right of redemption to certain conditions. The deed having been lost, the onus was on the plaintiffs to prove the terms of the mortgage, so as to show that the suit was not barred by section 6 of the Oudh Estates Act (I of 1869) [see *Raja Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh* (1)] which onus he was found unable to discharge.

Held (affirming the decision of the Judicial Commissioner of Oudh) that the plaintiffs were not in any case entitled to redeem as long as there was no breach by the defendants of the covenants contained in the compromise.

APPEAL from a judgment and decree (28th July, 1908) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (15th May, 1907) made on appeal by the Court of the Subordinate Judge of Biswan, the latter decree having affirmed a decree 12th December, 1906), by the court of the Munsif of Biswan.

The main question for decision on the present appeal was whether the appellants were entitled to redeem a mortgage executed on the 12th of July, 1846, by one Ahlad Singh, in favour of one Daryao Singh.

The mortgaged properties were the villages of Gathia and Pipri, and the mortgage money was Rs. 388-15-0. The plaint alleged that the mortgagor was to retain possession of 250 bighas of land and receive the sum of Rs. 87-8-0 annually from the mortgagee, who was to have possession of the rest of the villages and appropriate the profits in lieu of interest. Redemption was to take place in any year during the fallow season.

The first ten appellants were the representatives of Ahlad Singh, the mortgagor ; the eleventh appellant was a purchaser [621] from them. On a partition between the descendants of Daryao Singh, the mortgagee (whose name was entered in lists 1 and 3 under section 8 of Act 1 of 1869) the village of Gathia fell to the share of Shankar Bakhsh Singh, whose estate was under the management of the Court of Wards. The village of Pipri was allotted to Hardeo Bakhsh Singh, and descended to his widow Musammat Ram Kali, by whom it was transferred as a waqf to the President of the Kyastha Scholarship Trust, Allahabad (the respondent No. 1). The suit was originally brought to redeem both villages, but so far as it related to Gathia it was dismissed in default of sufficient notice to the Court of Wards, and the present appeal was confined to the right to redeem the village of Pipri.

* *Present.*—Lord SHAW, SIR JOHN EDGE and Mr. AMEER ALI.

(1) (1876) L. R. 3 I. A. 85.

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For the defendant No. 6 (respondent No. 1) it was admitted that Ahlad Singh had made a possessory mortgage in 1846, but its terms as stated in the plaint were denied. The defendants did not, however, produce the mortgage deed. They alleged that it was lost and "not found in spite of search;" but they produced no evidence to prove either the loss of the deed, or that any search had ever been made for it. It was also pleaded that the suit could not be maintained in consequence of a compromise made on the 7th of January, 1870, between the predecessors of the parties at the time of the regular settlement of Oudh. The terms of the compromise and the order of the Settlement Commissioner thereon, dated the 17th of January, 1870, are sufficiently set out in the judgment of their Lordships of the Judicial Committee. The 17th paragraph of the written statement of Gokal Prasad (respondent No. 1) was—"Plaintiff's claim is barred by limitation and the defendants hold proprietary possession."

The Oudh Estates Act (I of 1869) became law on the 12th of January, 1869, and under section 6 of that Act the following mortgages only could be redeemed from a taluqdar:—"(*a*) When the instrument of mortgage was executed on or after the 13th of February, 1844 and fixed no term within which the property comprised therein might be redeemed; or (*b*) When the instrument of mortgage fixed a term within which the property comprised therein might be redeemed, and such term did not expire before the 13th of February, 1856."

On the pleadings 9 issues were settled by the Munsif, of which only two were material on this appeal namely:—(3) "Did Ahlad [622] Singh, son of Kirpa Ram, mortgage the villages in suit with possession to Daryao Singh, for Rs. 388-15-0 on the 12th of July, 1846, with the conditions given in the plaint," and (5) "How do the compromise, dated the 7th of January, 1870, and the decision of the Settlement Court dated the 17th of January, 1870, affect the plaintiffs' claim?"

On these issues the Munsif held on the oral evidence that the execution of the mortgage was proved and that its terms were as stated in the plaint. He was of opinion that the proceedings taken at the settlement did not bar redemption, and he made a decree for redemption of the one village of Pipri.

The Subordinate Judge on appeal decided that the oral evidence produced by the plaintiffs and accepted by the Munsif was valueless to prove the mortgage or its terms, but that from the documentary evidence he was satisfied that the mortgage referred to in the compromise was that which the plaintiffs now sought to redeem; and that under the circumstances, and on the inferences to be drawn from the non-production of the mortgage deed by the defendants, the presumption was in favour of the plaintiff's right to redeem. He therefore agreed with the Munsif that the settlement proceedings were no obstacle to the maintenance of the suit. As to these holdings, he said:—

"It is urged before me that as the plaintiffs have failed to prove that the mortgage-deed fixed no term within which the property comprised therein might be redeemed or that, if it fixed such a term, it did not expire before the 13th of February, 1856, no decree could be passed in plaintiffs' favour. The learned counsel, Mr. Lincoln, who argued the case on behalf of the plaintiffs before me did not protest against the contention being raised. That contention seems to have been raised before the court below at the time of argument. The learned Munsif allowed it to be raised and disposed of it. But that contention does not appear to have been raised in the pleadings. The only pleas that might be said to embody the above contention are the plea of limitation and another plea that the plaintiffs have no *locus standi*. I do not think

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that the said pleas cover the contention above referred to. The plaintiffs never stated in their plaint that the mortgage-deed in suit fixed any term. What they said was that, according to the conditions of the mortgage-deed, the mortgage was redeemable in any fallow season. It does not amount to the fixation of a term within the meaning of section 6 of the Oudh Estates Act. The mere denial by the defendant No. 6 of the conditio s of the mortgage-deed does not amount to the raising of a plea that by the mortgage-deed in suit a term for redemption was fixed and that it expired before the 13th of February, 1856.

[623] After referring to the case of *Raja Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh* (1) and distinguishing it from the present, the Subordinate Judge continued:—

"I do not think the authority noted above is applicable to this case. If the defendants No. 6 wanted to raise a plea under section 6 of the Oudh Estates Act he should have pleaded expressly that the term fixed for redemption in the mortgage-deed expired before the 13th of February, 1856. This plea does not arise by the mere denial of the averment that no term for redemption was fixed in the deed However, if the pleadings in the case be so construed as to raise the aforesaid plea, the authority of their Lordships of the Privy Council in the case noted above will be fatal to the plaintiffs' case. But, as I have distinguished the case noted above from the one before me, I think the plaintiffs are entitled to redeem. Every mortgage is in its nature redeemable and its redemption is barred either by act of the parties or by force or law. It is not for a plaintiff, mortgagor, to prove in absence of any plea that no conceivable acts of the parties have rendered the mortgage incapable of redemption, or that there is no law which stands in the way of redemption."

The appeal was accordingly dismissed with costs. The respondent No. 1 appealed to the Court of the Judicial Commissioner, (Mr. L. G. EVANS, Additional Judicial Commissioner, and Mr. T. C. PIGGOTT, officiating Second Additional Judicial Commissioner), who reversed the decisions of the lower courts.

The material part of their judgment was as follows:—

"In this appeal the following points have to be decided:—

"First, whether the plaintiffs have proved the terms of the mortgage-deed as set forth by them in their plaint; and secondly, if the terms are not proved, whether there is anything in the compromises alluded to above, which would enable the plaintiffs to redeem the mortgage, having regard to the provisions of section 6 of Act I of 1869.

"With reference to the first point, the learned Subordinate Judge discussed the evidence produced on behalf of the plaintiffs and found that the oral evidence as to the contents of the mortgage-deed was wholly insufficient and worthless. As to the documentary evidence, he discussed the terms of the compromises noted above. He was satisfied that they did refer to the mortgage-deed which the plaintiffs seek to redeem, but he remarked that he was unable to ascertain its terms and that the plaintiffs had failed to prove what they were."

"Upon this point, the case of *Raja Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh* (1) is the only authority. In that case, it was held that the burden of proof lay upon the plaintiff to substantiate his case by evidence. 'But.....regard must be had to the opportunities which each party may naturally be supposed to have of giving' evidence; and although the burden of proof *prima facie* in this case in their Lordships view is upon the plaintiffs, still they think that the consideration should not be omitted that the defendant would naturally have the mortgage, and that it would be, *prima facie* at all [624] events, more in his power to give accurate evidence of its contents than in that of the plaintiff.' In this particular case, it is necessary to consider what trustworthy evidence has been produced by the plaintiffs. I concur entirely with the learned Subordinate Judge in his opinion as to the oral evidence produced by them. He regarded it as worthless and has given good reasons for his decision. I have persued the evidence and have come to the same conclusion.

"The other evidence as to the terms of the mortgage-deed consists of the compromises of 1870, which are admitted by the parties. It is true that these compromises give details of the land held by the ancestors of the plaintiffs and the annual sum

(1) (1876) L. R. 3 I. A. 85.

payable to them by the defendants' predecessors, and in the plaint these details are given as one of the conditions under which the property is mortgaged. Under section 61 of the Evidence Act the contents of a document can only be proved by *primary* or *secondary* evidence. The plaintiffs are unable to produce *secondary* evidence of the contents of the mortgage-deed within the meaning of section 63 of the Evidence Act, and I am compelled to find that the plaintiffs have failed to produce any legal evidence, which is admissible, as to the terms of the mortgage they seek to redeem. Therefore, as the plaintiffs are unable to give any *prima facie* proof that the mortgage is redeemable, it must be held that they cannot succeed, unless they can show that there is anything in the terms of the compromises of 1870 which would entitle them to a decree for redemption. It might be urged that the predecessors of the defendants admitted in the compromises that the mortgage was redeemable and that that admission was made one year after Act I of 1869 was passed, when all the ta'uqdars knew perfectly well that mortgages executed after the 13th of February, 1844, could only be redeemed if they came within the meaning of section 6 of the Act. But I am unable to find that any admission made by a mortgagee would operate as to make a mortgage redeemable, which *by law*, was irredeemable at the time when the admission was made. The plaintiffs have failed to discharge the burden laid on them of proving that the mortgage can now be redeemed, and I hold that the subsequent agreement of 1870 cannot operate so as to extend a period of limitation which had already expired according to the special law provided for cases of this kind in Act I of 1869. All that I find established from the compromises of 1870 is that the parties agreed that no action should be taken by the mortgagors so long as they are retained in possession of certain lands assigned to them in under-proprietary tenure. If their possession was disturbed, they were entitled to take action under their mortgage-deed of 1846. It is not pretended that the defendant (No. 6) or his predecessors have broken the terms of the compromises, and therefore the plaintiffs, according to the strict terms of the compromises, have no right to enforce the mortgage of 1846. If they now insist upon their legal right as mortgagors to institute a suit for redemption independently of the terms of the compromises, they have to show by evidence which is legally admissible that the mortgage is redeemable. This they have failed to show, and I hold that the claim for redemption should have been dismissed."

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The appeal was consequently allowed and the suit dismissed with costs.

On this appeal by the plaintiffs

[625] *De Gruyther K. C.*, and *Ross* for the appellants contended that having regard to the special circumstances of the case the terms of the mortgage were sufficiently proved to enable the appellants to redeem.

The respondent, it was submitted, in whose possession the mortgage had all along been, should, if it were lost as he alleged, have produced some evidence of the loss, and that a search had been made for it, but no such evidence was given. The case of *Kishen Dutt Ram* v. *Narendar Bahadur Singh* (1) was distinguishable from the present case. It was held by the Judicial Commissioner that the mortgage was not redeemable in consequence of the provisions of section 6 of the Oudh Estates Act (1of 1869). No plea, however, raising that defence was taken in the pleadings: the only plea that could possibly include it was paragraph 17 of the respondents' written statement, as to limitation, which did not cover the point, and it therefore ought not to have been allowed to be raised on appeal. No term was fixed in the mortgage for redemption. As to the compromises of 1870, it was contended that they did not operate as an agreement under which the right of redemption could not be exercised and did not bar the right of redemption. The onus was on the respondent and he had not discharged it. Reference was made to the Oudh Estates Act (I of 1869), sections 3, 4, 5 and 6: Sykes' Taluqdari Law, page 163; and the Commentaries on the Transfer of Property Act (IV of 1882) by Shepbard and Brown (7th Edition), section 6, note 1.

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Sir Erle Richards, *K. C.*, and *B. Dube* for the respondent contended that the appellants had failed to prove the terms of the mortgage, or to show that the mortgage was still subsisting and was redeemable. For 42 years no claim had been put forward by the appellants to the property. At the time of the compromises in 1870 there was no right of redemption which could have been enforced. The right of redemption could only be exercised on the conditions in the compromises and on no other. The onus had been rightly placed on the appellants.

Ge Gruyther, *K. C.*, replied.

[626] 1912, July 18th.—The judgment of their Lordships was delivered by Mr. AMEER ALI.—

The sole question for determination in this appeal is whether the plaintiffs are entitled in this action to a decree for redemption in respect of certain property mortgaged so long ago as 1846 by their ancestor, Ahlad Singh, to one Daryao Singh, whom the defendants represent.

The suit was brought in the Court of the Munsif of Biswan in the Province of Oudh in respect of two villages, Pipri and Gathia. This officer dismissed the claim in respect of Gathia for failure on the part of the plaintiffs to serve sufficient notice on the Court of Wards, who held the village for one of the defendants; but he made a decree for redemption in respect of Pipri, and his decision was affirmed on the appeal of the defendants by the Subordinate Judge. On second appeal to the Court of the Judicial Commissioner of Oudh, this decree has been reversed and the suit dismissed with costs. The present proceedings refer only to Pipri.

The plaintiffs have appealed to His Majesty in Council, and their main contention before this Board is that, having regard to the admitted position of the parties as mortgagors and mortgagees, the learned Judges have taken a wrong view of their relative rights.

In the view their Lordships take of the case they do not deem it necessary to set out at any length the facts on which the parties proceeded to trial. It is not disputed that in 1846, Ahlad Singh mortgaged the two villages in question to Daryao Singh and that since then the mortgagee and his representatives have been in possession. As the transaction took place ten years before the annexation of Oudh, it came within the purview of the Oudh Estates Act of 1869, section 6 of which imposed certain restrictions on the right of redemption in respect of properties held by the taluqdars on mortgage.

The plaintiffs were naturally unable to produce the deed of mortgage, and the defendants would not produce it on the ground that it was lost. The onus was thus cast on the plaintiffs to show that they had, in view of section 6 of the Oudh Estates Act, the right to redeem. To discharge this burden and to prove the contract as stated by them in their plaint they relied in part on [627] certain oral evidence and in part on proceedings *inter partes* which took place in 1870 in the course of settlement disputes regarding the lands of which they were in possession under the terms of the mortgage in question. In the course of those proceedings certain *razinamahs* or deeds of compromise were entered into between the parties and filed in the court of the Extra Assistant Commissioner, who, on the 17th of January, 1870, made the following order :—" With the consent of the parties the Court decrees the claim subject to the conditions set forth in the *razinamahs*." These documents clearly show that, although the right of redemption was admitted as subsisting, it was subjected to certain conditions. The plaintiffs' right to the possession of the lands and to the

enjoyment of the annuity reserved to them under the deed of 1846, together with various other rights, were admitted, some further lands were conceded, and then followed an important covenant, which in the document executed by the plaintiffs' ancestors is in these terms :

"Should Anant Singh or any of his descendants resume the under-proprietary tenure, then we the executants may at first obtain a decree in respect of the said proprietary tenure.

"Should they even after the decree fail to deliver possession, then we the executants and our heirs shall be at liberty to take back the villages Pipri and Gathia according to the terms of the deed executed by Ahlad Singh and others in favour of Thakur Daryao Singh after compliance with the said terms."

The same covenant in almost identical language is to be found in the deed of compromise executed by the persons who then represented the mortgagee. They say as follows :—

"Whenever they convert the same into an agricultural land they should pay rent therefor. Wherefore we with our own volition do record that neither we nor our heirs shall, generation after generation, resume the under-proprietary land. And in case we or our heirs resume the same, the said Madho Singh and others may by suing in Court obtain a decree.

"If we fail to deliver the land after such a decree then Madho Singh and others and their heirs shall be competent to take back, recover the villages of Pipri and Gathia after complying with the provision of the deed executed by Ahlad Singh and others in favour of Thakur Daryao Singh, our deceased father."

In their Lordships' judgment the arrangement arrived at in 1870 is conclusive as regards the present action. Whatever may have been the mortgagor's right under the deed of 1846, the parties deliberately came to a settlement in 1870 by which his representatives for certain additional benefit reserved to them under the *razinamahs*, agreed to subject their right of redemption [628] to certain conditions. There is nothing in law to prevent the parties to a mortgage from coming to any arrangement afterwards qualifying the right to redeem. In the present case it is not alleged that the action is brought upon a breach of the covenant contained in the deed of compromise. Their Lordships are therefore of opinion that the suit was rightly dismissed by the Judicial Commissioners, and they will humbly advise His Majesty to dismiss this appeal with costs.

Appeal dismissed.

Solicitors for the appellants :—*T. L. Wilson & Co.*
Solicitors for the respondent No. 1.—*Barrow, Rogers & Nevill.*

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34 A. 620=14 Bom. L. R. 1098=23 M. L. J. 621=15 C. C. 285=12 M. L. T. 419 =1912 M. W. N. 1061=10 A. L. J. 344= 17 C. W. N. 1 =17 C. L. J. 9.

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34 A. 628 (=16 I. C. 183 =10 A. L. J. 252).

APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

SRI CHAND (*Decree-holder*) *v.* MURARI LAL (*Judgment-debtor*).*

[17th July, 1912.]

Act No. III of 1907 (Provincial Insolvency Act), sections 16 and 34—Execution of decree against the insolvent during pendency of insolvency proceedings—Right of decree-holder in respect of proceeds of property attached and sold and money attached before order of adjudication.

Whilst proceedings in insolvency under the Provincial Insolvency Act, 1907, were pending, certain immoveable property of the insolvent was attached and

* First Appeal No. 79 of 1912 from an order of Sushil Chandra Banerji, Officiating Second Additional Judge of Meerut, dated the 29th of March, 1912.

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APPELLATE CIVIL.

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sold in execution of a decree against him, and the proceeds deposited in court for the benefit of the decree-holder. The decree-holder also attached certain moneys which had been paid into court to the credit of the insolvent, but up to the date of the order of adjudication had taken no further steps to possess himself thereof. *Held* that the decree-holder was entitled as against the receiver to the benefit of the proceeds of execution of his own decree, but not to the money of the insolvent which he had attached. *Peacock* v. *Madan Gopal* (1) followed.

[Fol. 2 Pat. L. J. 235=39 I. C. 246 ; 42 All. 336=18 A. L. J. 287=59 I. C. 67.]

THE facts of this case were as follows :—

Ram Saran Das and two others were, on an application by one of their creditors, dated the 21st of February, 1911, adjudged insolvents on the 1st of February, 1912. The appellant, Sri Chand, was one of the creditors and was made a party to the insolvency proceedings. In execution of a decree which Sri Chand had obtained against the persons adjudged insolvents, he attached, in November, 1911, a sum of Rs. 1,139-12-3, which was in deposit in the court of the Subordinate Judge to the credit of those persons; and, further, **[629]** caused a house of theirs to be sold by auction, the sale proceeds of which were deposited in court to his credit in January, 1912. At the date of the order of adjudication, namely, the 1st of February, 1912, both these sums of money remained unpaid to Sri Chand. He applied, on the 6th of March, 1912, for payment of these sums to himself, claiming, under section 34 (1) of the Provincial Insolvency Act, priority over the receiver. The application was refused. From the order of refusal he appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellant.

Sri Chand has priority over the receiver in respect of the two sums. There was nothing to prevent him from executing his decree and realizing the money for himself as long as the order of adjudication was not passed. Both the sums are assets "realized" within the meaning of section 34 (1) before the date of the order of adjudication. As to the item of Rs. 1,139-12-3, as soon as Sri Chand attached the money, it became payable to him and could be said to have been "realized." Upon the attachment the court had no option but to make it over to him; the writing of a formal order being, therefore, only a mechanical act, its absence is immaterial. When the money was attached it came to be at my disposal and ceased to be the property of the judgment-debtors. Decree-holders attaching subsequently to the receipt the money by the court which ordered the first attachment cannot claim contribution; *Srinivasa Ayyangar* v. *Seethiramayyar* (1). The words "assets realized" were also used in section 295 of the old Code of Civil Procedure. The meaning of the word "realized" as used there was explained in *Manilal Umedram* v. *Nanabhai Maneklal* (3). The money was in deposit in the Court of the Subordinate Judge ; it was attached by an order of the court of the Second Additional Subordinate Judge; and as soon as it was received by the latter court, it became an asset "realized." I also rely on the case of *Debi Prasad* v. *O. M. Chiene* (4). Similarly, as regards the sale proceeds of the house, as soon as the money was paid into court, it became an asset realized, although it was not actually paid over to Sri Chand. The ruling relied on by the lower court in *Frederick Peacock* v. *Madan Gopal* (1) is clearly distinguishable. There the property had been attached but not **[630]** sold prior to the order of adjudication and appointment of a receiver.

(1) (1902) I. L. R. 29 Cal. 428.
(2) (1895) I. L. R. 19 Mad. 72.
(3) (1903) I. L. R. 28 Bom. 264.
(4) (1912) 9 A. L. J. 707.

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The respondent (receiver) was not represented.

MUHAMMAD RAFIQ and PIGGOTT, JJ. :—In this case, the appellant, Sri Chand, held a decree against one Murari Lal. Proceedings to have this judgment-debtor declared insolvent were pending from the 21st of February, 1911, to the 1st of February, 1912. Sri Chand, as one of the creditors, had notice of these proceedings. While, however, they were going on, he took an opportunity to continue executing his decree, and we can find nothing in law to prevent him from doing so, up to the date when an order of adjudication was passed. He attached certain immovable property of his judgment-debtor and got it put up to sale, and the sale proceeds were deposited in court in the month of January, 1912. We think he was entitled to the money so deposited, and the order of the court below to the contrary was wrong. The deposit was for the benefit of the decree-holder. It was not the property of the judgment-debtor which could vest in the court or in the official receiver under the provisions of section 16, clause (2) of the Provincial Insolvency Act, and it also came within the definition of the assets realized in the course of execution within the meaning of section 34 of the same Act. We think, however, that the order of the court below was right and the appeal should not be allowed in respect of another item of Rs. 1,139-12-3. This seems to have been the surplus proceeds of a sale of some other property of Murari Lal's in execution of some other decree. In the month of November, 1911, it was lying to the credit of Murari Lal in the court of the Subordinate Judge of Meerut. Sri Chand applied to the court executing his decree to attach this money for his benefit, and obtained an order of attachment. But nothing further had been done before the order of adjudication against Murari Lal was passed. There had been no order under rule 8 of order XXI, Code of Civil Procedure, vesting the money so attached in the decree-holder. It was, therefore, the property of the insolvent on the date on which the order of adjudication was passed and so vested in the insolvency court and became divisible among the creditors. We are not prepared to hold that section 34 of the Provincial Insolvency Act gives the appellant, Sri Chand, any **[631]** special claim in respect of this money. It may have been, and no doubt was, realized in the course of the execution of the other decree, in the execution of which the sale took place; but it was attached by Sri Chand simply as movable property belonging to his judgment-debtor in the hands of the court of the Subordinate Judge. It was, therefore, subject to the provisions of the Code which deal with the satisfaction of a decree by attachment of movable property. We think the ruling relied on by the court below in *Frederick Peacock* v. *Madan Gopal* (1) is in point and should govern our decision. We, accordingly, allow this appeal only to this extent, that we set aside the order of the court below as regards the sale proceeds deposited in the court of the Second Additional Subordinate Judge of Meerut in the month of January, 1912, as proceeds of the auction sale held in execution of Sri Chand's own decree. The money thus deposited, Sri Chand is entitled to realize and to apply to the satisfaction of his decree.

We dismiss the appeal as regards the attached item of Rs. 1,139-12.3 holding that the court below was right in directing this sum to be realized for the benefit of the creditors in insolvency. The appellant will get his proportionate costs.

Appeal allowed in part.

(1) (1902) I. L. R. 29 Cal. 428.

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34 A. 631=10 A. L. J. 222 =17 I. C. 19.

34 A. 631 (=10 A. L. J. 222=17 I. C. 19).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

ISHRI PRASAD (*Defendant*) *v.* GOPI NATH AND OTHERS (*Plaintiffs.*)*

[19th July, 1912.]

Act No. III of 1877 (*Indian Registration Act*), *section* 50—*Registration—Mortgage—Priority between registered and unregistered deeds.*

Property which was the subject of two unregistered mortgages of different dates was sold in execution of a decree on the later of the two mortgages and purchased by the decree-holder, who afterwards sold it by an unregistered deed to Bal Kishan, who in turn sold it by a registered deed without making any mention of the prior unregistered mortgage. *Held* that after such sale no suit would lie on the prior unregistered mortgage. *Sobhagchand Gulabchand* v. *Bhaichand* (2), *Baldeo Prasad* v. *Baldeo* (2) and *Ram Lal* v. *Thakur Bachcha Singh* (4) referred to.

[Fol. 18 I. C. 724.]

THE facts of this case were as follows:—

Shib Lal and others executed a simple mortgage on the 21st of August, 1894, in favour of Gopi Nath and others by means of an unregistered deed. Subsequent to that date the same mortgagors **[632]** executed another simple mortgage by means of an unregistered deed on the 30th of May, 1896, in favour of Bindraban. Bindraban sued upon his mortgage, and in execution of his mortgage decree purchased the property. He, on the 10th of March, 1910, by an unregistered deed of sale sold the property to Bal Kishan, and Bal Kishan subsequently by a registered deed of sale sold the property to Ishri Prasad, the defendant. The deed of sale purported to transfer the property free of all incumbrances. The plaintiffs brought the present suit to enforce their mortgage of the 21st of August, 1894, and impleaded Ishri Prasad as defendant. Ishri Prasad pleaded that because he had purchased the property from Bal Kishan by a registered deed of sale, he was entitled to priority under section 50 of the Registration Act. The lower appellate Court held that he was not entitled to priority and decreed the plaintiff's claim. On second appeal the decree was confirmed by a single Judge of the High Court in the following judgment:—

"In my judgment there is no force in this appeal. The suit which has given rise to it was brought by the respondents for sale upon a mortgage, dated the 21st of August, 1894, for Rs. 99 executed by Ram Bakhsh and others. On the 30th of May, 1896, the same mortgagors mortgaged the same property to one Bindraban. Both the mortgage-deeds were unregistered. Bindraban brought a suit for sale upon his own mortgage, and in execution of the decree obtained by him sold the mortgaged property and bought it himself. His son sold it to one Bal Kishan, whose heir sold it to Ishri Prasad, defendant, on the 7th of April, 1910. This sale-deed was registered. Ishri Prasad claims that by reason of his sale-deed being registered, he has priority over the plaintiff by virtue of the provisions of section 50 of the Registration Act. In my opinion the lower appellate court has rightly overruled his plea. The mortgage in favour of Bindraban was a mortgage of such rights as existed in the mortgagor after the execution of the prior mortgage in favour of the plaintiffs. It is these rights which Bindraban brought to sale in execution of his decree, and it is these rights only which passed to him under his auction purchase. Ishri Prasad under his purchase had acquired only such rights as Bindraban and his successors in title possessed. Therefore Ishri Prasad has only acquired the rights of the mortgagors which existed in them after the execution of the mortgage-deed in favour of the plaintiffs,

*Appeal No. 34 of 1912 under section 10 of the letters Patent.

(1) (1882) I. L. R. 6 Bom. 193.
(2) Weekly Notes, 1901, p. 112.
(8) (1912) 10 A. L. J. 114.

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that is to say, the equity of redemption of the mortgagors. That being so, Ishri Prasad cannot claim that he has acquired the property mortgaged to the plaintiffs, that is the entire property, and that he can ignore the mortgage in the plaintiff's favour. His sale-deed and the mortgage of the plaintiffs do not in reality cover the same property, and therefore section 50 cannot apply to a case like this. The principle of the decision of the Bombay High Court in *Sobhagchand Gulabchand* v. *Bhaichand* (1) does not apply to the present case. I dismiss the appeal with costs."

[633] The defendant appealed under section 10 of the Letters Patent.

Babu *Sital Prasad Ghosh*, for the appellant :—

The defendant is entitled to priority under section 50 of the Registration Act because his document refers to the same property over which the plaintiffs held a mortgage. The plaintiffs' mortgage-deed being unregistered would be postponed to the defendant's title deed which is a registered document. It is immaterial to inquire into the title of Bal Kishan or of his predecessor in title because the Legislature has clearly enacted that a subsequent registered document will have priority over a prior unregistered document dealing with the same property. To take a simple illustration:—If *A* makes a mortgage by an unregistered deed and then makes a mortgage of the same property by a registered deed, strictly speaking the interest conveyed by the second mortgage would be only the equity of redemption which was left, but yet it cannot be argued that section 50 would not help the subsequent mortgagee. His document by virtue of its being registered will have priority over the first unregistered deed. It makes absolutely no difference in principle if there is not a common transferor in both cases. The policy of the Registration Act is to place a premium on registration, and if parties fail to have recourse to the provisions of that Act, they cannot complain if they afterwards find that their title deed has to be postponed to others which, though subsequent in date, have been registered.

Babu *Piari Lal Banerji* (for Babu *Durga Charan Banerji*) for the respondent :—

It could not have been the intention of the Legislature in enacting section 50 to do away with all inquiry into the title which could be conveyed by means of a registered deed. In the present instance it is quite clear that the defendant's original predecessor in title Bindraban, could only have acquired at the auction sale the right, title, and interest of the judgment-debtor at the date of the sale, *i. e.* the property subject to the plaintiff's prior mortgage. His title could not be enlarged by any subsequent act of his. His transferee, Bal Kishan, therefore, acquired by the sale in his favour the same rights as Bindraban had acquired at the auction sale, and Bal Kishan in his turn, could only have transferred the interest which he had himself acquired. He could not by simply registering **[634]** his deed of transfer amplify the *quantum* of his estate, and the defendant, therefore, could not possibly be deemed to have acquired any larger interest than Bindraban originally had, and that interest was admittedly inferior to the plaintiff's title, as it was the purchase of a subordinate interest subject to the plaintiffs' prior interest. It is an elementary principle of law that no one can give a better title than he himself has, and the analogy suggested by the appellant cannot be pushed so far as to include a case like the present. Section 50 will only apply where the two deeds are antagonistic to each other, in other words, where it is impossible to give effect to one without destroying the other. I rely on *Sobhagchand Gulabchand* v. *Bhaichand* (1).

Babu *Sital Prasad Ghosh* not heard in reply.

(1) (1882) I. L. R. 6 Bom. 193.

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RICHARDS, C. J., and TUDBALL, J.—The facts of this case are as follows :—

Ram Bakhsh and others mortgaged certain property to the present respondents on the 21st of August, 1894. On the 30th of May, 1896, they mortgaged the same property to Bindraban. Both mortgage-deeds were unregistered. Bindraban brought a suit for sale on his mortgage and purchased the property himself in execution of his decree. His son sold the property to Bal Kishan. The latter's heir sold it to Ishri Prasad, the present appellant. It must be clearly noted here, that though Bindraban purchased at the auction sale the right, title and interest of his mortgagors, what was sold to Ishri Prasad by the heir of Bal Kishan was the full right of ownership and not the mere right, title and interest of the transferor. An examination of Ishri Prasad's sale-deed makes this clear. That sale-deed was registered. Ishri Prasad's vendor was the full owner if the mortgage of the 21st of August, 1894, was out of the way, but we may assume for the purposes of this appeal that the vendor legally owned only the property subject to that mortgage ; what he purported to sell, was the full right of ownership. In this way he may or may not have acted dishonestly, but there is nothing to show that Ishri Prasad had any notice whatever of the pre-existing unregistered mortgage. The prior mortgagee brought the present suit for sale out of which this appeal has arisen.

In defence, Ishri Prasad pleaded section 50 of the Registration Act and urged that his registered sale-deed took effect as regards [635] the property comprised therein against the unregistered mortgage deed of the plaintiff which related to the same property. The court of first instance upheld this plea and dismissed the suit. The lower appellate court reversed that decision and decreed the suit. On second appeal to this Court, the learned Judge who heard the appeal confirmed the decree of the court below : hence this appeal under the Letters Patent.

It is urged before us, and with great force, that our learned brother has taken a wrong view of the facts of the case. The argument in his judgement is that what was mortgaged to Bindraban was the equity of redemption ; and this is what Bindraban purchased, and what his son sold to Bal Kishan, and what Bal Kishan's heir transferred to Ishri Prasad ; and as the latter only purchased equity of redemption, the two deeds do not cover the same property and, therefore, section 50 of the Act does not apply. Reliance was placed on the decision in *Sobhagchand Gulabchand* v. *Bhaichand* (1). The error in the above is patent on an examination of sale-deed in favour of Ishri Prasad. That deed does not purport to transfer only the right, title and interest of the transferor, but is, in plain terms, a sale, out and out, of the full right of ownership in the property. The mortgage in the present suit is a mortgage of the same property.

The two deeds, therefore, *do* cover the same property and section 50 of the Act does apply.

There can be no question that if the original mortgagors had executed the two deeds now in conflict, the sale-deed being registered would take effect against the unregistered mortgage-deed, even though, *after the execution of the latter*, the mortgagors would have been the owners of only the equity of redemption.

The rights of the mortgagors were acquired by the appellant's vendor, but he sold to the appellant not the equity of redemption but the property itself. In principle there is no difference.

(1) (1882) I. L. R. 6 Bom. 193.

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We would call attention to the remarks of MELVILLE, J., in I. L. R., 6 Bom., 193, to be found at page 208, and which were quoted with approval by AIKMAN, J., in *Baldeo Prasad* v. *Baldeo* (1).

In the present case the "estate" was covered by both the deeds in suit. The case is also covered by the un-reported decision in [636] *Ram Lal* v. *Thakur Bachcha Singh*, S. A. No. 1148 of 1911, decided on the 13th June, 1912 (2).

We allow the appeal, set aside the decree of this Court and restore that of the court of first instance, with costs in all courts.

Appeal allowed.

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34 A. 636 (=16 I. C. 190=10 A. L. J. 256.)

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

MAHARAJA OF BENARES (*Decree-holder*) *v.* LALJI SINGH AND OTHERS (*Judgment-debtors*).*

[27th July, 1912.]

Civil Procedure Code (1882), *section* 230—*Execution of decree—Decree upon compromise against lessees, and on their failure to pay against the property of the surety—Execution against the lessees after lapse of twelve years.*

A decree for rent was passed upon a compromise against certain lessees and their surety. The decree provided that the amount of it should be realized in the first instance from the lessees by annual instalments, and in the event of failure it would be recoverable by the sale of certain immovable property which the surety had hypothecated. The decree was put into execution against the lessees as a simple money decree more than 12 years after the date of its passing: *Held*, that section 230 of the Code of Civil Procedure of 1882 applied, and the decree could not be executed after the expiration of 12 years from the date thereof. *Pahalwan Singh* v. *Narain Das* (3) distinguished.

THE facts of this case were as follows :—

The Maharaja of Benares granted a lease of certain property in Arrah to Lalji Singh, Mahabir Singh, and Ram Barat Lal. Lachman Singh became a surety and hypothecated some immovable property. As the lessees did not pay the rent, the Maharaja brought a suit against the four persons, and a decree was passed for Rs. 1,304-13-9 on the 26th of February, 1897. It was directed that the lessees should pay the money in certain instalments; that the property hypothecated should remain so; and that if the lessees should fail to pay any of the instalments, the lessor would be entitled to recover the whole amount of the decree from the defendants ("*muddaileham*") out of the property mortgaged. The decree-holder made several infructuous attempts to realize the money from the lessees, and finally, the decree having been transferred from Arrah to Benares, he applied to have his money recovered by sale of some immovable property belonging to one or the other of his lessees. This application was made on 5th January, 1910. One of the lessees, Lalji Singh, [637] contended that the application was statute-barred. The first court repelled the contention and allowed execution. Upon appeal the Judge

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* Appeal No. 21 of 1913 under section 10 of the Letters Patent.

(1) Weekly Note, 1901, p. 112.

(2) (1912) Since reported, 10 A. L. J. 114.

(3) (1900) I. L. R. 22 All 401.

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held that it was a decree for the payment of money within the meaning of section 230 of the Civil Procedure Code and rejected the application as time-barred.

The decree-holder appealed to the High Court, and the case came before KARAMAT HUSAIN and CHAMIER, JJ., who delivered the following judgment: —

KARAMAT HUSAIN, J.—The appellant obtained a decree from the court of the Subordinate Judge of Arrah, against four persons. The operative part of the decree may be rendered as follows: —" It is decreed and ordered that the plaintiff's claim against defendant No. 3 be decreed *ex parte*, and against defendants No 2 on his admission of the claim, and against defendants Nos. 1 and 4 according to a compromise." The decree goes on further to direct, that, if the decretal money be not recovered from the defendants Nos. 1, 2 and 3, then it should be recovered from the property mortgaged by the 4th defendant as a surety. The decree was transferred to Benares. It was passed on the 26th of May, 1897, and the application for execution of it was made on the 5th of January, 1910.

Lalji, one of the respondents in this Court, objected that the decree was barred under the provisions of section 230 of the Code of Civil Procedure of 1882. This contention was accepted by the learned Judge, who in his judgment said:—

" The decree with which I am concerned is, however, a money decree so far as it affects the appellant and other lessees, and a mortgage decree so far as it affects the surety of Lachman Singh. "

Coming to that conclusion, the lower appellate court dismissed the application for execution. In second appeal it is urged by the learned vakil for the decree-holder that the decree of which execution is sought is a mortgage decree within the meaning of section 230 of the Code of Civil Procedure, Act No. XIV of 1882. I am unable to accept this contention. The decree, so far as the respondent, Lalji Singh, is concerned, cannot be regarded as a mortgage decree in any sense of the word. So far as the appellant is concerned, it is a decree for payment of money. I therefore, would dismiss the appeal with costs.

CHAMIER, J.—The suit in which the decree now in question was obtained was brought against three lessees, who were defendants [638] 1, 2 and 3, and their surety, who was defendant No. 4. The decree directed the defendants 1, 2 and 3 to pay the amount decreed in certain instalments and then went on to provide that if the money decreed could not be recovered from defendants 1, 2, and 3, the decree-holder might proceed to bring to sale the property which had been mortgaged to the plaintiff by the surety. The decree-holder made several ineffectual attempts to recover his money in the district in which the decree was passed. Subsequently, the decree was transferred for execution to Benares. By the present application the decree-holder seeks to bring to sale some immovable property belonging to defendants 1, 2 and 3, or one or more of them. His application has been dismissed on the ground that the decree, so far as defendants 1, 2 and 3 were concerned, was a decree for the payment of money within the meaning of section 230 of the Code of Civil Procedure, 1882. The lower appellate court has accepted the contention and dismissed the application with costs.

This is a second appeal by the decree-holder. It is conceded, in accordance with a recent decision of this Court, that section 48 of the Code of Civil Procedure, 1908, does not apply to the case ; and that the question

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for decision is, whether the decree held by the appellant is a decree for the payment of money within the meaning of section 230 of the Code of 1882. The decree, in my opinion, cannot by any possibility be described as a decree for money against defendant 4. If it is possible to split up the decree into two decrees, then no doubt it may be said that the decree is a decree for payment of money against defendants 1, 2 and 3, and is a decree for the sale of immovable property against defendant No.4, to which the third paragraph of section 230 of the Code of 1882 does not apply. But it seems to me that if a decree can be split up in this way where different reliefs are given against different sets of defendants then a decree may be split up also where several distinct reliefs are given against the same set of defendants. I find no justification for this course in section 230. The terms of the decree before us undoubtedly go beyond the terms of an ordinary decree for the payment of money as that expression has been interpreted by this Court. It provides for the sale of immovable property under certain contingencies. In my opinion the principle on which the case of *Pahalwan Singh* v. [639] *Narain Das* (1) was decided applies to the present case, and I would hold that the decree before us is not a decree for the payment of money within the meaning of section 230, and I would allow this appeal, set aside the decree of the court below, and remand the case for disposal on the merits according to law.

The decree of the Court accordingly followed the judgment of KARAMAT HUSAIN, J., against which the decree-holder preferred this appeal under section 10 of the Letters Patent.

Babu *Beni Madho Ghosh* and Babu *Sarat Chandra Chaudhri*, for the appellant.

Munshi *Gulzari Lal*, for the respondents.

RICHARDS, C. J., and BANERJI, J.—The facts connected with this appeal are as follows :—A suit was brought against certain lessees and their surety. The suit resulted in a compromise decree which provided that, in the first instance, the lessees should pay the amount of the decree by instalments and that the decree should be capable of execution against them. If the decree-holder failed to realize the amount of his debt in this way from the lessees, then, he was to be entitled to bring the property which the surety had mortgaged to sale. The decree was granted in May, 1897. The present application for execution was made on the 5th of June, 1910, that is to say, more than twelve years after the granting of the decree. The application was made against lessees only. It was an application to execute the decree not as a mortgage-decree but as a simple money decree. Section 230 of Act XIV of 1882 provides that where an application to execute a decree for the payment of money or the delivery of other property has been made under this section and granted, no subsequent application to execute the same shall be granted after the expiration of twelve years from, *inter alia*, the date of the decree or date upon which payment of money was ordered by the decree. It has been conceded here that if the decree can be treated as a simple money decree, then it was barred by limitation by virtue of the provisions of section 230, more than twelve years having elapsed from the date of default in payment of the instalments. It is argued, however, that because the decree directs that if the decree-holder has failed to realize the amount of his decree against the first three judgment-debtors, he can bring the property of the fourth

(1) (1910) I. L. R. 22 All. 401.

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[640] judgment-debtor to sale, therefore this decree is not a decree for payment of money but must be regarded as a mortgage decree. It has no doubt been held by this Court that section 230 does not apply to a mortgage decree, but in our opinion, the compromise decree in the present case was a simple money decree as against the first three defendants, and only became a mortgage decree against the fourth defendant after default was made. It was a conditional decree for the sale of his property. We have already pointed out that it was being executed as a simple money decree, and that it could never have been executed against the first three defendants as anything else except a simple money decree. It comes within the very words of section 230, clause (iii). The case of *Pahalwan Singh* v. *Narain Das* (1) has been referred to. In that case the compromise decree was against a single defendant. It only differed from an ordinary mortgage decree under section 88 of the Transfer of Property Act by substituting certain instalments for the usual six months allowed for payment of the mortgage money. The application to execute such decree was an application to execute a mortgage decree by sale of the mortgaged property. Therefore, it is quite clear that that case has no application to the present case. In our opinion the decree appealed against was correct, and this appeal should be dismissed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

34 A. 640 (=10 A. L. J. 278=17 I. C. 682).

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Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

NANDAN SINGH (*Plaintiff*) *v.* JUMMAN AND OTHERS (*Defendants*).*

[24th June, 1912.]

Mortgage—Estoppel—Power of representatives of mortgagor to question validity of mortgage—Adverse possession—Possession adverse to mortgagor not necessarily adverse to mortgagee.

Held that, although the representatives of a mortgagor cannot as such question the validity of the mortgage, it may be open to them as *mutawallis* to plead that the property was waqf and that the mortgage of it was void. *Gulzar Ali* v. *Fida Ali* (2) distinguished.

Held, also, that a simple mortgage being not merely a security for a debt but a transfer of an interest in the property mortgaged, a trespasser who ousts the mortgagor and holds the property adversely to him may by prescription become [641] the owner of the limited estate which the mortgagor had in the property, but such adverse possession cannot extinguish the right of the mortgagee. *Agency Company* v. *Short* (3), *Smith* v. *Lloyd* (4), *Secretary of State for India* v. *Krishnamoni Gupta* (5) and *Ismdar Khan* v. *Ahmad Husain* (6) referred to. *Ramaswami Chetty* v. *Ponna Padayachi* (7) and *Pratap Bahadur Singh* v. *Maheshwar Bakhsh Singh* (8) not approved. *Aimadar Mandal* v. *Makhan Lal Day* (9) and *Parthasarathi Naikan* v. *Lakshmana Naikan* (10) approved and followed. *Karan Singh* v. *Bakar Ali Khan* (11) discussed.

[Ref: 36 All. 567 ; 77 I. C. 125=10 O. L. J. 216.]

* Second Appeal No. 985 of 1911 from a decree of G. A. Paterson, District Judge of Benares, dated the 8th of August, 1911, confirming a decree of Srish Chandra Basu, Subordinate Judge of Benares, dated the 21st of June, 1911.

(1) (1900) I. L. R. 22 All. 401.
(2) (1883) I. L. R. 6 All. 34.
(3) (1888) L. R. 13 A. C. 793.
(4) (1854) 9 Ex. 562.
(5) (1902) I. L. R. 29 Cal. 518.
(6) (1907) I. L. R. 30 All. 119.
(7) (1911) 21 M. L. J. 397.
(8) (1903) 12 O. C. 45.
(9) (1906) I. L. R. 33 Cal. 1015.
(10) (1911) 21 M. L. J. 467.
(11) (1882) I. L. R. 5 All. 1.

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THE facts of this case were as follows:—

Kudrat Shah and others, the predecessors in title of defendants, 2 and 3, made a simple mortgage of two plots of land with houses and trees, one of which was near Taksal and the other near Kabir Chaura, in favour of the plaintiff, on the 5th of July, 1875. They again mortgaged the same property to the same mortgagee on the 12th of March, 1878. One Subhan, alleging himself to be the son-in-law of Kudrat Shah, on the 15th of September, 1893, sold the land near Taksal to Musammat Biraiya, who made a mortgage of it to Babu Sital Prasad and Bisheshar Prasad on the 22nd of December, 1893. They obtained a decree on their mortgage on the 7th of November, 1900, in execution of which the land was purchased by Ram Dei, who built on it a house with a cost of about Rs. 6,000. The plaintiff sued on his two mortgages on the 4th of May, 1910, claiming Rs. 1,628-6-3. The defendants 1, 2 and 3, as *mutawallis*, pleaded that the property near Kabir Chaura was waqf and that the mortgage of it was void. Ram Dei pleaded that the suit relating to the land near Taksal was barred by limitation.

The first court dismissed the suit. Regarding the property near Kabir Chaura the dismissal was based on the unlawfulness of the mortgage of waqf property. Regarding the property near Taksal it was based on limitation. The lower appellate court affirmed the decree of the first court.

The plaintiff appealed to the High Court.

Mr. *B. E. O'Conor* and Munshi *Gokul Prasad*, for the appellant.

Dr. *Satish Chandra Banerji*, and Dr. *Tej Bahadur Sapru*, for the respondents.

[642] KARAMAT HUSAIN, J.—The facts of the case are these:—Kudrat Shah and others, the predecessors in title of defendants, 2 and 3, made a simple mortgage of two plots of land with houses and trees, one of which is near Taksal and other near Kabir Chaura in favour of the plaintiff, on the 5th of July, 1875. They again mortgaged the same property to the same mortgagee on the 12th of March, 1878. One Subhan, alleging himself to be the son-in-law of Kudrat Shah, on the 15th of September, 1893, sold the land near Taksal to Musammat Biraiya, who made a mortgage of it to Babu Sital Prasad and Bisheshar Prasad on the 22nd of December, 1893. They obtained a decree on their mortgagees on the 7th of November, 1900, in execution of which the land was purchased by Ram Dei, who built on it a house with a cost of about Rs. 6,000.

The plaintiff sued on his two mortgages on the 4th of May, 1910, claiming Rs. 1,628-6-3. Defendants 1, 2 and 3, as mutawallis, pleaded that the property near Kabir Chaura was waqf and that the mortgage of it was void. Ram Dei pleaded that the suit relating to the land near Taksal was barred by limitation.

The first court dismissed the suit. Regarding the property near Kabir Chaura the dismissal was based on the unlawfulness of the mortgage of waqf property. Regarding the property near Taksal it was based on limitation. The lower appellate court affirmed the decree of the first court.

In second appeal two points are taken:—

(1) The representatives of the mortgagors cannot question the validity of the mortgage, and (2) the adverse possession of a trespasser against a mortgagor is not, in every case, adverse to his simple mortgage. On the first point I am of opinion that it is open to the representatives of the

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mortgagors as mutawallis to plead that the property was waqf, and that the mortgage of it was void. They could be estopped from raising such a plea as representatives of the mortgagors, but as mutawallis they cannot be regarded as the representatives of the mortgagors. When the law renders the mortgage of waqf property void, the mortgagee of such property is presumed to know the law, and if he takes a mortgage of such property he does so at his own risk. *Gulzar Ali* v. *Fida Ali* (1) has no application. There a trustee **[643]** representing the property as his own mortgaged it, and when the mortgagee had got a decree, the trustee sued to recover the property. In these circumstances the trustee was held to be estopped.

There is a conflict of authority on the second point, and before going into the case-law on the subject I deem it fit to set forth the conclusion to which the legal principles lead. Adverse possession in the nature of things is impossible against a person who has no right to possession and hence the legal maxim "*Contra non volentem nulla currit prescriptio*" (Prescription does not run against a person who is unable to act). On the same foundation rests the exposition of law by PARKE, B., quoted by the Lords of the Privy Council in the *Trustees Executors and Agency Company* v. *Short* (2) as follows :—"In the latter case, *Smith* v. *Lloyd* (3), which was decided in 1854, PARKE, B., in giving the judgment of the Court says :—'We are clearly of opinion that the Statute applies not to cases of want of actual possession by the plaintiff but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the Statute.'"

Their Lordships reaffirm the opinion of PARKE, B., in *Secretary of State for India* v. *Krishnamoni Gupta* (4). They remark :—

"In the case of *The Trustees, Executors and Agency Company* v. *Short* (2) it was laid down by this Board that 'if a person enters upon the land of another and holds possession for a time and then without having acquired a title under the statute abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place,' and the opinion of PARKE, B., is there quoted that there must be both absence of possession by the person who has the right and actual possession by another to bring the case within the Statute."

On the same principle proceeds *Ismdar Khan* v. *Ahmad Husain* (5). The portion of the judgment bearing on the point is as follows :—

"As the defendants wrongfully dispossessed the mortgagees and themselves took possession, their possession was undoubtedly **[644]** adverse to the mortgagees, and as their adverse possession has continued for a longer period than twelve years, the right of the mortgagees has, under section 28 of the Limitation Act, become extinct and has vested in the defendants. The possession of the mortgagees was not full proprietary possession, but was possession of a limited nature. It is this possession of which they were deprived by the defendants; so that the adverse possession of the defendants was also of the limited character and had the effect of extinguishing the limited interests of the mortgagees and vesting those interests in the defendants. The possession of the defendants was

(1) (1883) I. L. R. 6 All. 24.
(2) (1888) L. R. 13 A. C. 793.
(3) (1902) I. L. R. 29 Cal. 518, 535.
(4) (1854) 9 Exch. 562.
(5) (1907) I. L. R. 30 All. 119.

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not therefore adverse to the plaintiff. There may be cases in which adverse possession against the mortgagee, would also be adverse against the mortgagor, for example, where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a denial of the title of the mortgagor. But, as held in *Muhammad Husain* v. *Mul Chand* (1), following *Chinto* v. *Janki* (2), possession obtained by the ouster of a mortgagee in possession is not necessarily adverse to the mortgagor also. In the present case it has been found that the title of the plaintiff was never denied by the defendants. It is also an admitted fact that when the defendants took possession the persons entitled to remain in possession were the mortgagees and not the mortgagors and that the mortgage was unsatisfied. As the plaintiff had therefore no right to immediate possession, the defendants cannot be held to have been in possession adversely to plaintiff. As observed by Mr. Justice MARKBY in *Bejoy Chunder Banerjee* v. *Kally Prosonno Mukerjee* (3), by adverse possession is meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession. We are, therefore, unable to accept the defendants' contention that their possession is adverse to the plaintiff and that the claim is time-barred."

A mortgage under the Transfer of the Property Act (Act No. IV of 1882) is " the transfer of an interest in specific immoveable property for the purpose of securing the payment of money." In a simple mortgage therefore an *interest in the property* mortgaged is carved out of the aggregate interests symbolized by the [645] legal term "ownership" and vested in the mortgagee and the residue of those interests remains in the mortgagor. This residue may be called "the equity of redemption with possession." A mortgagee under a simple mortgage by virtue of the interest in the property mortgaged which he acquires has the right to bring it to sale for the realization of the mortgage debt. (Section 67, Transfer of Property Act.) Such a mortgage gives him no right to take possession of the property mortgaged. The legal position of the parties to a simple mortgage is as follows. The mortgagor owns the equity of redemption with possession and is in possession of the property as a limited owner. The mortgagee owns an interest in the property which entitles him to have the property sold by court for the satisfaction of the mortgage debt but has no right to enter into possession of the property. In these circumstances if a trespasser ousts the mortgagor *after the execution of the simple mortgage*, he can take possession of what belongs to the mortgagor and can hold adversely to him to the extent of his limited interest. In other words, he can hold the property adversely subject to the liability of its being sold for the satisfaction of the mortgage debt. His adverse possession cannot in any way affect the right of the mortgagee to bring the property to sale. Adverse possession of the limited ownership in the property which is all that remains in the mortgagor is not recognised by law as one of the causes which extinguish the mortgagee's right to bring the property to sale. Adverse possession affects rightful possession and such rights as go with it and cannot destroy such rights as are independent of it. A necessary corollary of the above mentioned principles is that a trespasser who ousts a mortgagor under a simple mortgage and holds the property adversely to him may by prescription become the owner of the limited

(1) (1904) I. L. R. 27 All. 395.
(2) (1892) I. L. R. 18 Bom. 51.
(3) (1878) I. L. R. 4 Cal. 327.

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estate which the mortgagor had in the property, but such adverse possession cannot extinguish the right of the mortgagee. This of course happens when adverse possession begins after the simple mortgage. If adverse possession precedes the simple mortgage it will run against the mortgagor and the mortgagee both. Similarly, if the mortgagee is entitled to the possession of the property mortgaged, adverse possession will run against him from the date of his right to [646] possession. In two reported cases it has, however, been held that adverse possession against the mortgagor extinguishes the security of the mortgagee.

ABDUL RAHIM, J., in *Ramaswami Chetty* v. *Ponna Padayachi* (1) took that view. The reasons which led him to it are that the mortgage is only a security for the debt; that the interest in the land remains with the mortgagor; that a decree for sale in favour of the mortgagee cannot bind the trespasser, and that *Karan Singh* v. *Bakar Ali Khan* (2) covers the point. With due respect to the learned Judge, a simple mortgage is not *merely a security for the debt*, it is the *transfer of an interest in the property mortgaged*, which interest cannot be affected by the adverse possession of a trespasser over the *limited interest of the mortgagor*. No one can doubt the correctness of the proposition that a decree for sale against a mortgagor cannot bind a trespasser who is no party to the decree ; but it must not be forgotten that the property which the trespasser acquires is the property which is liable to sale at the instance of the mortgagee, and the adverse possession of the limited estate of the mortgagor is not sufficient to free it from that liability. If a simple mortgage did not create *an interest in the property* in favour of the mortgagee, adverse possession against the mortgagor who would have been the full owner of the property would have extinguished the security. In the case before us the law gave the mortgagee sixty years to enforce his remedy and the ouster of the mortgagor by the trespasser in the absence of statutory provisions to that effect cannot cut it down to twelve years, and force the mortgagee to sue the trespasser in ejectment, who may well plead that no suit for ejectment lies and that there is no cause of action for sale against him. *Karan Singh* v. *Barkat Ali Khan* has no application to the case of adverse possession, which begins *after the execution* of a simple mortgage against the mortgagor. In that case the village Khard Khera was in dispute between Karan Singh on one hand and Kharag Singh and Rudar Singh on the other. The Collector took possession of it as *kurk tahsil* in April 1861. The guardian of Kharag Singh and Rudar Singh mortgaged it on the 7th of January and the 6th of October, 1862. Karan Singh obtained a decree [647] for the village, and the Collector delivered possession of it to Karan Singh in October, 1863, making over to him the surplus profits too. In 1874, the mortgagee sued on the mortgages of 1862. Karan Singh pleaded limitation, attempting to tack on the Collector's possession which began in April, 1861, to his own. Their Lordships ruled that the Collector's possession was not adverse to the owner and could not be tacked on to that of Karan Singh. From this ruling it is sought to be inferred that their Lordships were of opinion that the adverse possession against a mortgagor which begins *after a simple mortgage* is adverse to the mortgagee. They have not expressly so ruled, and to rely on an inference is very dangerous. Moreover, the possession of the Collector in that case began *before the mortgage* and it had been adverse to the mortgagee also inasmuch as the mortgagor at the commencement of adverse possession

(1) (1911) 21 M. L. J. 397.

(2) (1882) I. L. R. 5 All. 1.

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was not the mortgagor but the absolute owner of the property. In that case the Collector's possession *began before the mortgage*, and the rule that his possession if adverse to the mortgagor was also adverse to the mortgagee, would have been sound law but could not have governed cases in which adverse possession *began after a simple mortgage*. The distinction has been noticed by MUNRO, J. in *Parthasarathi Naikan* v. *Lakshmana Naiken* (1). He says:—"Had the Collector's possession which began before the mortgage been adverse to the mortgagors and had the defendant claimed through the Collector, then the mortgagee's suit would have been barred as in *Nallamuttu Pillai* v. *Betha Naikan* (2). This supplies a reason why it was considered necessary to consider the question of tacking."

ABDUL RAHIM, J., is also of opinion that the result of holding that adverse possession against a mortgagor does not extinguish the security of his mortgagee "would be that when a property is under mortgage and the mortgagor or his successor in interest goes on paying interest on the debt or otherwise acknowledges his liability, persons in peaceable and unchanged possession and enjoyment of such property in assertion of their own rights whatever the length of the time during which their possession and enjoyment might have lasted would not be secured in the title." This in his opinion is monstrous. With due respect I am unable to agree with him. I see no reason why the invader of the possession and **[648]** the limited rights the mortgagor should be so favoured by law as to acquire the right of the mortgagee also.

The other case which is against the view I take is that of *Pratap Bahadur Singh* v. *Maheshwar Bakhsh Singh* (3). In it one of the learned Judges based his decision on what appeared to him to be the view of their Lordships of the Privy Council in the case of *Karan Singh* v. *Bakar Ali Khan* (4). He said :—

"And it appears to me that in the case of a simple mortgage when the mortgagee is not entitled to possession twelve years adverse possession against the mortgagor must be held to extinguish the security as far as regards the property held adversely to the mortgagor. This appears to have been the view of their Lordships of the Privy Council in the case of *Karan Singh* v. *Bakar Ali Khan*."

I have already explained that the inference sought to be drawn from the case of *Karan Singh* would apply to those cases in which adverse possession against the mortgagor commenced before the mortgage. That ruling does not, therefore, cover those cases in which adverse possession begins after a simple mortgage. The learned Judge gave no other reason for the view he took and no principle favours it. The other learned Judge says :—

"It will be seen that practically the rulings under both heads are concurrent upon the general principles that the person who is in possession of mortgaged property when there is no priority between him and the mortgagor (like the respondents in the present case) can assert his title as against the mortgagee from the date on which the mortgagee was entitled to take action on his mortgage deed by suing for possession *for sale of the property in case of default*."

With due respect, no ruling, so far as I have been able to understand it, lays down that a mortgagee under a simple mortgage who is not entitled

(1) (1911) 21 M. L. J. 467.
(2) (1900) I. L. R. 23 Mad. 37.
(3) (1908) 12 O. C. 45.
(4) (1882) I. L. R. 5 All. 1.

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to take possession of the property mortgaged is *bound* to sue the trespasser. The following cases are in favour of the view I take. *Aimadar Mandal* v. *Makhan Lal Day* (1) and *Parthasarathi Naikan* v. *Lakhsamana Naikan* (2). MUNRO, J., in the last named case has with great ability distinguished all the rulings which seem to be in conflict with that [649] view. I fully agree with him and need not repeat what he has so well set out in his judgment.

For the above reasons I would hold that the suit for the enforcement of the two mortgages against the property near Taksal, which is in possession of Ram Dei, is not barred by twelve years' limitation.

KNOX, J.—On the former of the two questions raised in this appeal I never had any doubt. I quite agree with what my brother has said on the question.

The second question raised is of more difficulty, but after reading the various authorities and after giving full consideration to the question I agree with my brother in holding that limitation does not bar the claim.

The result is that the decree of the lower appellate court is so far modified that the plaintiff will get a decree for sale of the property situate at muhalla Taksal in the city of Benares, with costs in proportion to his success and failure.

BY THE COURT.—The decree of the lower appellate court is modified and the plaintiff will get a decree for sale of the property situate at muhalla Taksal in the city of Benares, with costs in proportion to his success and failure.

Decree modified.

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34 A. 649 (=16 I. C. 191=10 A. L. J. 289.)

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice and Mr. Justice Tudball.

NAWAB KHAN (*Plaintiff*) *v.* MUHAMMAD ZAMIN (*Defendant*).*

[16th July, 1912.]

Municipality—Election—Practice—Petition against elected member on ground of personation of voters—Limitation—Fresh instances of personation allowed to be pleaded after expiry of time for filing petition.

An elector on the roll of a municipality filed a petition under the rules framed in that behalf by the Local Government against a successful candidate in a municipal election alleging various instances of personation of voters for which the opposite party was stated to be legally responsible. The petition was filed within the time limited by law. *Held*, that it was competent to the court in which such petition was presented to allow the petition to be amended by the addition of fresh instances of personation.

[Ref. 35 All. 450.]

This was a petition by an elector on the electoral roll of the municipality to set aside the election of the opposite party as a municipal commissioner of Allahabad under rule 42 of the [650] Government Notification No. 2640, published in the Government Gazette, Part III, page 337, of the 30th of July, 1910. In paragraph 6 of the petition, the plaintiff said :—"The plaintiff had come to know from inquiry that (*a*) fraudulent

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* Second Appeal No 354 of 1912 from a decree of H. E. Holme, District Judge of Allahabad, dated the 26th of February, 1912, reversing a decree of Tufail Ahmed, Second Additional Munsif of Allahabad, dated the 22nd of December, 1911.

(1) (1906) I. L. R. 33 Cal. 1015.

(2) (1911) 21 M. L. J. 467.

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proceedings were taken and threats were held out, and the defendant, his agents, or friends, made an unauthorized person vote in place of the rightful voter ; (*b*) that, at the defendant's election, certain improper proceedings were taken on his behalf. The names of some of the voters are given at the foot of the plaint. Other names will be given later on after the inspection of the ballot paper." Below this, four instances or particulars of illegal votes were given. This petition was filed within fifteen days of the election as provided by the Government Notification; but after that period was over, the petitioner applied to add six more instances of illegal voting. The Munsif granted this application, and, after recording evidence, set aside the election of the defendant. The opposite party appealed to the District Judge, who held that the Munsif was not justified in allowing the plaint to be amended, and therefore he disregarded the instances of illegal votes subsequently added and decreed the appeal, dismissing the plaintiff's petition.

Mr. *B. E. O'Conor*, for the appellant, submitted that the lower appellate court had mixed up the grounds on which an election petition can be filed, with the instances of illegal votes. The petitioner was not entitled to add new grounds after the prescribed period, but he could add new instances. The cause of action was the malpractice and not the particular instance set up. Instances can be given after filing the petition and before trial, Rogers on Elections, Vol. III, pp. 219-220. In this case, particulars were given before the first hearing.

The Hon'ble Dr. *Sundar Lal*, for the respondent, submitted that the procedure in such cases in India was quite different from what it was in England. In England there was special law on the subject. The Local Government was entitled to make rules under section 187 of the Municipalities Act. Those rules had the force of law. The law did not lay down any mode of trial. The Local Government could frame rules, which it had not done. The only rule on the subject was rule 42 and it laid down that no election could be set aside except on an application within a certain number [651] of days. The rules did not define what was corrupt practice. The present petition made a mention of corruption, undue influence and personation in a vague manner. If particulars could be supplied later on, those words could be safely used in every case. Here all possible charges were made. Four cases of personation were alleged and six more were proved in evidence. There was no evidence given of anything but personation. The amendment could only be made within the period in which the original plaint could have been filed. According to English practice, a petition was to be filed within a certain number of days of the election and within a certain time after that instances were to be alleged. Further charges, too, were to be made within a certain time. Here all charges, and particulars were alleged in the petition. Otherwise, the result would be that we could go on adding fresh particulars every day, and in certain cases it may go on for several months. The petitioner ought to make all allegations within 15 days. Inspection could have been made within this time.

RICHARDS, C. J. and TUDBALL, J.—This appeal arises out of an election petition Nawab Khan was one of the electors at an election of the Municipal Board of Allahabad, which was held on the 8th of March, 1911. At that election the respondent, Muhammad Zamin, was declared duly elected. Within fifteen days the present petition questioning the validity of the election was presented in the court of the Additional Munsif.

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The grounds for questioning the election are set forth in paragraph 6 of the petition. In clause (*a*) it is asserted that fraudulent proceedings were taken and threats were held out and the defendant, his agents or friends made unauthorized persons vote in place of rightful voters. Four instances of impersonation were then set forth, and it went on to assert that other names would be given later on after the inspection of the ballot papers. Before the petition was heard the petitioner was in a position to give further cases of personation and the petition was amended by adding the particulars of six aditional cases of alleged personation. The learned Additional Munsif heard the case and found that a certain number of cases of personation were proved ; and he accordingly set aside the election.

The respondent appealed to the District Judge. In that court and in this Court it was admitted that personation, to which the [652] candidate or his agents were parties, was a good ground for setting aside an election. The learned District Judge held that the Munsif had jurisdiction to hear the petition, and in this Court it has not been contended —and, in our opinion, could not be contended—that the Munsif had not jurisdiction to hear the case. The learned District Judge, however, set aside the decree of the Munsif and dismissed the petition upon the ground that the court had no power to amend the petition by adding the further cases after the expiration of fifteen days from the date of the election. The learned District Judge held that those cases which were originally set forth in the petition were not proved and that therefore the petitioner's case failed.

The only question which we have to decide in the present appeal is whether or not the petitioner was entitled to give evidence of the additional cases which were mentioned for the first time after the expiration of 15 days of the election. Rules have been framed under the Municipalities Act, section 187, with regard to election petitions. Rule 42 is as follows:—

"The validity of an election made in accordance with these rules shall not be questioned except by a petition presented to a competent court within 15 days after the day on which the election was held by a person or persons enrolled in the Municipal electoral roll:

"Provided that no election shall be called in question on the ground that

"(*a*) the name of any person qualified to vote has been omitted from or the name of any person not qualified to vote has been inserted in the electoral roll or rolls made and revised under rules 1 and 2 of these rules; or

"(*b*) the name of any person qualified for election as a member of the Board has been omitted from, or the name of any person not qualified for election as a member of the Board has been inserted in the candidate list as prescribed under rule 8 of these rules "

This is the only rule relating to election petitions. The learned District Judge says:—

" Reading rule 42 it seems to me perfectly plain that the intention of the Legislature is that specific and not general grounds for questioning an election shall be alleged and that those grounds shall all be put forward within 15 days of the election. The two provisos, and the words 'shall not be questioned except by petition presented within 15 days' seem to place this beyond doubt. It would stultify the section if a petitioner were allowed to allege general corruption and then add specific instances to his plaint at leisure as he gathered material."

[653] In the present case the petitioner alleged that the respondent had been guilty of misconduct in the course of the election by procuring persons to personate dead or absent voters. That was the ground of the

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petition, The particular instances of personation are quite another matter, and in our judgment it was quite open to the petitioner to furnish those particulars after the expiration of the 15 days. What the court had to guard against was the respondent being taken by surprise by the petitioner keeping back the particulars until the last moment. It seems to us perfectly clear that there is nothing in the rule which requires that all the particulars should be specified in the petition. In many cases, and probably in the present case it would have been impossible for the petitioner to have furnished all these particulars within 15 days. The practice in England with regard to elections is to allow particulars of the charges to be given after the petition is presented; and we see no reason whatever why the same practice should not prevail here in the absence of clear rules on the point. The court will always have it in its power to prevent any abuse of the process of the court by insisting that proper particulars shall be furnished to the respondent in ample time to enable him to meet the charges. The mere fact that the additional particulars were given by means of amending the plaint is in our opinion no reason why we should hold that the petitioner was not entitled to go into evidence and prove the additional cases.

We allow the appeal, set aside the decree of the learned District Judge and remand the case to his court with directions to re-admit the appeal under its original number on the file and to proceed to hear and determine the same according to law, having regard to what we have stated above. The appellant will have his costs in this Court. Other costs will be costs in the cause.

Appeal decreed—Cause remanded.

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34 A. 654 (=17 I. C. 799=13 Cr. L. J. 863=10 A. L. J. 294).

[654] REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox.

EMPEROR v. LALTA PRASAD.*

[18th July, 1912.]

Criminal Procedure Code, section 195 (c)—Sanction to prosecute—Forgery—Offence alleged not in connection with any proceeding before any Court—Sanction unnecessary,

By section 195, clause (c), of the Code of Criminal Procedure courts are prohibited from taking cognizance of an offence described in section 463 of the Indian Penal Code, when such offence has been committed by a party to any proceeding in any court in respect to a document produced or given in evidence in any such proceeding. The section does not remove from the cognizance of criminal courts an offence described in section 463 when such an offence has been committed by an ordinary individual. So long as the prosecution is confined to offences connected with a document committed prior to its production in court, such prosecution is within the law and requires no sanction.

[Diss. 18 M. L. T. 322=16 Cr. L. J. 721=39 Mad. 677.]

THE facts were as follows :—

Lalta Prasad applied for compulsory registration of a sale-deed in his favour. The deed was registered on the 8th of September, 1911. It was afterwards discovered that certain entries in the deed had been tampered

* Criminal Revision No. 374 of 1912 from an order of P. U. Allen, District Magistrate of Bareilly, dated the 16th of February, 1912.

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with prior to the registration. The Registrar brought the matter to the notice of the District Magistrate, who passed the order:—"There is a strong *prima facie* case of forgery. I direct prosecution of Lalta Prasad.....". Proceedings were commenced. Before this a civil suit was brought by the executant of this deed against Lalta Prasad for declaration that the deed as registered was forged. An application was then made to the criminal court for staying its proceedings pending the decision of the civil court. It was refused and some evidence for the prosecution was taken. Lalta Prasad then applied in the High Court for revision of the order of the District Magistrate directing the prosecution.

Munshi Gulzari Lal (Mr. *C. Ross Alston* with him), for the applicant:—

The prosecution is bad in law. It contravenes the provisions of section 195 (*c*) of the Criminal Procedure Code. A proceeding in respect of the document alleged to have been forged is pending in the civil court, and Lalta Prasad is a party to that proceeding. Hence, no criminal court can take cognizance of the **[655]** offence of forgery alleged to have been committed by Lalta Prasad in respect of that document except with the sanction or on the complaint of that civil court or some other court to which it is subordinate. The District Magistrate had no jurisdiction to sanction or direct the prosecution. To hold otherwise would be to very much limit the operation of section 195 (*c*). No such limitation appears in the section itself. Then, no charge has yet been framed, and it is not known whether the charge against the applicant will be one of forgery or of uttering a forged document. The latter charge can, at all events, not be taken cognizance of without the sanction of the court in which the forged document is produced.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown, was not called upon.

KNOX, J.—A forgery is alleged to have been committed with reference to deed of sale. From the deed it would appear that if a forgery was committed it was committed on or about the 8th of September, 1911. At that time no proceedings were pending with reference to this particular document. The District Magistrate of Bareilly has, by an order, dated the 16th of February, 1912, directed the prosecution of Lalta Prasad for forgery and made the case over to one Mr. Karar Husain, for hearing. An objection is raised to this order based upon section 195, clause (*c*), of the Code of Criminal Procedure.

It is true that the Magistrate has not stated under what section he has directed the prosecution, buta prosecution for forgery would ordinarily run under section 463 of the Indian Penal Code. As I read section 195, clause (*c*), courts are prohibited from taking cognizance of an offence described in section 463 when such offence has been committed by a party to any proceeding in any court in respect to a document produced or given in evidence in any such proceeding. The section does not remove from the cognizance of Criminal Courts an offence described in section 463 when such an offence has been committed by an ordinary individual. Suppose, for instance, this very document had never been put into the civil court and suppose further that it is a forgery—is the person who forged it to be free from all prosecution? I do not by this mean to say that I have any reason for saying this document is a forged document, I know nothing about **[656]** it. As long as the prosecution is confined to offences connected with this document committed prior to its production in court, such

prosecution is within the law and requires no sanction. Sanction is required for offences committed by a party to a proceeding in any court, in respect to a document produced or given in evidence in such proceeding.

I find no reason for interfering and dismiss the application.

Application dismissed.

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34 A. 654=17 I. C. 799=13 Cr. L. J. 863=10 A. L. J. 294.

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34 A. 656 (=16 I. C. 369=10 A. L. J. 297).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

NARAIN DAS AND ANOTHER (*Plaintiffs*) *v.* THE EAST INDIAN RAILWAY COMPANY (*Defendant*).*

[25th July, 1912.]

Act No. IX of 1890 (*Indian Railways Act*), *section* 75—*Goods referred to in section* 75 *consigned on a "risk note"—Railway Company not liable for loss.*

Where a person chooses to send goods referred to in section 75, the Indian Railways Act on a "risk note" form instead of declaring them and paying the extra percentage demandable under the terms of the section he cannot hold the Railway Company by which such goods are sent responsible for the loss thereof.

IN this case the plaintiffs or their agents consigned certain bars of silver for delivery at Allahabad to the Great Indian Peninsula Railway Company at Bombay. The box was delivered intact at Jubbulpore to the East Indian Railway Company, but when it was delivered at Allahabad one of the bars, valued at over Rs. 2,000, was missing. The box was sent on a risk note form and the plaintiffs did not pay the extra percentage provided for by section 75 of the Indian Railways Act, 1890. The plaintiffs sued the East Indian Railway Company for compensation and obtained a decree from the Subordinate Judge of Allahabad. On appeal, however, this decree was reversed by the District Judge and the plaintiffs' suit dismissed. The plaintiffs appealed to the High Court.

Dr. *Satish Chandra Banerji* and Munshi *Damodar Das*, for the appellants.

Mr. *B. E. O'Conor* and Pandit *Ladli Prasad Zutshi*, for the respondents.

[657] RICHARDS, C. J. and BANERJI, J.—The facts connected with this appeal are shortly as follows:—Plaintiffs or their agents consigned certain bars of silver for delivery at Allahabad to the Great Indian Peninsula Railway Company at Bombay. The Great Indian Peninsula Railway Company delivered the box intact to the East Indian Railway at Jubbulpore. When the box was delivered to the plaintiffs or their agents at Allahabad, it was found that one silver bar was missing, valued by the plaintiffs at Rs. 2,044-12-0. There can be no doubt that the silver bar was stolen in the course of its transit between Jubbulpore and Allahabad, either by one or more of the company's servants or by an outsider. As to how it was stolen there appears to be no evidence. Section 75 of the Railways Act of 1890 provides that "when any articles mentioned in the second schedule are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds one hundred rupees the railway admini-

* Second Appeal No. 256 of 1912 from a decree of H. E. Holme, District Judge of Allahabad, dated the 6th of December, 1911, reversing a decree of Guru Prasad Dube, Subordinate Judge of Allahabad, dated the 19th of June, 1911.

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34 A 656=16 I. C. 369=10 A. L. J. 297.

stration shall not be responsible for the loss, destruction, or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared * * * and, if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk." In the present case the plaintiffs or their agents signed a risk note which shows clearly on the face of it that they had been required to pay an increased percentage on the value but had elected not to do so. This being so, the only question which arises in the appeal is whether or not the silver can be said to have been 'lost' within the meaning of the section. It is contended that it would not be lost unless the actual way in which the silver was stolen was proved by the Railway Company. In our opinion this argument has no force whatever. As already stated, it is absolutely clear from the admitted facts that the silver bar was stolen whilst in transit between Jubbulpore and Allahabad. The package was delivered intact at Jubbulpore and one bar was missing when it was delivered to the plaintiffs or their agents at Allahabad. In our opinion this was a loss within the meaning section 75. The case of *Hearn* v. *The London and South Western Railway Company* (1) is cited on behalf of the appellants. This case **[658]** turned upon an argument as to the sufficiency of a plea. In that case the declaration alleged that the particular goods had not been delivered through the negligence of the Railway Company, but there was no allegation that the goods has been lost. A perusal of the judgment in the case clearly shows that if it had been alleged that the title deeds had been actually lost while in transit in the Railway Company, the plea of the defendants would have been a good plea.

It has also been argued that the risk note cannot save the defendants unless they show that they took proper care of the package consigned to them. In our opinion the present case does not turn upon the construction of the risk note at all The article was clearly one of the articles mentioned in the second schedule and the consignor was bound to declare the value of the article and to pay the percentage mentioned in the section so as to hold the railway company responsible for the loss.

In our opinion the appeal fails and is dismissed with costs.

Appeal dismissed.

34 A. 668 (=10 A. L. J. 299=16 I. C. 181.)

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

LALA (*Plaintiff*) *v.* NAHAR SINGH (*Defendant*).*

[13th July, 1912.]

Act (Local) No. II of 1901 (Agra Tenancy Act), section 22—"Lineal descendant"—Adopted son.

Held, that an adopted son is a lineal descendant within the meaning of section 22 of the Agra Tenancy Act, 1901.

[Fol. 37 All. 7.]

* Second Appeal No. 1187 of 1911 from a decree of A. W. R. Cole, Additional Judge of Aligarh, dated the 22nd of August, 1911, confirming a decree of Suraj Narain Majju, Munsif of Bulandshahr, dated the 11th of May, 1911.

(1) 1855) 10 Ex. 798.

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APPELLATE CIVIL.

34 A. 658 = 10 A. L. J. 299 = 16 I. C. 181.

THIS was a suit to recover possession of a certain occupancy holding detailed in the plaint, left by one Siya Ram, the plaintiff's brother, who was said to have died childless about 8 months before the filing of the suit. It was alleged that, under section 22 of Local Act No. II of 1901, the said holding devolved on the plaintiff, but that the defendant, who was the daughter's son of the said Siya Ram, professing himself to be the adopted son of Siya Ram, caused his name to be recorded in the Revenue papers, and that the defendant was not in fact and could not have been legally adopted. The plaintiff, therefore, besides the holding, also asked for possession of a house which had been left by Siya Ram. It was further stated by the plaintiff that the plaintiff's objection in the Revenue Court had been summarily dismissed. The courts [659] below dismissed the suit. The plaintiff appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellant.

The respondents were not represented.

RICHARDS, C. J., and BANERJI, J.—We think that the Court was quite justified in finding that the deceased occupancy tenant, Siya Ram, was a Sudra, and could adopt a daughter's son. This being so, the only question which remains is whether or not an adopted son is a lineal descendant within section 22 of the Tenancy Act, and in our opinion he clearly is. An adopted son is in the eye of the Hindu law just the same as a natural born son. The appeal fails and is dismissed, but without costs, as no one appears on behalf of the respondents.

Appeal dismissed.

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34 A. 659 (=10 A. L. J. 330 =17 I. C. 340).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice and Mr. Justice Banerji.

CHHOTKU RAI AND ANOTHER (*Plaintiffs*) *v.* BALDEO SHUKUL AND OTHERS (*Defendants*).*

[21st June, 1912.]

Mortgage—Non-payment of greater part of mortgage money—Mortgagee allowed to redeem before expiry of term of mortgage.

Certain property was mortgaged by way of conditional sale for Rs. 599-15-0 for ten years. Of the mortgage money Rs. 50-15-0 only were paid, and the balance was left with the mortgagees for payment to prior incumbrancers. The mortgagees did not pay off the prior incumbrancers, and, the mortgagor having meanwhile sold the mortgaged property, his assignees sued for redemption of the mortgage before the expiry of ten years. *Held* that on equitable grounds, the defendants not having performed what was a most essential part of the contract, the plaintiffs ought to be allowed to redeem before the expiration of the period of ten years.

[Rel: 28 I. C. 129; 42 Mad. 203.]

THE facts of this case were as follows:—

One Baldeo executed a mortgage by conditional sale in favour of the defendants, second party, on the 21st of August, 1905, for a term of ten years. The mortgage money was Rs. 599-15-0, out of which only Rs. 50-15-0 were paid to the mortgagor and the balance was left with the mortgagees for payment of debts due to prior creditors. This amount not having been paid, Baldeo transferred the same share to the plaintiffs on the 5th of January, 1906. The plaintiffs brought the present suit against

* Appeal No. 128 of 1911 under section 10 of the Letters Patent.

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34 A. 659=10 A. L. J. 330 =17 I. C. 340

the defendants, second party, the mortgagees, under the deed of the 21st of August, 1905, seeking to redeem the mortgage on payment of Rs. 50-15-0, on [660] the allegation that they had paid the sum of Rs. 549-15-0 to the prior creditors of Baldeo and were entitled to redeem. The defence of the defendants, second party, was that they had paid the sum of Rs. 549-15-0, and in any case that the suit for redemption was premature, the period of ten years not having elapsed. The courts below, without a finding whether the defendants, second party, had actually discharged the prior debts which they had undertaken to pay, dismissed the suit on the ground that it was premature, the period of ten years not having elapsed. On second appeal, a single Judge of the High Court confirmed the decision of the court below by the following judgment:—

"The point really in issue in this appeal admits of being stated without going into all the somewhat complicated, but not strictly relevant, details. The proprietor of a one anna share in certain zemindari property executed a mortgage by conditional sale, the terms of which were as follows:—

"The mortgagees paid Rs 50-15-0 in cash to the mortgagor, and covenanted to pay Rs 549 to certain other creditors of the latter. The mortgagor covenanted to give the mortgagees possession for ten years and to redeem at the end of that time; there was the usual stipulation that, failing redemption at the time specified, the instrument should operate as a deed of sale The plaintiffs have acquired the equity of redemption in this one anna share They say the holders of the mortgage above referred to have not paid off the creditors in accordance with the stipulations in the deed: they accordingly deposit in court Rs. 50 15-0 for payment to the mortgagee and sue for possession. The courts below have held that the suit is premature, the period of ten years stipulated in the mortgage deed not having expired. The plaintiffs do not contest the general principle that on a deed like the one in question the mortgagee is entitled to claim the benefit of the stipulation ensuring him ten years' possession; they plead that it is inequitable that the mortgagees should enforce this stipulation when they have not performed their part of the bargain. The principles governing the question in issue are to be found in sections 39, 55 and 73 of the Indian Contract Act (Act IX of 1872); a consideration of these sections shows that the courts below were right, the mortgagor (or the plaintiffs as representatives of the mortgagor) cannot claim relief against the contract allowing ten years' possession to the mortgagee, and that the mortgagor's remedy for the loss he is alleged to have suffered is by way of a suit for damages. The contract embodied in the instrument of mortgage cannot be set aside unless the plaintiffs can bring the case within the scope of section 39 or of section 55 of Act IX of 1872. The latter section cannot apply because no time was fixed within which the mortgagees were to pay off the creditors named in the deed. Nor can it be said that they have either 'refused to perform or disabled themselves from performing their promise in its entirety' within the meaning of section 39. The plaintiffs' case is at most that they have neglected to perform it. So far from refusing to do so, their plea on the facts (a plea which the decision of the courts below on the issue of law has prevented them from investigating) was [661] that they had performed it. It cannot be said that the mortgagees have disabled themselves from performing their part of the contract, or that it has become impossible of performance within the meaning of section 56 of Act IX of 1872. The case is simply one for a suit for damages. This appeal therefore fails and is hereby dismissed with costs."

The plaintiffs appealed under section 10 of the Letters Patent. On the appeal coming up for hearing before RICHARDS, C. J. and BANERJI, J., a finding on the issue as to whether the defendants, second party, had or had not paid the amount which they had undertaken to pay, was called for. The finding on this issue was in the negative. The appeal was then re argued.

Babu *Piari Lal Banerji*, for the appellants, contended that the mortgagees, defendants, second party, were not entitled to resist the claim for redemption on the ground that the claim was premature. The reason for enforcing a contract for a fixed term was based on the principle that when a mortgagee had parted with his money on the understanding that he would

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34 A. 659=10 A. L. J. 330=17 I. C. 340.

be allowed to enjoy the usufruct of the property for a fixed term, he should not be deprived of the fruits of his bargain by being made to give up the property before the expiration of the period. But this equitable rule could not be enforced by a mortgagee who had never parted with his money. If a mortgagor in order to save himself and his property makes a mortgage for a long term on the understanding that the mortgagee would pay off his creditors, it would be most unfair to allow the mortgagee to retain possession of the property without paying off the prior debts and thus expose the mortgagor to all the risks which he had intended to avoid by making the mortgage. If, under such circumstances, the mortgagee was allowed to resist the claim for redemption, it would be a most deplorable consequence to flow from an equitable rule.

Babu *Jogendra Nath Mukerji*, for the respondent, urged that the mortgagor was bound by the term fixed, just as much as the mortgagee was bound. A mortgage when made was not a mere contract, but a conveyance, and the mortgagor could not avoid the mortgage simply because a portion of the mortgage money had not been paid. He cited *Rashik Lal* v. *Ram Narain* (1) and *Bajrangi Sahai* v. *Udit Narain Singh* (2).

Babu *Piari Lal Banerji* was not called upon.

[662] RICHARDS, C. J. and BANERJI, J.—The vendors of the plaintiffs in this appeal made a usufructuary mortgage in favour of the defendants of the second party. The consideration for the mortgage was Rs. 599-15-0. All save Rs. 50-15-0 were left with the mortgagees for payment of creditors of the mortgagors. It has been found as the result of certain issues which we referred to the court below that the creditors were prior incumbrancers of the mortgaged property, and that the mortgagee never discharged the incumbrances. The usufructuary mortgage was by way of conditional sale and provided that the property should not be redeemed for ten years. The present suit is in form a suit to redeem the property upon payment of Rs. 50-15-0, which was the full amount of the consideration given by the mortgagees. The defendants, second party, contend that the plaintiffs cannot redeem the property or get possession of it until the expiration of the term of ten years, and this notwithstanding that the prior incumbrances to meet which the greater part of the consideration was left with them have never been discharged by them. Both the lower courts dismissed the plaintiff's suit. On second appeal to this Court the decision of the courts below was affirmed.

The plaintiffs came here in appeal under the Letters Patent and contend that inasmuch as the defendants, second party, never kept their part of the bargain by discharging the incumbrances which they agreed to discharge, they ought not to be delayed in redeeming or getting back possession of the property until the end of ten years. It seems to us that if under the circumstances of the present case the defendants, second party, are allowed to remain in possession of the property over the full period of ten years, taking the profits and allowing the interest on the prior incumbrances to accumulate, the plaintiffs will be without any proper or effectual remedy. It is doubtful whether a suit for damages could possibly be brought at the present time, and at the expiration of the period of ten years it will only be an effectual remedy if the defendants, second party, or their representatives are sufficiently good marks for damages. We think that on equitable grounds the defendants not having performed what we deem to be a most essential part of the

(1) (1912) I. L. R. 34, All. 273. (2) (1906) 11 C. W. N. 932.

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34 A. 659=10 A. L. J. 330 =17 I. C. 340.

contract so far as they are concerned, the plaintiffs ought to be allowed to redeem the property before the expiration of the period of ten years.

[663] We accordingly allow the appeal; set aside the decree of this Court and also the decrees of the courts below, and decree the plaintiff's claim for redemption on payment of Rs. 50-15-0. The appellants will have their costs in all courts. We allow one month for payment of the Rs. 50-15-0 mentioned above. The decree will be drawn up in the usual form.

Appeal decreed.

34 A. 663 (=10 A. L. J. 303=16 I. C. 529).

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Piggott.

BUDDHA SINGH AND OTHERS (*Plaintiffs*) *v.* LALTU SINGH AND ANOTHER (*Defendants*).*

[6th July, 1912.]

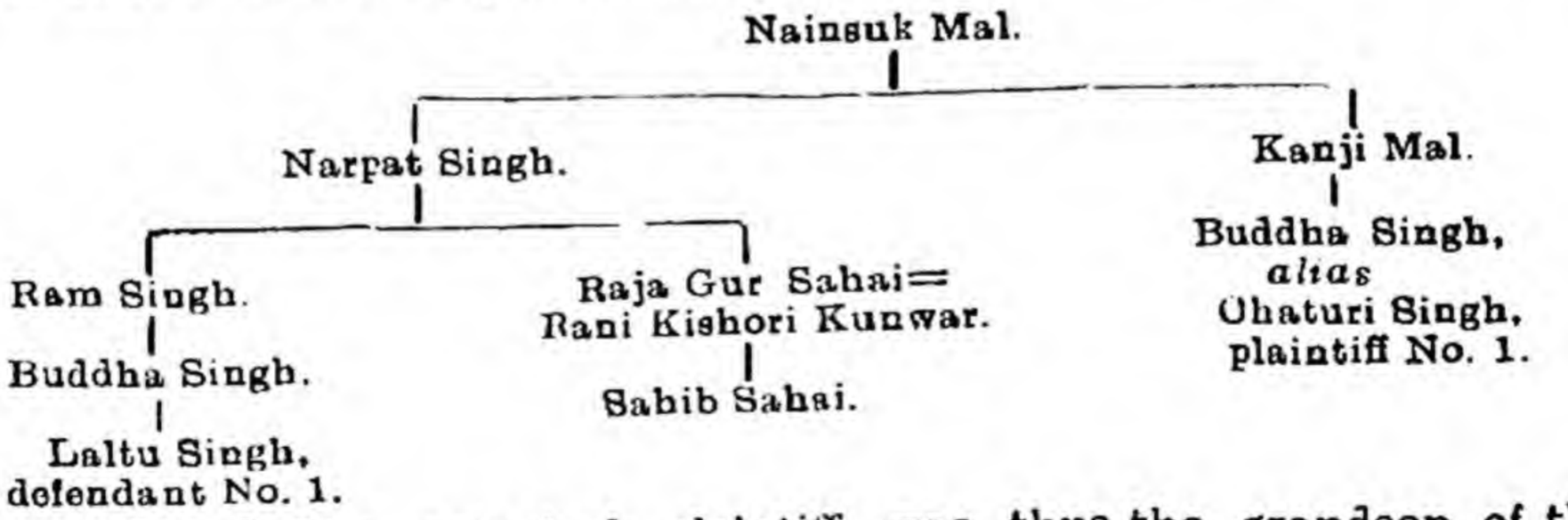
Hindu law—Mitakshara—Succession—Great-grandson of the grandfather—Grandson of the great-grandfather.

According to the Mitakshara law the three immediate descendants of the grandfather succeed in preference to the great-grandfather and his descendants, and the great-grandson of the grandfather is a preferential heir as against the grandson of the great-grandfather.

The following cases were referred to in the judgments delivered:—*Kalian Rai* v. *Ram Chander* (1), *Rutcheputty Dutt Iha* v. *Rajander Narain* (2), *Kashibai Ganesh* v. *Sitabai Raghunath Sivram* (3), *Rachava* v. *Kalingapa* (4), *Kureem Chand Gurain* v. *Oodung Gurain* (5), *Chinnasami Pillai* v. *Kunju Pillai* (6), *Bhyah Ram Singh* v. *Bhyah Ugar Singh* (7) and *Suraya Bhukta* v. *Lakshminarasamma* (8).

[Ref. 1913 M. W. N. 202=24 M. L. J. 301=18 I. C. 506.]

THIS was a suit for possession by right of inheritance of considerable property, both movable and immovable, which had belonged in his lifetime to one Sahib Sahai. The relationship of the parties to the propositus is shown in the subjoined table:—



[664] The principal plaintiff was thus the grandson of the great-grandfather of Sahib Sahai, whilst the principal defendant was the great-grandson of Sahib Sahai's grandfather. The Court of first instance decided in favour of the defendants and dismissed the suit. The plaintiffs appealed to the High Court.

* First Appeal No. 249 of 1910 from a decree of Gauri Shankar, Subordinate Judge of Moradabad, dated the 23rd of June, 1910.

(1) (1901) I. L. R. 24 All. 128.
(2) (1889) 2 Moo. I. A. 133.
(3) (1911) 13 Bom. L. R. 552.
(4) (1892) I. L. R. 16 Bom. 716.
(5) (1866) 6 W. R. 158.
(6) (1911) I. L. R. 35 Mad. 152.
(7) (1870) 13 Moo. I. A. 373.
(8) (1881) I. L. R. 5 Mad. 291.

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APPELLATE CIVIL.

34 A. 663=10 A. L. J. 303 =16 I. C. 529.

The Hon'ble Dr. *Sundar Lal* (with him The Hon'ble *Moti Lal Nehru*) for the appellants :—

The conclusion of the court below that the great-grandson of the grandfather is, under the Mitakshara, to be preferred as an heir to the grandson of the great-grandfather is opposed to Hindu law. The text of Yajnavalkya, II, 136, has been correctly expounded by Mandlik at pp. 220, 377-8 and 380-4 of his translation. The passages of the Mitakshara which have to be considered are ch. II, section 4, pl. 1, 7 and section 5, pl. 1,4,5. अपुत्रस्य means "of one without male issue" तत्सुता means "their sons" and *not* "their descendants," and सन्तान means only such descendants as are entitled to inherit and are mentioned before. The great-grandson is nowhere mentioned.

The following authorities support the appellants :—J. C. Ghose, *Hindu Law*, 125, 127 ; West and Buhler, *Hindu Law*, 124, 114, 116 ; J. N. Bhattacharyya, *Hindu Law*, 448 ; S.C. Sircar, *Vyavastha Chandrika*, Vol. I, 178, 183, 204 ; R. Sarvadhikari, *Hindu Law of Inheritance*, 423, 435 ; Madanaparijata (Sitaram Sastri's translation), 22 ; G. C. Sarkar, *Hindu Law*, ed. 4, 290 ; Rumsey, *Chart of Inheritance*, 43 ; Macnaghten, *Hindu Law*, 28 ; Colebooke's *Digest of Hindu Law*, vol. II, 542, pl. 417 ; Viramitrodaya (Setlur's translation), 420-3.

The court below relies upon *Kalian Rai* v. *Ram Chandar*, but this case lays down no general principle and is in the teeth of all authorities. It is criticized in G. C. Sarkar, *Hindu Law*, 288. The law is exhaustively discussed in *Chinnasami Pillai* v. *Kunju Pillai* (2) and this decision supports me.

The Hon'ble Pandit *Madan Mohan Malaviya* (with him Dr. *Satish Chandra Banerji* and Dr. *Tej Bahadur Sapru*), for the respondents :—

The general rule is laid down by Manu, IX, 186-7. Three generations are in the line of heirs. Mandlik's translation of Yajnavalkya, II, 135-6, is not correct ; च and एव have not been [665] translated at all, and तथा should have been connected with भ्रातरः The most important word used is अपुत्रस्य, and it cannot be disputed that the word पुत्र here includes the great-grandson. Mandlik, *Yajnavalkya*, 222. The Mitakshara does not mention the great-grandson specifically (ch. I, pl. 3), but the Viramitrodaya supplies the omission. The list of heirs in the older authorities is only illustrative, and not exhaustive. Consequently the omission to mention any particular heir does not imply his exclusion. The daughter's son, *e. g.*, is not mentioned in Yajnavalkya's text. Sanskrit has a convenient word पितृव्य for the paternal uncle, but no similar word to denote the brother of the grandfather or the great-grandfather, and that is why the texts are not more specific. The *sapinda* relation ends at the seventh degree, and in Mitakshara, s. 5, pl. 5, the line is traced "up to the seventh degree in ascent." Manusmriti, V. 60. J. C. Ghose, *Hindu Law*, 41, 57, 58, 65-6, 78, 97, 169, 170, 183-4. The texts of Devala and Parasara cited by J. C. Ghose show that as far as three generations downwards there is an *identity* of body. If the appellant's contention were adopted, the great-grandson would find no place among *sagotra sapindas*. Yajnavalkya had to indicate the entire range of inheritance in one *anustur* couplet and he used तत्सुतः to denote the issue generally. The Mitakshara uses the word पितृसन्तान to indicate the *line* of the father. सन्तान is in-

(1) (1901) I. L. R. 24 All. 128.

(2) (1911) I. L. R. 35 Mad. 152.

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terpreted as 'continuation' *Rachava* v. *Kalingapa* (1). Mandlik's authorities as cited on p. 360 (Subodhini) and p. 364 (Viramitrodaya) are both wrong. Mandlik has erred in thinking that only ten heirs are indicated. Harrington took a more correct view, though he should have stopped at the fourth degree and not counted up to the seventh. Neither abstraction, viz., obstructed or unobstructed inheritance, can be the antecedent of तत् पुत्रः, but it refers to son, grandson, uncle and brother (पितृ व्यादि). "And *the like of* the son" is not in the original. "Of sons and other descendants of others" is mentioned here. This is supported by the Subodhini, which has पुत्रपौत्रादयः There is no justification to limit आदि in the way Mandlik limits it. His suggestion too regarding error in the passage cited from the Subodhini is not justified; Setlur, Mitakshara, 590, 1, 8. The **[666]** Subodhini is commenting on the Mitakshara, ch. I, s. 1, pl. 3. एवतत् पुत्रादिषु अपि उहनीय applies to both obstructed and unobstructed heritage. The word पुत्र includes a great-grandson. Why should the Mitakshara repeat the same thing over and over again? पुत्र पौत्र क्रमण is the ordinary idiom. Where the Sobodhini is in conflict with the Mitakshara, it must be rejected. No reason has been suggested why पितृसन्तान should be limited to the son. As to the meaning of the words सन्तान, सन्तति, and सूनु, see Sabda Kalpadruma, p. 2293; M. Willaims, *Sanskrit-English Dictionary*, 1057, 1118; Amarkosha, II, 7 (Colebrooke's translation, p. 175).

The case law supports the respondents:—*Rutcheputty Dutt Iha* v. *Rajunder Narain Rae* (2), *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (3), *Kureem Chand* v. *Oodung Gurain* (4), *Oorhya Koer* v. *Rajoo Nye Sookool* (5), *Kashibai* v. *Sitabai* (6), *Radhey Singh* v. *Jholee Singh* (7).

The case in 24 Allahabad was correctly decided, and that in 35 Madras, p. 152, can be distinguished and goes too far. Modern writers also support the respondents' contention. Sarvadhikari, *Hindu Law of Inheritance*, 654, 656; S.C. Sircar, *Vyavastha Chandrika*, Vol. I, 183; J. N. Bhattacharyya, *Hindu Law*, 447—78; J. C. Ghose, *Hindu Law*, 126, 146; Mayne, *Hindu Law and Usage*, 777. A liberal construction should be adopted; *Gridhari Lall Roy* v. *The Bengal Government* (8).

The Dayabhaga (Setlur's translation), p. 97, was also referred to, and reliance was placed upon Apararka, S. Aiyar's translation, 41.

Where a question of priority arises funeral oblations should also be considered; *Suba Singh* v. *Sarfraz Kunwar* (9).

The Hon'ble Dr. *Sundar Lal* replied.

Apararka is no authority in the Benares school and cannot override the Mitakshara. I do not say that the defendant (great-grandson) is not an heir, but he comes under the omnibus clause; K. L. Sirkar *Mimansa Rules of Inheritance*, 207. What is true of lineal succession cannot be true of collateral succession, because the doctrine of representation does not apply to the latter. Logic is **[667]** out of place where specific texts have to be applied. If "son" includes grandsons, then a daughter's grandson should come in immediately after the daughter's son. In Mitakshara, II, s. 4, pl. 7, सुत: means a son and not a grandson. A Hindu would

(1) (1892) I. L. R. 16 Bom. 716.
(2) (1839) 2 Moo. I. A. 132, 157.
(3) (1870) 13 Moo I. A. 373, 392, 393.
(4) (1866) 6 W. R. 158.
(5) (1870) 14 W. R. 208.
(6) (1911) 13 Bom. L. R. 552, 557.
(7) (1855) S. D. A. (Bengal), 384, at 396.
(8) (1868) 12 Moo. I. A. 448.
(9) (1896) I. L. R. 19 All. 215.

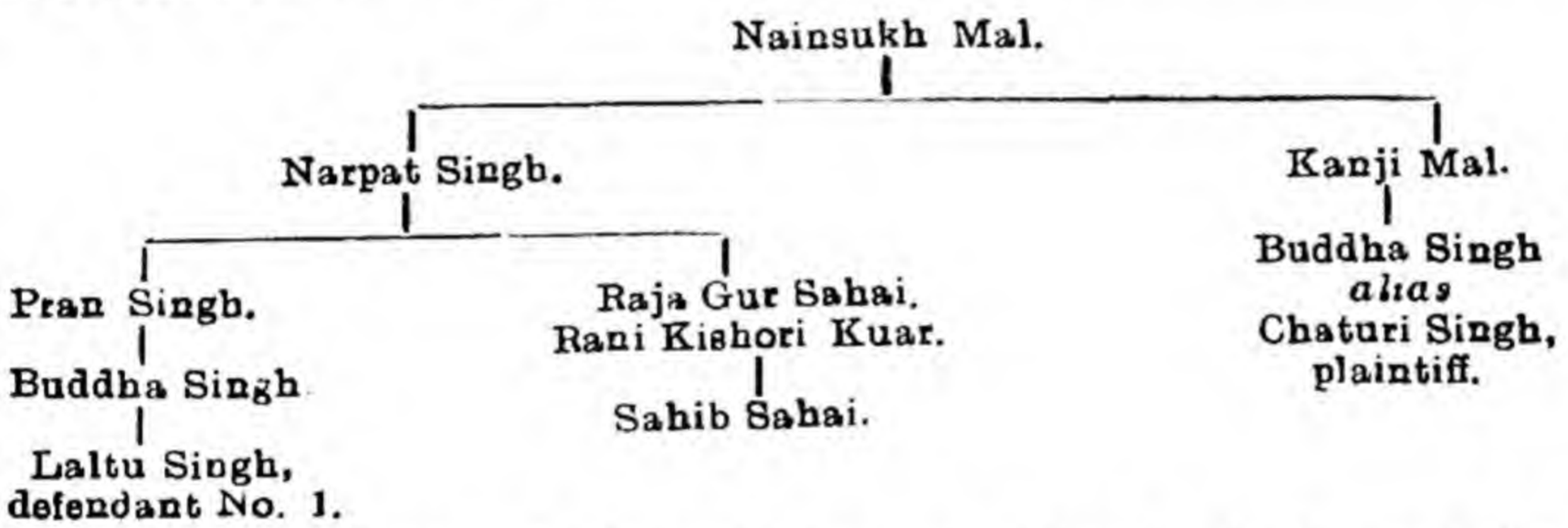
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prefer that his property should go to his grandmother and not to a brother's grandson, who might be a baby. Mitakshara, II, s. 5, pl 2, expressly prohibits the interposition of heirs between the brother's son and the grandmother. The word पे shows that the more excellent or preferable rule would be to give her a place immediately after the brother's son. The "compact series of heirs" ends with the latter. The brother's grandson is not in the "compact series," and is therefore only a gentile; Viramitrodaya (Sarkar's translation), 196, 199; K. L. Sirkar, *Mimansa Rules* (T. L. L.), 357, 358. General rules refer to the class previously mentioned in detail; Madanaparijata (Sastri's translation), 22. You can come down two steps, but no more; Sarvadhikari, *Hindu Law of Inheritance*, 510; Gentiles are of three classes, viz. *Sapindas* enumerated and unenumerated, and *samanodaks*; Smritichandrika (Iyer's translation), 188. Apararka is no authority outside Kashmir; J. C. Ghose, *Hindu Law*, 11; Sarvadhikari, *op. cit* 381. The connection with the fifth descendant stops for purposes of funeral oblations. There is no middle course, one must go up and go down to the seventh degree or not at all. The great grandson comes in under Mitakshara, ch. II, s. 1, pl. 3.

BANERJI, J.—This appeal raises an important question as to the order in which, according to the Benares school of the Mitakshara law, *gotraja sapindas* succeed. The first plaintiff claims the estate of Sahib Sahai as his next heir under the following pedigree:—



The correctness of this pedigree is not admitted on behalf of the defendants; but the case has been decided by the court below [668] on the assumption that it is correct, and the appeal before us has been argued on the same assumption.

The last male owner of the property in dispute was Sahib Sahai. After his death his mother, Rani Kishori Kunwari, was in possession till her death in 1907. It is claimed on behalf of the plaintiff Buddha Singh, *alias* Chaturi Singh, that he being the grandson of the great-grandfather of Sahib Sahai, the last owner, has a preferential right of inheritance as against Laltu Singh, the great-grandson of Sahib Sahai's grandfather. The other plaintiffs are purchasers of part of the property from Buddha Singh and are apparently financing the litigation.

The question to be determined is whether under the Hindu law as prevailing in these provinces, the great-grandfather's grandson succeeds in preference to the grandfather's great-grandson. The question is not free from difficulty and the authorities are to some extent conflicting.

The Mitakshara bases the order of succession on failure of sons and their descendants on the following text of Yajnavalkya: "The wife, and the daughters also, both parents, brothers likewise and their sons, *gotraja* (gentiles), *bandhu* (cognates), a pupil and a fellow-student. On failure of

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the first among these, the next in order is indeed heir to the estate of one, who departed for heaven leaving no male issue" (*Aputrasya*) (chap. II, S. I., section 1).

In section IV of chapter II the author of the Mitakshara deals with the rights of brothers, and section V lays down the rule of "succession of kindred of the same family name, termed *gotraja* or gentiles." In section 1 it is stated that the *gotraja* (gentiles) are the paternal grandmother and relations connected by funeral oblations of food and libations of water (*sapinda* and *samanodaka*). Paragraphs 4 and 5 are as follows :—

4. "* *Here on failure of the father's descendants (*santan*) the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons."

5. "On failure of the paternal grandfather's descendants (*santan*) the paternal great-grandmother the great-grandfather, his sons and their sons inherit. In this manner must be understood the succession of kindred belonging to the same general family till the seventh degree among the *sapindas*."

[669] The above is the translation of the original given in Setlur's Hindu Law Books on Inheritance and is more accurate than Mr. Colebrooke's translation.

Relying on the above text the learned advocate for the appellant contends that in the ascending line of heirs the paternal grandfather and his son and grandson succeed after the father, his son and grandson, and that after the paternal grandfathers' descendants mentioned above, the paternal great-grandfather, his son and grandson come in ; that is to say, the heirs are the paternal grandfather and his two descendants, and after them the great-grandfather and his two descendants, and the grandson of the paternal grandfather only comes in as a *gotraja sapinda* under the last clause of section 5. On the other hand it is urged that the word 'son' in the above texts includes the grandson and great-grandson, that the word *santan* must be taken to include three descendants, and that in computing the heirs in the ascending line three descendants of each ancestor should be computed. The former contention has for its support, besides the literal words of the texts of the Mitakshara, the opinion of Biseswar Bhatt, the author of the Subodhini and the Madan Parijat among commentators and of Mr. Mandlik and Mr. Golap Chandra Sarkar among modern writers, whilst the latter contention is favoured by the authority of Apararka and Vaijayanti among commentators and of Dr. Jolly, Mr. Mayne, Professor Sarbadhikari and other modern writers to whom I shall presently refer in detail. I leave out of consideration the commentators who are of high authority in the Maharashtra and Dravidh schools of the Mitakshara law but do not carry much weight in these provinces. The Viramitrodaya, which, next to the Mitakshara, is of paramount authority in the Benares school, does not discuss the question but simply repeats the words of the Mitakshara.

The question thus turns on the interpretation of the words *santan* and *putra* in *placita* 4 and 5 of the Mitakshara cited above ; that is to say, whether by *santan* in *placita* 4 and 5 is meant the descendants specifically mentioned in the preceding paragraphs and the word *putra* is to be taken in the narrow sense of 'son' and does not include the grandson, the appellant contends that the enumeration of heirs given in the above paragraphs should be strictly followed and that after the son of the **[670]** paternal uncle comes the line of the paternal great-grandfather. He

says, as stated above, that the paternal uncle's grandson is a *gotraja* only under the last portion of paragraph 5.

It may be taken as settled that the enumeration of heirs in the Mitakshara is not exhaustive. We have therefore to consider whether the word "son" is to be understood in the narrow sense contended for, and whether in the case of each ancestor in the ascending line, only two descendants are to be computed.

The word *putra* has, it seems to me, been understood in a wide sense. In the text of Yajnavalkya beginning with *patni* (wife), &c., cited above, the word at the end is *aputrasya*. That the word *putra* is used by him in an extended sense and is not limited to the son but also includes the son's son and the son's grandson is manifest. This is admitted by Mr. Mandlik on p. 222 of his work on Hindu law. In the translation of the text itself he has retained the word *putra* and in the note relating to it he says :—"The word *putra* in this verse stands for son, son's son, son's son's son." He refers to the Viramitrodaya and Balambhatta as authorities for this interpretation. This is also in accordance with what Manu ordains (chap IX, v. 187. Sacred Books of the East, vol. XXV, p. 366) in the following text :—"To three ancestors water must be offered, to three funeral cakes must be given, the fourth descendant is the giver of oblations, the fifth has no connection." So that the participation of the body extends to the fourth descendant, including the *propositus*. To the same effect is the following text of Devala :—"Up to the third degree the members of the family *are of the same body*." (Ghose's Hindu law, 2nd edition, p. 97). Parasara says that "the separation of the body accrues to the fifth person born of one's family." (Ghose, p. 57). Jimutavahana, quoting Manu, Vishnu, Harita, Yajnavalkya, Sankha, and Likhita says that "the term *putra* stands for descendants up to the son's son's son." Mandlik's Hindu law, p. 381. Vijnaneswara, the author of the Mitakshara, has also used the word *putra* in the same sense. In chapter 1. S. 1, paragraph 3, treating of obstructed and unobstructed inheritance, he says, with reference to sons and grandsons, &c., that the rule should be "inferred in respect of *their* sons." Both Balambhatta and the author of the Subodhini are of opinion that the word 'their' **[671]** (*tat*) in the above passage refers to the grandsons, &c., so that the grandson includes the great-grandson. Again, chap. II, section 1, of the Mitakshara is headed "Right of the widow to inherit the estate of one who leaves no *putra* (*aputrasya*)." There can be no doubt that the word *putra* here also includes the grandson and the great-grandson. Similarly, in section 4 of the same chapter the word seems to have an extended meaning. So that the author of the Mitakshara has generally used the word *putra*, wherever it occurs, in the sense of including the two immediate descendants of the son in the direct line. There is apparently no reason for holding that he has used the same word in a restricted sense in section V, paragraphs 4 and 5. It seems that having used the word *putra* in other places in an extended sense he considered it unnecessary to state that he used it in the same sense in the chapter in question also. The view contended for will, it seems to me, militate against the general scheme of succession laid down in the Mitakshara. In the case of the owner himself, his son, grandson and great-grandson succeed one after another, that is, down to the third degree. They take before the parents, and therefore it is reasonable to conclude that the same rule applies to the descendants of the father and the grandfather. There is

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apparently no reason to limit the line of descent to two descendants only in the case of the father and the grandfather, and it does not seem that the author of the Mitakshara intended to do so. If such was his intention one would expect that he would state some reason for putting a restricted meaning on the word *putra* in the case of the father, the grand-father and other ascendants, although that word had been elsewhere used by him in the sense of including the grandson. Under the Mitakshara *sapinda* relationship depends on participation in particles of the same body and propinquity is the rule of inheritance. It is to the nearest *sapinda* that the inheritance goes. Therefore the three descendants of the father being nearer *sapindas* than the three descendants of the grandfather, and the three descendants of the latter being nearer than the three descendants of the great-grandfather, the three descendants of the father inherit before the descendants of the grandfather, and his three descendants inherit before those of the great-grandfather. This is perfectly consistent with the rule of the Mitakshara. If Vijnaneswara intended to lay down a different rule, he would not have used the word **[672]** *santan* in paragaphs 4 and 5 of section V. That word has a wide meaning, and in the English translation of Amarkosh its equivalent is, 'lineage,' 'race'. The use of that word may fairly be regarded as an indication of the idea that the descendants of the father and the grandfather, &c., are not to be limited to two degrees only but should include the great-grandson who is the last man in the series of those who are of the same body, according to Manu and other ancient Hindu law givers.

The learned advocate for the appellant chiefly relies on the position which he contends is given in the Mitakshara to the grandmother, that is, immediately after the brother's son, and he urges that the persons mentioned by name are indicated as the heirs who would come in after the paternal grandmother. As to this it seems to be extremely doubtful whether the author of the Mitakshara intended to bring in the paternal grandmother after the brother's son and before his grandson. In paragraph 2 of section V he was considering the question whether the grandmother would come in immediately after the mother. He expressed the opinion that she does not do so, that her place in the order of inheritance is after the compact series of heirs from the father to the brother's son and "that the highest place which can be assigned to her (*utkarshe*) was after the brother's son." If this placitum be read with the general context and be considered in connection with the whole scheme of succession according to the Mitakshara and with the meaning of the word "*putra*" as understood in other chapters, it would not, in my opinion, support the appellants' argument to the extent contended for, and the grandmother would inherit after the brother's descendants and just before the paternal grandfather. The expression "compact series of heirs" in section 2 apparently refers to the series of heirs mentioned in Yajnavalkya's text quoted above and not to the heirs mentioned in Chapter V of the Mitakshara.

It is also urged that if son includes the grandson, the daughter's grandson would succeed after the daughter's son. The answer to this is that the daughter's son succeeds because he is assigned a particular place by Yajnavalkya in the text quoted above, otherwise he wou'd have succeeded as *bandhu*. This cannot be said of the daughter's grandson, who is not mentioned in the text.

[673] The learned advocate also relied upon the Subodhini and the Madanparijat as supporting his contention that the great-grandfather and

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his descendants succeed after the grandfather's grandson, *i.e.* the paternal uncle's son. The latter of the two authorities only recites the words of the Mitakshara literally. The Subodhini, no doubt, at one place, says that the brother's grandson does not succeed after the brother's son, but in the case of unobstructed and obstructed inheritance it would include the son of the grandson in the line of heirs. (Mandlik's Hindu Law, p. 382.) Besides, the author of that work would include females among *gotraja* heirs, which is admittedly not the law in the Benares school.

On the other hand, Apararka and Vaijayanti clearly support the view that the grandson of the paternal uncle succeeds before the line of the great grandfather comes in.

Mr. Mandlik and Mr. Golap Chandra Sarkar adopt the list of heirs specifically mentioned in the Mitakshara and would not extend the line of the father and the grandfather to three degrees of descendants but would limit them to two.

On the other hand Professor Sarbadhikari (Tagore Law Lectures, 1880) would extend the list of heirs to three degrees of descendants in each case. He points out that there are fourteen classes of *sapinda* heirs, four of whom are propinquous *sapindas*. The first of these are the three immediate descendants of the deceased. The next class consists of the mother, the father and their three immediate descendants. In the third class are the grandmother, the grandfather and their three immediate descendants. The fourth class consists of the paternal great-grandmother and the great-grandfather with their three immediate descendants (p. 654). He gives a complete table of *sagotra sapinda* heirs on p. 656, assigning in the ascending line the order of succession to each ancestor and his three immediate descendants. In this respect he differs from Mr. Mandlik, who gives the right of succession to two descendants only. (See table on p. 378.) Dr. Jolly adopts the same view as Mr. Sarbadhikari (Hindu Law, pp. 210 and 212). The table of heirs given by him is on the same lines as that of Mr. Sarbadhikari, and he gives to the grandfather's great-grandson the 17th place, while he assigns the 21st place to the great grandfather's grandson. Mr. Mayne in his well-known work (7th edition, p. 777) **[674]** mentions the grandfather's successors as being "issue to the third degree inclusive."

In the Vyavastha Chandrika, vol. I, p. 183, the great-grandson of the paternal grandfather, that is, the grandson of the paternal uncle, is included. Messrs. West and Buhler also think (p. 124) that the descendants of the grandfather must be exhausted before the great-grandfather's line can come in. The opinion of Mr. Bhattacharya (2nd edition, pp. 444 to 448) is that the three immediate descendants of the grandfather succeed before the great-grandfather. Referring to his opinion and that of Professor Sarbadhikari, Mr. J. C. Ghose in his work on Hindu Law, (2nd edition, p. 148) says :—" This rule is in accordance with the later theory of *sapindaship* and probably more consistent with the principle of propinquity." The weight of the authority of commentators and text writers is thus in favour of the respondent. It is said in regard to Apararka's opinion that it is based on the theory of spiritual benefit, which is inconsistent with the Mitakshara theory of *sapindaship* The Viramitrodaya, however, which, next after the Mitakshara, is of great authority in the Benares school, regards superior spiritual benefit as a determining factor in cases of competition, and this seems to have been the opinion of Their Lordships

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of the Privy Council. [*Bhyah Ram Singh* v. *Bhyah Ugur Singh* (1).] However, it is not necessary to go into that question, because, as observed by Mr. Ghosh (p. 147), *sapinda* relationship is " based on the identity of the body of the father, son, grandson and great-grandson."

The preponderance of the case law on the subject is also in favour of the respondents. In *Kalian Rai* v. *Ram Chandar* (2), a bench of this Court held that the word " son " in the Mitakshara includes " grandson," and therefore the brother's grandson is a nearer *sapinda* than the son of the paternal uncle. The exact question now before us was not decided in that case, but the principle laid down applies equally to the present case. The authorities were referred to and discussed and the conclusion arrived at was that the Mitakshara was not to be understood in a restricted sense when using the words *putra* and *santan*, and that those words include the grandson also. The opinion of Mr. Harrington in the **[675]** case of *Rutcheputty Dutt Iha* v. *Rajunder Narain Rae* (3) was considered and approved. That opinion has been adversely criticized by Mr. Mandlik (pages 380-383). With much of this criticism I am unable to agree. The weight of authority, as pointed out above, is in favour of the view that the line of each ancestor down to the three immediate descendants must be exhausted before the next ancestor and his descendants can come in. In so far as Mr. Harrington extends the line to six degrees, he has apparently gone too far, but that is no reason for rejecting the theory he enunciates, the principle of which is, in my opinion, fully borne out by authority.

The decision of this Court, in the case mentioned above, appears to have met with the approval of the Bombay High Court in *Kashibai Ganesh* v *Sitabai Ragunath Shivram* (4). In *Rachava* v. *Kalingapa* (5) Mr Justice TELANG, referring to the Mitakshara, chapter II, section V, *placita* 4 and 5, observed that it was laid down that " the propinquity of *gotraias* is to be determined by lines of descent, that is to say, the inheritance is to go first in the line (the word in the original is *santana*, literally 'continuation') of the paternal grandfather, then, in default of any one in that line, of the paternal great-grandfather and so forth." The learned Judge understood the word *santana* in an extended sense and in his opinion the line of the grandfather was to be exhausted before the great-grandfather and his line came in ; so that this decision may be regarded as an authority supporting the case of the respondent.

In *Kureem Chand Gurain* v. *Oodung Gurain* (6), which was a Mitakshara case, the Calcutta High Court approved of Mr. Harrington's opinion and recognized the right of the brother's grandson. The Madras High Court has held the contrary view. The most recent case on the point is that of *Chinnasami Pillai* v. *Kunju Pillia* (7) where it was held that the word "son" in the Mitakshara, chapter II, does not include the grandson. The learned Judges seem to have based their decision on what they regarded as "the consensus of opinion among lawyers dealing with the Mitakshara school of law as prevalent in this (Madras) presidency." For the reasons already stated I am unable to agree with the learned Judges **[676]** and to dissent from the view taken in this Court in *Kalian Rai* v. *Ram Chandar*. In my opinion on principle and on the authorities the view adopted in that case is correct.

(1) (1870) 13 Moo. I. A. 373.
(2) (1901) I. L. R. 24 All. 128.
(3) (1839) 2 Moo. I. A. 183.
(4) (1911) 13 Bom. L. R. 552.
(5) (1892) I. L. R. 16 Bom. 716.
(6) (1866) 6 W. R. 158.
(7) (1911) I. L. R. 35 Mad. 152.

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Upon a true interpretation of the text of the Mitakshara and on the authorities referred to above, I hold that the three immediate descendants of the grandfather succeed in preference to the great-grandfather and his descendants and that the great-grandson of the grandfather is a preferential heir as against the grandson of the great-grandfather. The defendant, Laltu Singh is therefore the next heir to Sahib Sahai and the plaintiff's claim has been rightly dismissed. I would dismiss the appeal with costs.

PIGGOTT, J.—This is a suit for possession in respect of property, both movable and immovable, of very considerable value of which the last full owner was one Sahib Sahai, who died in July, 1873. Possession has since been with his mother Rani Kishori Kunwar, and the succession opened on the death of that lady in the month of August, 1907. The suit is based upon a pedigree, according to which the first plaintiff, Buddha Singh *alias* Chaturi Singh, is the grandson in the male line of one Nainsukh Mal, who was the paternal grandfather of Raja Gur Sahai (or Gauri Sahai), husband of Rani Kishori Kunwar and father of Sahib Sahai. The plaintiff's own pedigree shows that Laltu Singh (defendant No. 1) is the grandson in the male line of Puran Singh, own brother of Raja Gur Sahai. The defendants did not admit the plaintiff Buddha Singh to be in fact the son's son of Nainsukh Mal; but this issue of fact has not at present been tried out. The learned Subordinate Judge has held in effect that, whatever doubt may exist elsewhere on the question of Hindu law involved, the decision of this Court in the case of *Kalian Rai* v. *Ram Chandar* (1) was binding upon him and was sufficient authority for the proposition that Laltu Singh as the grandfather's great-grandson of Sahib Sahai was a nearer heir to that gentleman under the Hindu law of the Mitakshara school than Buddha Singh alias Chaturi Singh, even supposing the latter to be able to prove himself to be the grandson of Sahib Sahai's great-grandfather, all the relationships referred to being of course in the direct male line. There was some little discussion before us at the commencement of the hearing as to the convenience of the course thus adopted by the court below, but it is to be noticed that [677] the plaintiffs have not made it a plea in their memorandum of appeal that they desired an issue to be remitted upon the question of fact, and it seems clear that the learned Subordinate Judge acted as he did with the acquiescence, if not with the express consent, of both parties. We thought it best therefore to accept the position as it stood, and we have had the advantage of hearing the question of law argued out at length with the assistance of an array of counsel on both sides exceptionally well qualified, if I may take the liberty of saying so, to assist the Court in arriving at a correct conclusion.

Much of the argument centered round Mr. V. N. Mandlik's exposition of the Hindu Law of Succession contained in his commentary on the "Vyavahara Mayukha," and I find it convenient to turn at once to the table given by that learned author at page 378 of his work, quoting from the edition of 1880. We have exhausted in this case the line of the *propositus* himself and that of his father, and the question is as to the steps to be followed in order to arrive at the next heir amongst the *gotraja sapindas*. There is no grandmother or great-grandmother to be considered in this case, and I need not complicate the question at this stage by considering the position assigned to these ladies, or to other female heirs of the same class. Broadly speaking Mr. Mandlik's principle as applied to

(1) (1901) I. L. R. 24 All. p. 128.

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the facts of the present case is to ascend to the line of the grandfather, to follow this downward for two generations only, that is to say, as far as the grandfather's son's son (that is to say, the first cousin of the *propositus*), and then to ascend to the next generation and take the line of the great-grandfather. This is similarly followed for two generations only before ascending to the line of the grandfather's grandfather, and the process is continued to the sixth in ascent from the *propositus* (the great-grandfather's great-grandfather), after which Mr. Mandlik returns once more to the lower generations, continuing each line in turn until he reaches the sixth in descent, either from the *propositus* himself or from the common ancestor in each case. It is this table, together with the authorities upon which it purports to rest, which forms the basis of the appellant's case. It places the plaintiff, Buddha Singh, as great-grandfather's grand-son, eighteenth in the order of succession, while the defendant, Laltu Singh, as grandfather's great-grandson, stands only thirty-eighth. He is postponed, not merely to Buddha Singh, but to such hypothetical heirs as grandfather's first cousins, as **[678]** well as to the practically inconceivable heirs arrived at by ascending two generations higher still, who appear as numbers 24 to 32 inclusive in Mr. Mandlik's table.

As against this scheme of inheritance, which I may refer to for convenience sake as Mr. Mandlik's, there have been laid before us two other schemes or theories, which I propose to speak of as Mr. Harrington's and Mr. Sarvadhikari's. The former was expounded by Mr. Harrington of the Sudder Dewani Adalat in the case of *Kutcheputty Dutt Iha* v. *Rajunder Narain Rae* as long ago as 1839, vide 2 Moore's Indian Appeals, p. 133. It goes on the principle of exhausting the line of each ascendant down to the sixth person in direct male descent before taking another step in the upward line. As applied to the facts of the present case, this principle would exhaust the line of Sahib Sahai's grandfather, not merely down as far as his great-grandson, the defendant Laltu Singh, but if necessary, three generations further, before seeking for an heir in the line of Sahib Sahai's great-grandfather. The principle laid down by Mr. Sarvadhikari, and arrived at independently by Dr. Jolly in his "History of Hindu Law" (at p. 212), lies between these two. It would follow Mr. Mandlik's plan in its general outline, but would carry the descent in each case one step further, namely, to the great-grandson of the common ancestor concerned. Thus in the present case the line of Sahib's grandfather would have to be carried down to that gentleman's great-grandsons, and would thus reach the defendant Laltu Singh, before any attempt was made to search for other possible heirs by ascending to the line of the great-grandfather in order to reach the plaintiff Buddha Singh.

The defendants of course stand to win this case if the court will accept either Mr. Sarvadhikari's or Mr. Harrington's scheme of succession, but their learned advocate was inclined to press the former upon our acceptance rather than the latter. For purposes of argument however I prefer to consider Mr. Harrington's first. I do not propose to transcribe the ancient texts on which the argument turns, the most important of them have been set forth in the judgment of the lower court. The essential point is the interpretation to be placed on the fifth section of the second chapter of the Mitakshara. We must go back, however, to the beginning of the chapter in order to remind ourselves that we are dealing with "the estate of one who departed from heaven leaving no male issue." **[679]** *vide* Yajnyavalkya, chapter II, section V, 137, as quoted in the

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Mitakshara itself. The word used here is "*aputrasya*," and it is common ground that as used in the particular place and in this particular context, the word does not mean a man who has left no sons surviving him, but means at least a man who has left no son, grandson or great-grandson in the male line. Mr. Harrington would take it broadly as meaning a man who has left no lineal descendants in the direct male line. The first four sections of the chapter deal with the succession of the estate of such a man as far as the exhaustion of his father's line: we then come to the fifth section introduced by the words "if there be not even brother's sons, gentiles share the estate." Amongst these the ancient author proceeds to put the paternal grandmother first and he diverges into a curious exposition of his reasons for so doing. He then explains the general distinction which he draws between gentiles (*sapindas*) and cognates (*bandhus*) and finally returns to his table of succession at the fourth sub-division of the section. Thus, he says, on failure of the father's line (*santan*), the succession goes to the paternal grandmother, the paternal grandfather, the uncles and their sons. The next sub-division gives the succession "on failure of the paternal grandfather's line" to the paternal great-grandmother, the great-grandfather, his sons and their issue and provides further that this is the way in which the succession of *gotraja sapindas* is to be reckoned "up to the seventh degree." After this we are to make a fresh start in search of kindred connected by libations of water, and the principle laid down appears to be that we are to resume the same process and carry it to the seventh degree beyond that already reached, "or else as far as the limits of knowledge as to birth and name extend." The great point in favour of Mr. Harrington's scheme of succession is that it avoids making a fresh start until the necessity for so doing is clearly indicated by the ancient text itself. It carries out one single and consistent process up to the dividing stage marked by the end of pl. 5, and it then proceeds to follow the directions of pl 6 by carrying a precisely similar process six degrees further. It rests upon the contention that the word "son" or "issue" wherever they occur in this section must be interpreted in accordance with the general context, and must be governed by the use of the word "*santan*" **[680]** at the beginning of pl. 4 and pl. 5, as well as by the general direction to carry the entire process "up to the seventh degree." That there is authority for the use of the word "sons" in other parts of the Mitakshara so as to include at least the sons and grandsons of such sons is not denied; the contention for the appellants is that this use is only to be accepted where there are express words in the text itself to authorize such an interpretation. The argument in favour of Mr. Harrington's scheme I would state as being that the interpretation of such words as "sons" and "issue" should be governed in each case by the context as a whole, and that the context in the present case is such as to justify, if not to necessitate, an interpretation which will carry the direct line of descent downwards to the limit of the "seventh degree" prescribed by pl. 5. I understand that Mr. Harrington, in order to give symmetry and completeness to his scheme of inheritance, would propose formally to place the lineal descendants of the *propositus* in the main line down to the seventh degree (*i.e.*, down to the great-grandson of the great-grandson) first in order, before ascending to the line of the father at all, and would similarly exhaust the line of the father down to the grandson of a great grandson of a brother of the *propositus* before ascending to the grand-father's

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line. This has been made a matter of serious objection against the entire scheme by Mr. Mandlik and other Hindu critics. They contend that on the ancient texts themselves there can be no doubt that the ascent to the father's line (I am passing over for purposes of argument the rights of the wife, the daughter, the daughter's son and the mother) commences as soon as the line of the *propositus* has been carried down to his great-grandson. Moreover they lay particular stress on the position of the grandmother, contending (and this is an argument used both against Mr. Harrington's scheme and against that of Mr. Sarvadhikari) that it is quite clear from section V, pl. 2, of the second chapter of the Mitakshara that paternal grandmother succeeds immediately after the brother's son. These arguments are not without real weight, but I conceive that there is much to be said by way of rejoinder. One cannot deal with an ancient text like that of the Mitakshara precisely as one would with a modern Act of Parliament. I cannot feel that it is a conclusive argument [681] against a scheme of inheritance which is really intended to apply when one reaches the "*gotraja sapindas*," after the exhaustion of the father's line, that it involves by analogy the assigning of a place in the line of succession to such improbable heirs as the great-grandson, or the brother's great-grandson of the *propositus*, such as does not seem to be strictly warranted by the ancient text. The text relating to the paternal grandmother represents what the author of the Mitakshara felt to be a difficulty, not to say an anomaly, about the older scriptures on which he was commenting. It is at least open to argument whether on a correct rendering of the original, the author's meaning should not be taken to be that the paternal grandmother can only come in "at best" or "at the highest" after the brother's son. In any case the argument, to some extent at least, begs one of the most critical questions in issue, that is to say, whether the expression "brother's son" in this very passage may not include the descendants of the brother in the direct male line either to the third or to the sixth degree.

I now pass on to consider Mr. Sarvadhikari's scheme. In order to the due appreciation of this it is necessary to go right back to the original text of Manu, which is the foundation of the Hindu law on the question. I quote from Manu, III, 216, as translated by Mr. Ghose at p. 66 of his book on Hindu law:—"To the three ancestors water must be offered; to three the funeral cake (*pinda*) is given; the fourth (descendant) is the giver of these (oblations); the fifth has no concern (with them)." The way in which this text has been understood and applied by subsequent commentators can best be understood if we start with a series of seven descendants in the direct male line in which our *propositus* occupies the middle place. He offers the mystic "funeral cake" to three ancestors, *i.e.*, to his own father, paternal grandfather and paternal great-grandfather; similarly he has three descendants who make the same offering to him, namely, his son, his son's son and his great-grandson, the son of his son's son. By the "fifth" who has "no concern" is to be understood the fifth person in the descending series reckoning the *propositus* himself as the first, that is to say, the "fifth" person would be the great-grandson's son. In the table at page 378 of Mr. Mandlik's book to which I have already referred we find as the basis of the scheme of inheritance a series not of seven, [682] but of thirteen, descendants and ascendants in the direct male line, with the *propositus* or "deceased owner" in the centre. This is presumably because of the interpretation which all Hindu lawyers appear

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to have placed on the expression "up to the seventh degree" in the Mitakshara, chapter II, section V, pl. 5. The series itself stands connected with the *propositus* not only by the offering of water spoken of in the text of Manu, but by the fact that the great-grandfather offers the funeral cake to his own great-grandfather, and the great-grandson receives the same offering from his own great-grandson. The general principle has been laid down (vide Mayne's Hindu Law at page 777 of the VII edition) that "so far as the issue of each ancestor are his *sapindas*, they are also the *sapindas* of the person with whom they are connected through that ancestor." From these considerations Mr. Sarvadhikari deduces a theory of nearer and more remote *sapindas*, according to which the "nearer" line comes to an end in each case with the great-grandson of the *propositus* himself and of each male ancestor in the ascending line in turn; the search for more "remote" *sapindas* is then recommenced with the great-grandson's son of the *propositus* himself and continued as already explained. The theory finds support from a passage from Visvesvara referred to at page 382 of Mr. Mandlik's book, which has evidently puzzled that learned author so much that he can only get away from it by suggesting some misreading in the manuscripts now available, a suggestion which later research has apparently quite failed to bear out. The advantage of this scheme over Mr. Harrington's is that it begins the ascent in strict conformity with the letter of the ancient texts after the great-grandson of the *propositus*, and that it can quote more direct authority for understanding the word "sons" as including the sons and grandsons of such sons than is available in support of Mr. Harrington's theory that the descendants of such sons to the sixth degree should be deemed to be indicated. I do not say that this argument altogether meets, to my mind, the contention that Mr. Harrington's scheme is based upon the general context of the section of the Mitakshara in question (chapter II, section V) read and considered as a whole, but it is certainly not without weight. As the matter presents itself to my mind, a very important question is whether **[683]** this scheme of Mr. Sarvadhikari's is or is not open, equally with Mr. Mandlik's, to an objection which I have already suggested. Does it or does it not involve making a fresh start at a point where no fresh start is indicated by the text of the Mitakshara itself? As formulated, or at any rate as presented to us in argument, it seems to me, that it does. I venture to throw out the suggestion, however, that this objection as applied to Mr. Sarvadhikari's scheme turns rather upon a question of terminology. Would the learned Hindu lawyers who support this scheme of inheritance be content to admit that the heirs arrived at by making a fresh start after the great-grandson of the great-grandfather's great-grandfather come in under pl. 6 as "kindred connected by libations of water?" If this be done, and if we interpret the words "to the seventh degree" in pl. 5 as meaning "up to the seventh degree in the ascending line of ancestors," it seems to me that we arrive precisely at Mr. Sarvadhikari's scheme or table of succession upon a strict and consistent interpretation of the text of the Mitakshara and subject only to the condition that we bring in the entire line of what Mr. Sarvadhikari calls the "remote *sapindas*" by virtue of pl. 6 and not under pl. 5 of the text before us. I leave it to Hindu lawyers to say whether this suggestion is hopelessly unacceptable because doing too great violence to the accepted meaning of the term "*sapindas*," though I cannot refrain from remarking that the arguments before us seemed to disclose abundant instances of varying usage, now stricter and now looser, in respect of this particular term.

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I have now said enough to have indicated incidentally the essential basis of Mr. Mandlik's theory and the line of argument upon which it is based. It involves a strict and literal interpretation of the word " sons " or " issue " wherever they occur in section V of chapter II of the Mitakshara. It is as if we were to presuppose a second series of " enumerated heirs " given a preferential right amongst the *sapindas* themselves by virtue of the fact that they are specifically mentioned in the text itself, while the position of others is left to be deduced by inference and analogy. These would be the paternal grandmother, the paternal grandfather, his sons (" the uncles ") and his grandsons (" their," *i. e* the uncles' " sons ") ; then the " paternal great-grandmother, the [684] great-grandfather, his sons and their issue "—the latter expression being understood strictly as being the sons of such sons. The Madras High Court, which is the one modern authority clearly on the side of Mr. Mandlik's theory, has gone the full length of accepting these persons as "enumerated heir," in the same sense apparently in which that expression is used elsewhere of the "compact series of heirs from the father to the nephew " spoken of in the Mitakshara, ch. II, sec. V, pl. 2—*vide Chinnasami Pillai* v. *Kunju Pillai* (1). It matters not for the purpose of this particular case that the "enumeration" strictly so called ceases with the line of the great-grandfather, and that Mr. Mandlik himself has to continue his table of inheritance from this point by way of inference and deduction. The fact remains that a son of a great-grandfather's son is specifically mentioned in pl. 5, while the place in the line of succession of a grandfather's great-grandson must be determined by analogy upon one or other of the theories before us. If this specific mention is to be accepted as decisive, in spite of any other arguments in favour of Mr Sarvadhikari's scheme or of Mr. Harrington's, there is undoubtedly an end of the matter, and the decision of the court below on the issue of law involved must be reversed.

I pass on now to consider the competing theories before us in the light of authority. It was very stongly urged upon us in the final argument addressed to the Court on behalf of the appellants that we should by no means base our decision upon any interpretation which we might ourselves feel disposed to put upon the text of the Mitakshara, even afer considering that text in the light of opinions expressed by the most eminent modern commentators, or in view of analogies drawn from published decisions of English courts We are asked to decide simply what is the interpretation put upon the text of the Mitakshara by those ancient commentators who are the accepted authorities upon that school of law as prevailing in these provinces. I wish to make it clear that I fully appreciate the force of this argument. Had the very learned and able advocate for the appellants succeeded in satisfying me that there was a clear and unmistakable consensus of opinion amongst such commentators upon the particular point in issue, I should undoubtedly have felt it my duty to accept this consideration [685] as decisive. My learned colleague is better qualified than I am to appreciate the precise force of this argument as it was developed in detail, and if it failed to convince him I can feel no scruples on the point myself. It seemed to me that neither clear unanimity nor unmistakable certainty of decision in respect of the particular point before us on the part of the authorities cited was made out. In some cases the commentaries quoted simply reproduced the text of the Mitakshara, with little or no variation

(1) (1911) I. L. R. 35 Mad. 152.

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and nothing in the way of comment that had any bearing upon the issue we are considering. It did not appear to me that more than one authority, the "Madana Parijata" (S. Sitarama Sastri's translation) expressed itself with anything approaching certainty in favour of Mr. Mandlik's view. Nowhere did I find anything like a complete examination of the entire section of the Mitakshara with a view to deducting therefrom a definite and unambiguous scheme of succession amongst the "gentiles." I cannot accede to the view that the question before us is concluded by a clear consensus of opinion amongst the most ancient authorities of the Mitakshara school.

There is no reported decision of their Lordships of the Privy Council which can be regarded as turning upon or finally determining this particular point. It is to be noticed, however, that what I have spoken of as Mr. Harrington's scheme was formulated in a case which went up to their Lordships, and it is scarcely putting the matter too strongly to say that it received their tacit endorsement. Indeed in a subsequent case *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (1), though here again the actual point for decision was different. Their Lordships seem to have expressed approval of the position that Mr. Harrington's views had received a general endorsement from their authority. The Madras High Court has been on the side of the appellants. The recent case which I have already quoted refers back to an older decision of the same Court in *Surayu Bhukta* v. *Lakshminarasamma* (2), where Mr. Harrington's opinions in *Rutcheputty Dutt Iha* v. *Rajunder Narain Rae* (3) are treated as *obiter dicta*, which in a strict sense they undoubtedly were, and a clear finding is given in favour of the succession of a paternal uncle's son before a **[686]** brother's grandson. This, however, is precisely and definitely contrary to the decision of two Judges of this Court in the case relied upon by the court below, *Kalian Rai* v. *Ram Chandar* (4), and we are bound at least to give the decision of our own Court the greater weight. It was contended before us that this decision does not purport to proceed upon the definite adoption of any one principle or scheme of succession and that the learned Judges responsible for the same were careful to limit themselves to the particular issue before them. I think it is true that they refrained from saying that in their view the brother's grandson must necessarily come in under section IV of chapter II of the Mitakshara, but contented themselves with holding that under section V he would be a nearer heir than the uncle's son, assuming both to take only as "gentiles" under that section. I think it would perhaps be open to us to say that we are not necessarily bound to carry the principle affirmed in *Kalian Rai* v. *Ram Chandar* a step further into the next generation in the ascending line, but I do not see any possible line of reasoning upon which we could find for the appellants in the present case which would not involve a finding that *Kalian Rai* v. *Ram Chandar* was wrongly decided. Finally I may note that the Bombay High Court is almost as clearly against the appellants as the Madras High Court is in their favour. In the recent case of *Kashibai Ganesh* v. *Sitabai Raghunath Shivram* (5) much of the older case-law on the subject is reviewed, and the great authority of Mr. Justice TELANG is quoted for the proposition that—"The inheritance is to go first in the line (the word in the original is *santana*, literally 'continuation') of the paternal grandfather, then in default of any one in that line

(1) (1870) 13 Moore's I. A. p. 373.
(2) (1881) I. L. R. 5 Mad. p. 291.
(3) (1839) 2 Moo. I. A. p. 133.
(4) (1901) I. L. R. 24 All. 128.
(5) (1911) 13 Bom. L. R. 552.

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of the paternal great-grandfather, then of the paternal great-great-grandfather, and so forth." *Vide Rachava* v. *Kalingapa* (1) I come therefore to the conclusion of the whole matter upon a general review of arguments and authorities. It is perhaps difficult for an English Judge to clear his mind altogether of some antecedent prejudice in favour of Mr. Harrington's scheme. The English law is clear that in any question of inheritance through males the remoter ancestor and his descendants are excluded by the nearer ancestor or by his descendents how low soever. One [687] learned author, Mr. Golap Chandar Sirkar Shastri (*vide* p. 219 of his work in the IVth edition), in adversely criticizing the decision of this Court in *Kalian Rai* v. *Ram Chandar*, has been somewhat severe upon our Judges for having (as he seems to suggest) allowed themselves to be influenced by English rather than Hindu ideas of propinquity in relationship. His remarks suggested to my mind the putting of the question actually before us to the test of personal experience My "grandfather's great-grandson" sounds a somewhat formidable person when you put him to me in that way; but coming to disentangle him, I find that I know him well. He is the son of my first cousin, a member of a family which I know well, a lad for whom I feel much natural affection. As for my great-grandfather's grandsons, the sons of my grandfather's brothers, I frankly do not know whether or not any such persons now walk this earth. Is the idea of propinquity involved in the Hindu text that "to the nearest *sapinda* the inheritance next belongs," really different when you come to relations so far removed in degree, from that upon which the English rule of inheritance is based, and which I find to be strikingly illustrated by the case of my own family? I take leave to doubt it.

Of the schemes of inheritance which we have discussed Mr. Harrington's seems to me the simplest and most consistent. I do not believe that it does any real violence to the ancient text upon which it is based, and it seems to me to have behind it a weight of modern authority beyond that which can be claimed for the other two. On the other hand, Mr. Sarvadhikari's scheme attracts me by the suggestion that it is in closer conformity with essentially Hindu ideas, as going back for its basis to the most ancient authority upon which the Hindu law on the subject is based. Subject to the considerations which I have suggested when discussing it, I think it may claim equally with Mr. Harrington's to satisfy the requirements of section V, chapter II of the Mitakshara read as a whole. If the suggestion which I have ventured to make regarding it is considered admissible by Hindu lawyers of the modern school, I would prefer Mr. Sarvadhikari's scheme—regarded merely as a system deduced from the text of the Mitakshara to Mr. Harrington's; otherwise I think it open to an objection which would throw back my preference to the older system propounded by the English Judge. I would unhesitatingly [688] prefer either of these schemes to Mr. Mandlik's. With all respect to the learned authors and Judges who accept this last, I would say that the scheme rests upon a pedantically literal interpretation of the words "sons" and "issue" which is at variance with the context of the section read as a whole, and that its logical development does violence to the great principle "that to the nearest *sapinda* the inheritance next belongs."

I would therefore dismiss this appeal with costs.

BY THE COURT:—The appeal is dismissed with costs.

Appeal dismissed.

(1) (1892) I. L. R. 16 Bom. 716.

THE

INDIAN HIGH COURT REPORTS

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BORROWER'S NO.	ISSUE DATE	BORROWER'S NO.	ISSUE DATE

35 A. 1 (=10 A. L. J. 355=17 I. C. 574=13 Cr. L. J. 832).

[1] REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* HARGOBIND.*

[1st August, 1912.]

Act No. III of 1867 (*Public Gambling Act*), *sections* 3 *and* 4—*Presumption—Warrant not in accordance with provisions of Act.*

Held that a warrant authorizing the search of any house which the police officer to whom it has issued might think proper to search was not a legal warrant within the provisions of the Public Gambling Act, 1867.

[Ref. 35 All. 575; Rel, 73 I. C. 521=24 Cr. L. J. 633.]

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ONE Hargobind was convicted by a Magistrate of the first class under sections 3 and 4 of the Public Gambling Act, 1867 and fined Rs. 30. Against this conviction and sentence Hargobind applied in revision to the High Court. On this application two pleas were raised. The first was that the warrant under which the alleged public gaming house was searched was entirely illegal, the warrant being a general warrant authorizing the search of any house which the police officer to whom it was issued might think fit to search. The second ground was that the evidence was legally insufficient to warrant the conclusion that the house searched was used as a common gaming house.

Mr. *A. P. Dube*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

TUDBALL, J. :—The applicant in this case has been convicted under sections 3 and 4 of the Public Gambling Act and has been fined Rs. 30. The two points taken before me are :—(1) That the search carried out by the police was entirely illegal, and (2) that it is not proved that the house in question is a gaming house. In regard to the first point after examining the warrant I find it was issued apparently for the search of any house which the police officer to whom the warrant was issued might think proper to search. There can be little doubt that the warrant was entirely illegal and any search under it was not such as was contemplated by the Act. The result of this illegal search, however, is merely this, that no presumption whatsoever can be drawn in accordance with the [2] Act such as is allowed by the terms thereof to be drawn in the case of a legal search. If, however, there is evidence on the record to establish that the house was a gaming house and that the present applicant was using it as such for his own profit, the legality of the conviction cannot be questioned. The evidence on the record is to the effect that the house in question belongs to one Mohan Kalwar. It was empty and unoccupied. This is to be gathered from the evidence of Bindeshri, one of the defence witnesses. The prosecution evidence shows that Zakir and Hargobind, the

* Criminal Revision No. 499 of 1912 from an order of G. O Allen, Magistrate, first class of Mirzapur, dated the 18th of January, 1912.

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present applicant, with or without the permission of the owner, were as a matter of fact using a room in this building for the purpose of gaming and that they were taking a portion of the winning from the winners. The evidence is to the effect that when the police arrived gaming was going on. Sixteen cowries were found on the ground. There was also a carpet on the ground. Candles and a *chirag* were alight. A piece of chalk and a certain amount of cash was also recovered. But it is impossible to follow the train of thought in the Magistrate's mind when he said that the piece of chalk in the present case was an instrument of gaming, for there is nothing on the record to show that it was used for that purpose. It is urged that cowries are not instruments of gaming *per se*, and unless and until there is evidence to show that they were used as instruments of gaming, the court has no right to hold that they were such instruments. The evidence for the prosecution is to the effect that gaming was going on and that sixteen cowries were on the ground. *Solahi* is a game which is played with sixteen cowries and is a very common game in this country for the purpose of gambling, though it would have been better if the Magistrate had made the point perfectly clear by examination of witnesses. Still, the circumstances of the case place it beyond doubt that the game which was being played was a game of *solahi*, for which cowries are used as instruments of gaming. In my opinion, therefore, the evidence on the record is sufficient to enable the Court to hold that the applicant was using the house in question as a gaming house, deriving profit therefrom, and that the cowries were instruments of gaming and were being used as such. In these circumstances I do not deem it necessary to interfere at all in this case. The application is dismissed.

Application dismissed.

35 A. 3 (=10 A. L. J. 300=16 I. C. 406.)

[3] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

PARBATI (*Plaintiff*) *v.* BAIJ NATH PATHAK AND ANOTHER (*Defendants*).*

[3rd August, 1912.]

Gift—Registration—Consent of donor to registration of deed of gift of immovable property not essential to validity of gift.

Held, that it is not essential to the validity of a gift of immovable property that registration of the deed by which such gift is effected should be either at the instance of or with the consent of the donor. *Ramamirtha Ayyan* v. *Gopala Ayyan* (1) dissented from.

[Not fol. 28 I. C. 271=28 M. L. J. 378; Fol. 40 Mad. 204=38 I. C. 707.]

THIS was a suit for cancellation of a deed of gift of immovable property executed by the plaintiff. The claim was based upon undue influence and fraud; but these pleas were found against the plaintiff by the courts below, and the suit was dismissed. The plaintiff appealed to the High Court, where it was argued that the gift was not complete without registration, and further that registration was not valid unless procured or at least assented to by the donor. In this case registration had been obtained *in invitam*, and it was argued that the gift was still incomplete

*Appeal No. 38 of 1912, under section 10 of the Letters Patent.

(1) (1896) I. L. R. 19 Mad. 483.

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35 A. 3=10 A. L. J. 300= 16 I. C. 408.

and not binding on the donor. The appeal was heard by a Bench consisting of KARAMAT HUSAIN and CHAMIER, JJ., who differed, the former holding that there was no valid and complete gift, the latter that the fact of registration being obtained against the will of plaintiff donor was not sufficient to invalidate the transaction. The decree accordingly followed the judgment of CHAMIER, J. Against this judgment the plaintiff appealed under section 10 of the Letters Patent.

Mr. *M. L. Agarwala*, for the appellant.

The Hon'ble *Nawab Muhmmad Abdul Majid*, for the respondents.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises out of a suit in which the plaintiff sought to set aside a deed of gift executed by her. She based her claim upon undue influence and fraud. The courts below, however, have found against her upon these grounds. It was contended, however, on her behalf that the deed was not registered at her instance or with her consent, and that registration [4] was brought about compulsorily. The sole question to decide, therefore, is whether or not it is necessary in order that there should be a valid gift of immoveable property not only that the instrument should be duly executed and attested in the manner provided by section 123 of the Transfer of Property Act, but also that the registration should be either at the instance of or at least with the consent of the donor. The section merely provides that the gift should be effected by an instrument executed by the donor, attested by two witnesses and registered. In our opinion a document registered in accordance with the provisions of the Registration Act is a registered instrument, and if the document is in fact duly registered in accordance with those provisions the gift is complete and valid. The law does not require that the registration should be at the instance of or with the consent of the donor. The appellant relies upon the case of *Ramamirtha Ayyan* v. *Gopala Ayyan* (1). It is true that the learned Judges in that case held that it was necessary that the document should be registered with the consent of the donor. They say :—" We are further of opinion that a deed of gift being a voluntary transfer remains *nudum pactum* until the donor has done all that is necessary to make it legally complete." We do not quite understand what the learned Judges meant by saying that " the transfer remained *nudum pactum* until the donor had done all that was necessary to make it legally complete." The transaction remained *nudum pactum* even after registration, that is to say, there was no consideration for it. It was a voluntary transfer. It must be remembered too that at the time this suit was instituted nothing remained for the donor to do. She had executed the deed in the presence of two witnesses and the donee had had the document registered in accordance with the provisions of the Registration Act. Of course, if the plaintiff could have proved that she was induced to execute the deed by fraud or undue influence, this would be a good ground for setting the document aside quite irrespective of whether it was registered or unregistered. In our opinion the judgment of our learned brother CHAMIER was correct. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1896) I. L. R. 19 Mad. 433.

35 A. 5 (= 10 A. L. J. 357=17 I. C. 567=13 Cr. L. J. 823).

[5] MISCELLANEOUS CRIMINAL.

Before Mr. Justice Muhammad Rafiq.

EMPEROR *v.* RAM KISHAN DAS.*

[5th August, 1912.]

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MISCELLANEOUS CRIMINAL.

35 A. 5=10 A. L. J. 357=17 I. C. 567=13 Cr. L. J. 823.

Criminal Procedure Code, section 526—*Transfer—Nature of grounds warranting a transfer outside the district.*

Where the Magistrate of a district refused to grant an interview to and cancelled the arms licence of a person who was under trial for various offences before the Joint Magistrate, it was *held* that these were sufficient reasons for transferring the cases against him out of the district, there being also grounds for granting a transfer from the court of the Joint Magistrate. *Farzand Ali* v. *Hanuman Prasad* (1) followed.

[Dist: 12 A. L. J. 33=21 I. C. 906=14 Cr. L. J. 666; Ref: 81 I. C. 126=25 Cr. L. J. 638; 83 I. C. 723=26 Cr. L. J. 163; 81 I. C. 78=5 P. L. T. 63=25 Cr. L. J. 590; Fol: 81 I. C. 58=25 Cr. L. J. 570; Ref: 84 I. C. 441.]

ONE Ram Kishan Das, a mahant of Akhara Ram Bagh in the Karwi sub-division, stood charged with various offences before the Joint Magistrate of Banda. Ram Kishan Das applied to the High Court for the transfer of the cases pending against him for reasons which will be found set forth at length in the judgment of the Court. He further asked that the cases might be transferred outside the district of Banda altogether, and his grounds for this prayer were two—(1) because the District Magistrate had, whilst the cases against him were pending in the Joint Magistrate's court, refused to grant him a personal interview, and (2) because the District Magistrate had cancelled his licence for arms.

Babu *Satya Chandra Mukerji*, for the applicant.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown.

RAFIQ, J. :—The applicant, Mahant Ram Kishan Das of Akhara Ram Bagh, sub-division Karwi, has filed three applications in this Court under section 526 of the Code of Criminal Procedure, with regard to three criminal cases pending against him in the court of the Joint Magistrate of Karwi, praying that those cases be transferred to some other court outside the district of Banda on the allegation that the district authorities are prejudiced against him. The mahant stands charged with the offences of rash and negligent driving, enticing away of a married woman with criminal intent and committing riot in the course of the abduction of the woman. The allegations on which the transfer is sought are, to put them briefly:—(1) that on the 5th of June, 1912, the Joint Magistrate at first refused to see the applicant, and when on the latter's repeated [6] request an interview was allowed, the Joint Magistrate told him that the applicant was a *badmash* and ordered him to go away; (2) that the Joint Magistrate had sanctioned the prosecution of the applicant for rash and negligent driving; (3) that the Joint Magistrate received information of the alleged abduction at his bungalow in the middle of the night of the 27th of June, 1912, and went at once to the Railway station and issued orders to the police to make inquiry; (4) that the District Magistrate of Banda cancelled the applicant's license for arms and declined to see him when he called to pay his respects on the 8th of July, 1912. No explanation appears to have been submitted by the Joint or the District Magistrate in

* Criminal Miscellaneous No. 135 of 1912.

(1) (1896) I. L. R. 19 All. 64.

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reply to the allegations of the applicant. The learned Government Advocate appears to oppose the applications for transfer. He says that he does not oppose the transfer from the court of Mr. Muir, the Joint Magistrate, not because the allegations made against him are true, but because the defence might possibly call him as a witness in the abduction case. In the case of transfer from the District Magistrate's court he opposes it strenuously on the ground that no case has been made out for imputing prejudice to the District Magistrate. For the applicant it is contended that what the court has to consider on an application for transfer is "not merely the question whether there has been a real bias in the mind of the presiding Magistrate against the accused but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without any real bias in the mind of the Magistrate, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial." The withdrawal of the applicant's licence for arms and the Magistrate's refusal to see the applicant before he was found guilty by a court of law are circumstances, it is said, which are calculated to create in the mind of the applicant a reasonable apprehension that he may not have a fair and impartial trial. In support of his contention the learned counsel for the applicant relies on a case of this Court, namely, *Farzand Ali* v. *Hanuman Prasad* (1). The learned Government Advocate replies that the cancellation of the licence for arms is a matter purely discretionary with the Magistrate and his refusal to see a man who [7] is standing his trial in a criminal court is not improper, and that neither circumstance implies a prejudice in the mind of the Magistrate, nor can it be said to create a reasonable apprehension in the mind of an ordinary man that he would not have a fair and impartial trial at the hands of the Magistrate. Moreover, it is said that the case of *Farzand Ali* v. *Hanuman Prasad* has not, as a rule, been followed in this Court. The correctness of the order of the Magistrate cancelling the licence for arms, or the propriety of his conduct in refusing an interview to the applicant, is not and could not be in question in the present application. Nor is it contended by the learned counsel for the applicant that the District Magistrate, is, as a matter of fact, prejudiced against the applicant. What is advanced for the applicant and has to be considered is whether the said two circumstances would create in the mind of the applicant a reasonable apprehension of not getting a fair and impartial trial in the court of the District Magistrate. The position of an accused person is always one of great anxiety and suspense, and incidents, though susceptble of explanation and which would perhaps pass unnoticed but for the trial he is undergoing, alarm him and lead him to think that his guilt is already believed and that his conviction is a foregone conclusion. It is quite possible that such an impression has been produced in the mind of the applicant by the circumstances referred to above as they very likely led him to infer that the District Magistrate was displeased with him. It would, therefore, be advisable to grant the applicant's request for transfer. The suggestion that the principle enunciated in the case of *Farzand Ali* v. *Hanuman Prasad* has not been followed in this Court has no force, as I find on similar considerations transfers were allowed in the following cases, namely, *Krishna Nath Tewari* v. *King-Emperor* (2), *Inayat Ali Khan* v. *King-Emperor* (3)

(1) (1896) I. L. R., 19 All. 61.
(2) Decided on the 23rd of March, 1910.
(3) Decided on the 18th of October, 1910.

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and *Muhammad Fazl-ullah* v. *King-Emperor* (1). I think it is expedient in the ends of justice that the three cases pending against the applicant in the court of the Joint Magistrate of Karwi should be transferred to another district. I am told that Allahabad is as far from Manikpur, where most of the witnesses live, as Banda is, and that it would be convenient to both parties [8] to have the case tried in Allahabad. I order that the three cases, against the applicant, be transferred from the court of the Joint Magistrate of Karwi to that of the District Magistrate of Allahabad, who will either try the cases himself or send them for trial to some other Magistrate subordinate to him competent to try them.

Application allowed.

35 A. 8 (=17 I. C. 573=10 A. L. J. 361=13 Cr. L. J. 829.)

REVISIONAL CRIMINAL.

Before Mr. Justice Muhammad Rafiq.

EMPEROR *v.* DEBI PRASAD.*

[13th August, 1912.]

Criminal Procedure Code, sections 4 and 195 (1)—"Complaint"—Information of the supposed commission of an offence communicated by the District Judge to the District Magistrate with a view to the latter taking action as a magistrate.

A Munsif, being of opinion that a document filed in a case before him had been tampered with, communicated his suspicions to the District Judge, who thereupon wrote to the District Magistrate, requesting him to take action in the matter. *Held* that the letter of the District Judge to the District Magistrate amounted to a complaint within the meaning of section 195 (*c*) of the Code of Criminal Procedure. *Emperor* v. *Sundar Sarup* (2) followed.

IN this case the Munsif of Havali, Bareilly, coming to the conclusion that a document filed in a case before him had been tampered with, communicated his views on the subject to the District Judge. The District Judge thereupon wrote to the District Magistrate requesting him to take action in the matter, and the District Magistrate initiated proceedings against the person concerned and made the case over to the Joint Magistrate. An application for revision of the District Magistrate's order and to set aside the proceedings pending against the applicant was accordingly preferred to the High Court on the ground that there existed no legal foundation for the exercise of his jurisdiction by the Joint Magistrate.

Mr. *Nihal Chand*, for the applicant.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown.

RAFIQ, J.—It appears that in a case pending in the court of the Munsif of Havali in the district of Bareilly a document was tampered with. The learned Munsif reported to the District Judge about the tampering with the document. The latter wrote to the District Magistrate to take action in the matter. The case was made over to the Joint Magistrate of the District for trial. The [9] applicant, who is one of the accused in the case, has filed this petition, under section 439 of the Code of Criminal Procedure, for revision of the proceedings pending in the court of the Joint Magistrate. It is contended on his behalf that the Joint Magistrate has no jurisdiction to try the applicant and the other accused inasmuch as no complaint according to law has ever been filed. It is argued that the letter of

*Criminal Revision No. 530 of 1912.

(1) Decided on the 1st of April, 1912. (2) (1904) I. L. R. 26 All. 514.

the District Judge to the District Magistrate, in the absence of any proceedings under section 476 of the Code of Criminal Procedure, does not fall within the definition of a complaint, and that section 195, sub-section (1), of the Code of Criminal Procedure has no application. In support of this contention the learned counsel has cited *In the matter of the petition of Mathura Das* (1) and *In re Lakshmidas Lalji* (2). A later decision of this Court. viz., *Emperor* v. *Sundar Sarup* (3), covers the present case. The application is therefore rejected.

Application rejected.

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REVISIONAL CRIMINAL.

35 A. 8=17 I. C. 578=10 A. L. J. 361 =13 Cr. L. J. 829.

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35 A. 9 (=17 I. C. 672=10 A. L. J. 403).

APPELLATE CIVIL.

Before Mr. Justice Sir Henry Griffin and Mr. Justice Chamier.

HIRDEY NARAIN AND ANOTHER (*Opposite parties*) *v.* MRS. M. J. POWELL AND ANOTHER (*Objectors*).*

[30th October, 1912.]

Act No. I of 1894 (*Land Acquisition Act*), *section* 30—*Compensation—Mode of apportioning amount allotted as compensation between different interests.*

Where land which is taken up under the Land Acquisition Act belongs to two or more persons the nature of whose interest therein differs, the compensation allotted therefor must be apportioned according to the value of the interest of each person having rights therein so far as such value can be ascertained.

THIS was an appeal from an order or decree of the District Judge of Saharanpur, made on a reference under section 30 of the Land Acquisition Act, 1894, apportioning the compensation payable in respect of certain land in which both were interested between the appellants and respondent :—

The facts out of which the appeal arose are set forth in the following order of remand.—

Dr. *Tej Bahadur Sapru*, for the appellants.

Mr. *A. E. Ryves* and Mr. *Nihal Chand*, for the respondents.

[10] KARAMAT HUSAIN and CHAMIER, JJ.:—This is an appeal against an order or decree of the District Judge of Saharanpur, awarding to the appellants 12/40 and to the respondent Mrs. Powell 28/40 of the sum of Rs. 7,768-8-0, awarded by the Superintendent of Dehra Dun as compensation for certain land taken up under the Land Acquisition Act for public purposes. It is not now disputed that Rs. 7,768-8-0 represent the fair value of the property taken up, and the only question for decision now is how this sum should be divided between the appellants and the respondent Mrs. Powell. The Superintendent proposed to award to the appellants the whole of the above sum except Rs. 144 which he considered to be the value of Mrs. Powell's interests in the land. She objected to this, and the Superintendent referred the matter to the District Judge. Mrs. Powell's case was that she was virtually the zamindar of the land and that the appellants were only nominally zamindars and were entitled at best to compensation calculated on the amount of rent paid to them.

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* First Appeal No. 351 of 1910, from a decree of E. O. E. Leggat, District Judge of Saharanpur, dated the 14th of July, 1910.

(1) (1892) I. L. R. 16 All. 80.
(2) (1907) I. L. R. 32 Bom. 184.
(3) (1904) I. L. R. 26 All. 514.

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The rent was Rs. 12 per annum, and her suggestion was that the zamindars should be awarded Rs. 144 only. The reference by the Superintendent was made to the District Judge early in 1910. A date was fixed for the hearing of the case in June 1910, and it was decided that the case should be taken up at Dehra Dun. On some day in June, the exact date is not clear, it seems to have occurred to some one that the appellants were interested in the case, as of course they were, and on June, the 13th, notice was issued to the appellant, Hirde Narain, that the case would be taken up on the following day. Notice was served upon Hirde Narain on the 13th of June, at 9 p.m. He appeared before the court on the following day, and, as the Judge observes, very reasonably asked for time. On that day two witnesses only were examined for Mrs. Powell and the case was adjourned to June 22nd. It was taken up on June 25th. Witnesses were examined on that day and on the 26th, one witness only being produced by Hirde Narain. Here we may mention that although Maharaj Narain seems to have a share in the property, no notice was issued to him. But this is not made a ground of complaint here, and for present purposes Maharaj Narain may be disregarded. The object of Mrs. Powell seems to have been to prove that occupancy tenants, like herself, were entitled to build upon their land, also to transfer it to whomsoever [11] they pleased. An extract from the wajib-ul-arz of the village was put in, and several witnesses were called and questioned as to the rights of occupancy tenants in the village in question and in the adjoining villages. It is unnecessary for us to examine this evidence in detail. The wajib-ul-arz does not lay down that occupancy tenants can transfer their rights. It says only that certain *kashtkars* can build houses without the permission of the landlord. The oral evidence on the point is quite worthless. The District Judge has arrived at the conclusion, as we understand his judgment, that occupancy tenants in the suburbs of the town of Dehra Dun which include the village in question are practically sub-proprietors who are entitled to transfer their rights and need only pay a quit rent to the zamindars. In arriving at this conclusion he made use of some remarks made by Mr. Dampier in a rent rate report for the Dehra suburban circle. It is not contended here that these remarks are admissible in evidence. They ought to have been excluded, and, even if they are admitted, we consider that they are not sufficient to show that Mrs. Powell is entitled to transfer her rights in the land. She is recorded, or rather the person through whom she claims, is recorded, as occupancy tenant of the land. According to the present law she is not entitled to transfer her rights. No issues were fixed in the case. The point which the District Judge had to decide was how the sum awarded by the Collector as compensation for the land was to be divided between the claimants, and a definite issue should have been struck on this question. The sum awarded by the Collector should be apportioned between the appellants and Mrs. Powell in proportion to their interests in the land. On the one hand we have the zamindars entitled to receive Rs. 12 per annum as rent; on the other hand we have Mrs. Powell, an occupancy tenant of the land, receiving according to the evidence Rs. 40 from her sub-tenants, so that at first sight it would appear that the respective values of the interest of the zamindars and Mrs. Powell are in the proportion of 12 to 28, and it is in this proportion that the sum awarded by the Collector has been divided between them by the District Judge. The appellants take objection to this on the

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ground that the learned Judge has not taken into consideration the fact that whereas the rents received by Mrs. Powell were fixed quite recently, the rent payable by Mrs. Powell to the appellants was [12] fixed as long ago as 1890. They point out that a land-holder may sue an occupancy tenant for enhancement of the rent on the ground stated in section 43 of the Tenancy Act, and they contend that inquiry should be made as to whether Mrs. Powell was not at the date of the acquisition of the land paying rent at a rate below the prevailing rate paid by occupancy tenants for lands of similar quality and with similar advantages, and also that there has been a rise in the average local prices of staple food crops during the currency of the present rent. Owing to the fact that no issue was struck in this case the necessity for making a proper inquiry into the respective values of the interests of the parties has been overlooked. It has been held in more than one case in the Calcutta High Court that where a sum is to be apportioned between a land-holder and a subordinate tenure-holder, the respective values of the interests of the two should be ascertained, and, if possible, something should be awarded to the land-holder on account of the possibility that he may be able to have the rent of the subordinate tenure-holder enhanced. *Mutatis mutandis* what was said in those cases applies to the present case. If it can be shown that the land-holder was at the time of the acquisition of the land entitled to have the rent enhanced, there would be no difficulty in ascertaining to what extent the rent might have been enhanced had the land not been acquired by the Government. There is some evidence that the land-holder took steps to have the rent enhanced, but abandoned them. Considering that notice of the case was given at the last moment to the appellant, and considering that no attempt has been made to ascertain the respective values of the interests of the parties in the land, we think that a further inquiry should be held. Under order XLI, rule 25, we remit to the court of the District Judge the following issue :—What are the respective values of the interests of the appellants and Mrs. Powell in the land in question? Further evidence may be admitted on both sides. On return of the finding ten days will be allowed for filing objections.

On receipt of the finding the following judgment was delivered :—

GRIFFIN and CHAMIER, JJ. :—This case was remitted to the District Judge in order that he might ascertain the respective values of the interests of the appellants and Mrs. Powell in the land in [13] question for which the Superintendent of Dehra Dun has awarded under the Land Acquisition Act a sum of Rs. 7,768-8-0. The learned Judge rightly, as we think, set himself to ascertain what were the respective rights of the appellants and Mrs. Powell in the land. He came to the conclusion that Mrs. Powell was what he calls an *abadi* tenant, having a right to build on the land and to transfer it, that the interest of the appellant in the land was worth no more than Rs. 1,060, and that the balance of the sum awarded by the Superintendent of Dehra Dun, namely, Rs. 6,708-8-0, should be given to Mrs. Powell. But in case this Court did not agree with the view that Mrs. Powell was an *abadi* tenant, he went on to ascertain the values of the respective rights of the parties in the case on the assumption that Mrs. Powell was an occupancy tenant of the land. He found that the annual value of Mrs. Powell's interest as an occupancy tenant was Rs. 22, and the annual value of the appellants' interest as landlords was Rs. 11. He then suggested that Mrs. Powell should be given a sum of Rs. 352, that is, sixteen

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years' purchase of the annual value of her interests and that the balance should be given to the appellants. We are unable to accept either of these conclusions in their entirety. Mrs. Powell, or rather the person through whom she claims, is recorded as an occupancy tenant of the land. There is really no evidence as to the circumstances in which, or even as to the time when, Mrs. Powell's predecessors first obtained the land. Both sides have indulged in much speculation as to what their respective rights must be. One fact stands out clearly, namely, that for the last fifty or sixty years the land has been used for agricultural purposes, and in the absence of definite evidence as to the respective rights of the parties in the land, we think that the sum awarded should be divided between them in proportion to the values of the interests hitherto enjoyed by them, after making due allowance for the possibility of the rent being enhanced. We accept the finding of the District Judge that the annual value of Mrs. Powell's interest in the land is Rs. 22 and that the annual value of the appellant's interests is Rs. 11. But it seems to us that the whole sum awarded by the Superintendent should be divided amongst them in proportion to the value of their interests and that there is no jurisdiction for what the learned Judge has done, namely, give Mrs. Powell sixteen times [14] the value of her interest and give the appellants the whole of the balance. It would be as wrong in our opinion to give the appellants sixteen times the value of their interests in the land and to give Mrs. Powell the whole of the balance. The result is that we hold that the sum in question should be divided in the proportions of 1/3rd and 2/3rds, 1/3rd going to the appellants and 2/3rds to Mrs. Powell, that is to say, Rs. 2,590 to the appellants and Rs. 5,178-8-0, to Mrs. Powell. The decree of the court below is modified accordingly.

Decree modified.

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35 A. 14 (=10 A. L. J. 408=17 I. C. 376).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

JAGAN NATH AND ANOTHER (*Plaintiffs*) *v.* AJUDHIA SINGH (*Defendant*).*

[12th November, 1912.]

Act (Local) No. II of 1901 (Agra Tenancy Act), section 95—Civil and Revenue Courts—Jurisdiction—Dispute between rival claimants to a tenancy.

Held that the question of title to a tenancy arising between rival claimants to that tenancy is a question which is cognizable by a civil court and is not a matter coming within the purview of section 95 of the Agra Tenancy Act, 1901. *Bhup* v. *Ram Lal* (1) followed. *Zubeda Bibi* v. *Sheo Charan* (2) and *Hamid Ali Shah* v. *Wilayat Ali* (3) referred to.

[Ref. 37 All. 223 ; Fol. 18 I. C. 220 ; 79 I. C. 367=21 L. J. 899 ; 78 I. C. 1008 ; Dist. 73 I. C. 947.]

THE facts, of this case were as follows :—

The plaintiffs brought a suit in a Court of Revenue under section 58 of Act No. II of 1901, for ejectment of the present defendants from a plot of land which they claimed as their occupancy holding and which, they

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* Appeal No. 59 of 1912, under section 10 of the Letters Patent.

(1) (1911) I. L. R. 33 All. 795.
(2) (1899) I. L. R. 22 All. 83.
(3) (1899) I. L. R. 22 All. 93.

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alleged, had been sub-let to the defendants. The defendant claimed that he was not a sub-tenant, but that the land was his occupancy holding, and he also applied to the Revenue Court for correction of the revenue registers in which the plaintiffs were recorded as occupancy tenants of the land in dispute. The Assistant Collector dismissed the plaintiffs' suit on the ground that there was a defect in the frame of the suit. He, however, in the proceedings taken for the correction of revenue registers, accepted the defendant's plea and directed the defendant's name to be entered as occupancy tenant of the plot in dispute. The plaintiffs then brought the present suit in the civil court on the allegation that the defendant having denied the plaintiffs' title was liable to ejectment as a trespasser. The defendant pleaded that the suit was not maintainable in the civil court.

[15] The courts below decreed the claim.

The defendant appealed to the High Court, and the appeal, coming before a single Judge of the Court, was decreed and suit dismissed in the following judgment :—

"The plaintiffs in the present suit brought a suit against the first defendant under section 58 of the Agra Tenancy Act, alleging that he was a tenant at will of certain land. The first defendant replied that he was the occupancy tenant of the land, and he at once took steps by instituting another proceeding to have the revenue record corrected. Both cases came before the Assistant Collector together and were disposed of by one judgment. The suit under section 58 was taken on appeal to the Commissioner, who decided that it was not maintainable, because one of the present plaintiffs did not wish to eject the defendant. The result was that in that suit no decision was given as to the rights of the first defendant. Meanwhile the revenue record had been corrected in the manner suggested by the first defendant. The plaintiffs instituted the present suit in the Court of the Munsif, saying that the first defendant had taken the land from them as a tenant, that he had resistered the suit under section 58, that when doing so he had pleaded that he was the occupancy tenant of the land, and that this amounted to a denial of the plaintiff's title, with the result that the plaintiffs were entitled to treat him as a trespasser, and they asked for a decree for possession against him. The Munsif decreed the claim, and his decision was confirmed by the Subordinate Judge on appeal. In second appeal it is contended on behalf of the first defendant that the suit is not maintainable. It appears to me that this contention is sound and must be accepted. The plaintiffs admit that the first defendant was their tenant. They say that he is liable to be treated as a trespasser, because he set himself up as an occupancy tenant. Before I can hold that the defendant, who admittedly was till recently a tenant of some kind, has become a trespasser, I must hold that he was wrong in claiming to be an occupancy tenant of the land. I cannot decide that he was wrong in claiming to be an occupancy tenant without trenching on the jurisdiction of the rent court. The question whether a person is a tenant at will or an occupancy tenant is one in respect of which a suit can be brought under the Tenancy Act, and the decision is reserved exclusively for the revenue court, I hold that the present suit is not maintainable. I allow the appeal and dismiss the plaintiffs' respondents' suit with costs in all courts. I have said nothing about the effect of the order that the revenue record should be corrected, for it is not clear whether it was made under the Revenue Act or was a declaration made under Tenancy Act.'

Against this judgment the plaintiffs appealed under section 10 o the Letters Patent.

Babu *Piari Lal Banerji*, for the appellants.

The mere fact that the plaintiffs alleged the defendant to be their tenant in the former proceedings in the revenue court did not estop them from now alleging that the defendant having denied their title had become a trespasser, and on the pleadings in the present [16] suit it is quite clear that the suit is maintainable in the civil court. The defendant never pleaded in the former suit, nor does he plead in the present suit, that he is the plaintiffs' tenant, and the revenue court not having decided that the relationship between the parties was that of landlord and tenant, there was nothing to prevent the present suit being maintained in the civil

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court: *Zubeda Bibi* v. *Sheo Charan* (1), *Hamid Ali* v. *Shah Wilayat Ali* (2).

Moreover, the dispute in the present case was not a dispute between landlord and tenant but was a dispute between two rival tenants relating to a tenancy, and such a question was not exclusively reserved for the revenue court but could be decided by a civil court. The point is further covered by authority: *Bhup* v. *Ram Lal* (3).

Maulvi *Shafi-uz-zaman*, for the respondent:—

The case relied on relates to a dispute between two rival claimants to tenancy on succession. Moreover, the plaintiffs having alleged that the defendant was their tenant, and having brought their suit in the revenue court for his ejectment could not bring the present suit in the civil court: *Narain Singh* v. *Govind Ram* (4).

Babu *Piari Lal Banerji* was not heard in reply.

RICHARDS, C. J.—This Letters Patent Appeal arises out of suit in which the plaintiffs sought to recover possession of certain immovable property, treating the defendant as a trespasser. The facts, so far as I consider them material, are as follows. Prior to the institution of the present suit the plaintiffs brought a suit in the revenue court seeking to eject the defendant as their sub-tenant. They claimed that they were the occupancy tenants and that the defendant was their sub-tenant. The plea put in by the defendant was that he was not a sub-tenant but the occupancy tenant of the holding. The Assistant Collector was of opinion that the defendant was, as he alleged, the occupancy tenant. In other words he held that the relation of landlord and tenant did not exist between the plaintiffs and the defendant. As a result of this finding the suit for ejectment in the revenue court necessarily failed. There was an appeal to the Commissioner who held for other reasons that the ejectment suit brought by the plaintiffs failed. The plaintiffs then instituted the present suit to get possession of the property. The [17] question of course upon which the success or failure of the suit depended was whether or not the defendant was the occupancy tenant. The learned Munsif decided in his favour. On appeal the learned Subordinate Judge confirmed the decision of the Munsif. On second appeal to this Court a learned Judge held that the present suit was not cognizable by the civil court and on that ground allowed the appeal and dismissed the plaintiffs' suit.

It seems to me that the question of title to a tenancy arising between rival claimants to that tenancy is a question which is cognizable by a civil court. This has been decided, I think, in principle in the case of *Zubeda Bibi* v. *Sheo Charan* (1), in the case of *Hamid Ali Shah* v. *Wilayat Ali* (2) and in the case of *Bhup* v. *Ram Lal* (3). The learned judge of this Court says:—"Before I can hold that the defendant who admittedly was till recently a tenant of some kind, has become a trespasser, I must hold that he was wrong in claiming to be an occupancy tenant of the land. I can not decide that he was wrong in claiming to be an occupancy tenant without trenching on the jurisdiction of the rent court. The question whether a person is a tenant at will or an occupancy tenant is one in respect of which a suit can be brought under the Tenancy Act and the decision is reserved exclusively for the revenue court." I cannot altogether agree with what the learned Judge has stated above. It is quite true that if a person was claiming to be an occupancy tenant, whilst his land-

(1) (1899) I. L. R. 22 All. 83.
(2) (1899) I. L. R. 22 All. 93.
(3) (1911) I. L. R. 33 All. 795.
(4) (1911) 8 A. L. J. R. 431.

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35 A. 14=10 A L. J. 408 =16 I. C. 376.

lord was contending that he was a mere tenant-at-will, this would be a question exclusively triable by the revenue court. But that is not the question in the present suit. The question in the present suit is, 'to whom does the tenancy belong, does it belong to the plaintiffs or the defendant?' If the tenancy belongs to the plaintiffs, then they are clearly entitled to treat the defendant as a trespasser, having regard to the plea that he put forward in the revenue court, in which he totally denied their title and claimed that he alone was the occupancy tenant. If, on the other hand, the tenancy belongs to the defendant, it is quite clear that the plaintiffs' suit must be dismissed. It has been contended that the present suit is of the nature mentioned in section 95 of the Tenancy Act. In my opinion it is only necessary to read [18] the opening words of that section to see that the section deals with questions arising between landlord and tenant and that it does not in any way apply to rival claimants to any of the various classes of tenancy mentioned in the Tenancy Act.

I, therefore, would allow the appeal, as no other question arises.

BANERJI, J.—I am also of opinion that the jurisdiction of the civil court was not excluded by reason of the provisions of the Tenancy Act. The suit in this case would be cognizable by the civil court unless it came within the purview of any of the clauses of section 95 of that Act. I adhere to the view expressed in the case *Bhup* v. *Ram Lal* (1) that where a dispute arises between rival claimants to a tenancy that is not a matter which can be determined under section 95. In the present case the dispute is between persons who claimed to be entitled to the tenancy. There is no question as between either of them and the landlord. The plaintiffs alleged that the defendant is a trespasser, and they claim to eject him as such. Such a suit could not be brought in the revenue court, and the only court which could take cognizance of it is the civil court. It is true that the plaintiffs sued in the revenue court to eject the defendant on the allegation that the defendant was their sub-tenant. Had the revenue court decided that question and held that the defendant was the tenant of the holding, there might have been some difficulty in the plaintiffs' way; but in this case, as pointed out by the lower appellate court the Commissioner did not determine the question whether the plaintiffs were the tenants of the holding, or the defendant was so. He dismissed the plaintiffs' suit by reason of a defect in the frame of the suit. So that the question "who is the tenant of the holding" remained undecided by the revenue court. As both parties claimed to be tenants, the question was one between rival claimants to the tenancy, and it could not be taken into the revenue court in any of the forms of suits mentioned in section 95 of the Tenancy Act. The civil court therefore had jurisdiction to hear the case. On the merits that court found in favour of the plaintiffs. They were therefore entitled to the decree which was granted by the courts below, and this appeal must prevail.

[19] BY THE COURT:—The order of the Court is that we allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs of both hearings in this Court.

Appeal allowed.

(1) (1911) I. L. R. 33 All. 795.

35 A. 19 (= 10 A. L. J. 416 =16 I. C. 422).

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35 A. 19=10 A. L. J. 416 =16 I. C. 422

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Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

SIS RAM AND OTHERS (*Defendants*) *v.* ASGHAR ALI (*Plaintiff*).*

[17th July 1912.]

Landholder and tenant—Agreement to deliver agricultural produce over and above cash rent—Cess—Agreement opposed to public policy.

Certain tenants holding under a registered qabuliat agreed therein to deliver to their landlord, over and above the sum specified as a money rent, certain agricultural produce, and further to supply the landlord with a cart and bullocks "when necessary" and in default the landlord might claim the cash value of the said dues along with the rent. *Held*, on suit by the landlord to recover the cash equivalent of such dues for several years, that the covenant in question was for various reasons unenforceable. *Abdul Hai* v. *Nathua* (1), *Sadanand Pande* v. *Ali Jan* (2) and *Sheoambar Ahir* v. *The Collector of Asamgarh* (3) referred to.

[Dist. 38 All. 286; Ref., 64 I. C. 18; 63 I. C. 232; 71 I. C. 432]

This was a suit to recover the money value of certain zamindari dues alleged to be realizable from the defendants under the following circumstances. The defendants were tenants of the plaintiff, holding under a registered *qabuliat*, by which they agreed to pay a certain rent in cash. Besides the payment of rent, they ageeed to deliver to the plaintiff annually certain agricultural produce and to provide the plaintiff with a cart and bullocks "when necessary." In default the plaintiff might claim the cash value of the said dues along with the rent. The suit was filed in the court of a Munsif, who dismissed it. On appeal the District Judge remanded the case to the court of first instance, acting under sections 196 and 197 of the Agra Tenancy Act, 1901. Against this order of remand the defendants appealed to the High Court.

Mr. *D. R. Sawhny*, for the appellants.

Maulvi *Ghulam Mujtaba* and Maulvi *Shafi-uz-zaman*, for the respondent.

MUHAMMAD RAFIQ and PIGGOTT, JJ.:—In this case, the plaintiff is the landholder and the defendants are the tenants of [20] certain land. The conditions of the tenancy are determined by a registered *qabuliat*, dated January the 3rd, 1907. By this instrument the defendants contracted to pay to the plaintiff for the use and occupation of this land an annual rent of Rs. 99, and they further contracted that they would also render to the plaintiff certain zamindari dues (*rasum zamindari*) which are set forth in detail, and that in the event of their failing to do so, the plaintiff might claim the cash value of the said dues along with the rent. It may be convenient at once to state what these dues were. The defendants were to deliver to the plaintiff annually 1 jar containing treacle or raw sugar, 25 bundles of cattle fodder, 2 bundles of *bhusa*, 4 jars containing sugarcane juice, 1 basket-load of cow-dung cakes, and 5 *pakka* seers of hemp. The defendants further undertook to give the plaintiff the use of a cart and bullocks "when necessary." We are not concerned in this case with the payment of the cash rent of Rs. 99. Either it has been paid, or at any rate it is not claimed in this

* First Appeal No. 42 of 1912 from an order of C. E. Guiterman, Additional Judge of Meerut, dated the 15th of December, 1911.

(1) (1903) 1 A. L. J. 537.
(2) (1910) I. L. R. 32 All. 193.
(3) (1912) I. L. R. 34 All. 358.

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suit. The suit as brought appears to be one for damages for breach of a contract in writing registered. It claims the cash value for five years of these zamindari dues which, it is alleged, the defendants failed to render though bound under contract to do so. The plaint itself suggests no basis of valuation in respect of the vague agreement to supply a cart and bullocks " when necessary," but the damages for breach of this stipulation are stated at Rs. 15. In respect of the remaining articles which the defendants contracted to supply, the claim appears to be for their cash value at certain rates. The court of first instance, the Munsif of Muzaffarnagar, framed four issues, the first two of which were whether the suit is in fact one for recovery of cesses, and therefore not maintainable by reason of the provisions of sections 56 and 86 of the United Provinces Land Revenue Act, Local Act No. III of 1901, and whether the suit is not cognizable by the civil court. Having found against the plaintiff on each of these issues, the Munsif dismissed the suit. On appeal the learned District Judge held that the suit was essentially one for arrears of rent. He held further that it ought to have been filed as a suit for arrears of rent in the court of an Assistant Collector, and that by reason of the provisions of sections 196 and 197 of the Agra Tenancy Act, Local Act No. II of [21] 1901, it was incumbent upon him to deal with the suit on its merits. He, therefore, remanded the case for trial of the remaining issues, and in the exercise of the discretion conferred upon him by section 197 aforesaid, he addressed his order of remand to the court of the Munsif. The defendants come to us in appeal against this order of remand. It is contended on their behalf that this is not a suit to which sections 196 and 197 of the said Act apply, and further that in any case the suit is one for the recovery of cesses, and that the Munsif's order dismissing the same should be maintained. We have heard arguments at considerable length on both points. In respect of the first point, we are content to remark that if we could have accepted the view of the learned District Judge as to the nature of the suit, we should have been prepared to hold that he had jurisdiction to deal with it under the sections of the Agra Tenancy Act already referred to. We are, however, of opinion that the other ground taken in appeal must prevail, and that the Munsif's order dismissing the suit was right. The learned District Judge says that this must be regarded as a suit for arrears of rent, because there is nothing to prevent a tenant from contracting to pay a portion of his rent in cash and another portion in kind. This view of the case is open to objections on various grounds. As a matter of fact, the contract before us is not one to pay a portion of the rent in cash and another portion in kind. There is nothing in the terms of the contract to suggest that the various articles which the defendants undertook to supply were to be the produce of the fields in suit. The cowdung cakes certianly could not be the produce of their fields, nor had the covenant regarding the cart and bullocks anything to do with the produce of the fields. Nor would it be possible to understand the contract of lease as a whole as binding the defendants to cultivate sugarcane or hemp every year on some portion of the land in order to supply the products of such cultivation to their landholder. Moreover, the suit as brought was not a suit for arrears of rent. The covenant, if enforceable at all, was enforceable according to its terms, namely, that the cash value of the zamindari dues was to be claimed along with the rent. The fact that the plaintiff failed to do this, and endeavoured to bring his case before the court on a different basis, shows that he was

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[22] conscious of some inherent weakness in his position. That weakness was undoubtedly an apprehension on his part that rent courts at any rate would treat his suit as a claim for cesses and nothing else. We would refer to Mr. M. L. Agarwala's valuable Commentary on the United Provinces Land Revenue Act (No. III of 1901), under section 56 of the said Act, for an elaborate discussion of the question of cesses in these provinces. The term is nowhere defined, and its meaning has been the subject of discussion by this Court in various reported cases. We may refer to *Abdul Hai* v. *Nathua* (1), *Sadanand Pande* v. *Ali Jan* (2) and *Sheoambar Ahir* v. *The Collector of Azamgarh* (3). It is clear that the cesses referred to in section 50, aforesaid, cannot be payments for some purpose of public convenience such as were suggested by a Judge of this court as consonant with the primary notion of the word "cess" in the first of the rulings above referred to. Taking the words of the contract between the parties as they stand, the position seems to us fairly clear. The plaintiff in this case was giving the defendants a perpetual lease of certain land at a cash rent, and no doubt felt that in so doing he was conferring something of a favour. He had, or conceived himself to have, a claim for certain customary dues payable by his tenants on account of the occupation of the land, dues which are of the nature of rent and payable in addition to the rent of tenants. These customary dues have not been recognized by the Settlement Officer at the last settlement, and no doubt the plaintiff was aware that he could not maintain any suit for the recovery of the same apart from some special contract. He endeavoured therefore, to bind the defendants by the express terms of the contract to pay him the said dues. We are, both of us, of opinion that this contract cannot be enforced. The test which the Board of Revenue has applied in its directions to Settement Officers regarding the question of recording or not recording customary dues of this nature, is that a cess may be recognized when it is of the nature of a fixed sum calculated on the rent or on some other defined basis. "Thus if the tenant is admitted to pay regularly on his rent one anna in the rupee, or one seer in the maund as *kharch* that will be a cess which should be deemed to form part of his [23] rent. If the so-called cess is said to be so many bundles of *bhusa* or cakes of fuel or the like, it cannot be admitted to be part of the rent and should not be recorded." In the opinion of one of us the claim in the present case can only be regarded as a claim for a cess within the meaning of section 56 of the Land Revenue Act, and is as such barred by the provisions of that section. The other of us inclines rather to treat the suit on its original basis as a suit for damages for breach of contract, and in this view the suit must fail, and this for two reasons: on the terms of the contract itself the cash value of the zamindari dues, if not rendered, was to be claimed along with the rent and not by way of separate suit for damages. In the second place the contract as it stands appears to be contrary to public policy and intended to defeat the object of the provisions of the Land Revenue Act, particularly of sections 56 and 86. The object of the Legislature seems to have been to rid the courts once and for all of claims for customary dues or services of a vague and uncertain nature, the precise value of which would be difficult, if not impossible of determination. Landlords claiming to be entitled to receive by way of customary dues or services

(1) (1908) 1 A. L. J. 537 (540).
(2) (1910) I. L. R. 32 All. 193.
(3) (1912) I. L. R. 34 All. 358.

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something more from their tenants on account of the use and occupation of their holdings over and above their rent were required to bring such claim before the Settlement Officer at the time of settlement, and the latter was to judge once and for all whether such claims could in their nature be admitted and recorded. The general policy of the Act is that the Government may be assured that land-holders were not receiving from their tenants on account of the use and occupation of their holdings any payments which were not recognized either under the head of rent or under the head of cesses in the public records which form the basis of assessment for the government demand. The contract before us seems to be opposed to the policy of the law and in contravention of its provisions. We are, therefore, agreed that this appeal must prevail. We set aside the order of remand passed by the lower appellate court and restore the decree of the court of first instance dismissing the suit. The plaintiff will pay the costs of the defendants throughout.

Appeal allowed.

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35 A. 24 (=16 I. C. 333=10 A. L. J. 426=13 Cr. L. J. 685).

[24] REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox and Mr. Justice Banerjee.

EMPEROR *v.* IMAMI.*

[August, 1912.]

Act (Local) No. I of 1900 *(United Provinces Municipalities Act), section* 128 *(h)* (i) *Municipal board—Power of Board to make rules—Rules regulating use by hawkers of patris of public roads.*

Held that the United Provinces Municipalities Act, 1900, does not empower a Municipal board to make rules regulating the sale or exposure for sale of goods in streets or public places under the control of the board.

THE Municipal Board of Allahabad, purporting to act under section 128 (*h*) (i) of the United Provinces Municipalities Act, 1900, framed certain rules for the regulation of *tahbazari* within the municipality, providing, *inter alia*, that no person should sell or expose for sale any goods in any street or public place under the control of Board except by permission of the Board and on payment of such fees as the market committee might fix. One Imami, having been found guilty under section 132 of the Act of a breach of these rules, applied in revision to the High Court, contending that the rules for breach of which he had been convicted were *ultra vires* of the Municipal Board.

Babu *Satya Chandra Mukerji* (with him Babu *Jogindra Nath Chaudhri*), for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) and Munshi *Durga Charan Singh*, for the Crown.

KNOX and BENERJI, JJ. -Imami, who has been found guilty under section 132 of Local Act I of 1900, because he had committed a breach of a rule lawfully promulgated by the municipality of Allahabad under section 128 (*h*) (i), has applied to this Court to interfere in revision and the two grounds taken in the petition are :—(1) "That the Municipal Board of Allahabad had no power to frame rules charging fees for licences to hawk articles of food on the public street; and (2) that the words 'places

* Criminal Revision No. 724 of 1911 from an order of J. N. G. Johnson, Magistrate, First class, of Allahabad, dated the 6th of November, 1911.

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of public entertainment and resort' in the section 128 (*h*) (i) of the Municipalities Act cannot be construed to mean the *patri* of a street."

The particular part of Allahabad in which Imami is said to have committed a breach of Municipal rules is a strip of land on the Balua Ghat road. It appears that on the 18th of May, 1910, the [25] Municipal Board of Allahabad published certain rules for the regulation of *tahbazari* in the Allahabad municipality. These rules profess to have been passed under section 128 (*h*) (i). They were duly confirmed by the local Government, and by them no person is allowed to sell or expose for sale any goods in any street or public place under the control of the Board except by permission of the Board and on payment of such fees as the market committee may fix. If the making of these rules is within the powers invested by law in the municipality of Allahabad, then Imami has undoubtedly committed a breach of the rule. On the other hand, if they are *ultra vires*, Imami has not committed any breach.

The Municipal Board derive their power to make rules from Local Act No. I of 1900. Section 128 of that Act lays down that any Board may by rules provide for the inspection and proper regulation, *inter alia* of any place of public entertainment and resort, and for the charge of fees for the use of such places when vested in the Board. The question we have to decide is whether power has been given under this section to the Municipality to provide for (1) any place of public entertainment ; (2) any place of public resort. This is the way in which the Municipal Board read the rule. They contend that they are empowered to provide for the inspection and proper regulation, not merely of any place of public entertainment but also of any place of public resort. The petitioner, on the other hand, contends that unless it can be shown that this strip of land is a place both of public entertainment and public resort, the Municipal Board are not empowered to provide for its inspection and to charge fees for its use. The question is by no means an easy one to decide and we have taken time to consider our judgment. We wished to find whether there existed any precedent which might show how other courts have interpreted similar rules. Careful search has been made and no precedent could be found, and we are left to interpret the Act by the ordinary rules for interpretation of Acts of this nature. The first consideration is, whether we may rightly conclude that it was the intention of the Legislature to give the municipality powers to provide for the inspection and proper regulation of every place of public resort. This will include places for worship, such as temples, mosques, cathedrals and churches. All these are places of public resort. [26] The same reasoning may apply to courts of justice and many other public buildings to which the public from time to time resort. It seems to us far from likely that such was the intention of the Legislature.

Next, bearing in mind that when we interpret an Act like the present, which is an Act encroaching on the rights of the subject, we have a right to expect that the Legislature will manifest its intention plainly, if not in express words, at least by clear implication and beyond reasonable doubt [Maxwell's Interpretation of Statutes, 4th Edition, page 429, and cases cited therein]. On turning to the actual words used we find a number of places mentioned as places which may be inspected and regulated. Each of these is divided from the place following it by a comma. With the exception of "dairies and bakeries," which are lumped in one, each place is separately named and falls into a separate category. The last category appears to include places of public entertainment and resort,

and we hold that if it had been the intention of the Legislature that places of public resort which are not places of public entertainment, should be inspected and properly regulated, the two kinds of places would have been separately named. In our opinion the word, " public entertainment and resort " cannot be read distributively. The one argument that tells against this interpretation is the collocation of dairies and bakeries in this very same section 128 (*h*) (i). But whether this was due to an oversight or to some other case, we need not in this cause consider.

Furthermore, we doubt whether it was ever the intention of the Legislatures in section 128 (*h*) (i) to provide for the regulation of streets. Provisions for regulation of streets occur in other parts of the Act, and it seems a forced idea to talk of providing for the inspection of a street or the land adjoining a street.

Finally, we might add, that the word ' entertainment'—so far as Mr. Murray's Dictionary is any guide—could not properly be applied to a street or a *patri* adjoining a street.

For all these reasons, we have arrived at the conclusion that the rule with the breach of which Imami is charged was not a rule which the Municipal Board of Allahabad was empowered to pass under section 128 (*h*) (i). We, therefore, set aside the conviction and direct that the fine, if paid, be refunded.

Application allowed.

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35 A. 24=16 I. C. 333=10 A. L. J. 426=13 Cr. L. J. 685.

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35 A. 27 (=16 I. C. 399=10 A. L. J. 437).

[27] FULL BENCH.

Before Sir Henry Richards, Knight. Chief Justice, Mr. Justice Banerji and Mr. Justice Tudball.

DEBI PRASAD (*Defendant*) *v.* BHAGWAN DIN AND OTHERS (*Plaintiffs.*)*

[6th August, 1912.]

Exproprietary tenant—Sale by one of several co-owners holding sir land of his undivided zamindari share—Vendor exproprietary tenant of all the co-parceners and not merely of his vendees.

Where the owner of an undivided share in a *patti* sells his zamindari rights and becomes an exproprietary tenant of the *sir* land held by him he becomes the tenant as regards such land, not merely of his vendees but of all the co-sharers in the *patti*.

[Rel. 79 I. C. 1025; Ref. 71 I. C. 1017; 84 I. C. 117=22 A. L. J. 570=46 All. 690.]

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case appear from the judgment under appeal, which was as follows :—

" The plaintiffs are the proprietors of a one anna share of *patti* Ram Dayal. The defendants 2 to 4 owned the remaining 3½ annas share in the same *patti*. Their right to this share has been acquired by defendant No. 1, Debi Prasad. Defendants 2 to 4 were in possession of certain plots, some as *sir*, some as *khud-kasht*, and some for a period of less than twelve years. The plaintiffs in this suit sought for a declaration of their right to collect their proportionate share of the rent payable by defendants 2 to 4 on the lands in this *patti*. The courts below have decreed the plaintiffs' suit only in so far as the plots in the possession of the defendants 2 to 4 as non-occupancy tenants are concerned The courts below are of opinion that the defendants Debi Prasad, who has acquired the proprietary rights of defendants 2 to 4, was alone entitled to collect the rent payable by defendants 2 to 4, on the land held by them as ex-proprietary tenants. The plaintiffs appealed and an

* Appeal No. 8 of 1912, under section 10 of the Letters Patent.

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objection also has been filed on behalf of the defendants. An issue was remitted by this Court to ascertain whether defendant No 1, Debi Prasad, has collected the entire rent from defendants 2 to 4, hitherto, or whether the plaintiffs had been collecting their proportionate share of the rent payable by these tenants. The finding of the court below on this issue is that the plaintiffs have been collecting their proportionate share of rent due from d fendants 2 to 4 direct. This finding is in favour of the plaintiffs appellants The learned advocate who appears on behalf of the defendants supports the view taken by the court below and contends that his clients as purchasers of the rights of defendants 2 to 4 are entitled to collect the rent payable by these defendants on land held by them as ex-proprietary tenants to the exclusion of the plaintiffs. The right of the plaintiffs to a share in the profits is not denied. In my opinion this appeal must succeed. The *patti* is an undivided one. The defendant No 1 acquired the proprietary rights of defendants 2 to 4. Thereupon defendants 2 to 4 become the ex-proprietary tenants of the [28] entire body of co-sharers. No provision of law has been pointed out to me which confers on defendant No. 1 the exclusive right of collecting rent from defendants 2 to 4 in respect of land held by them as ex-proprietary tenants. No custom or contract to that effect has been pleaded. I allow this appeal, set aside the decree of the courts below and decree the suit for a declaration that the plaintiffs are entiled to recover rent from defendants 2 to 4 to the extent of their share in respect of all the lands in the occuption of defendants 2 to 4 as tenants. The plaintiffs shall obtain their costs throughout."

The defendants appealed.

The Hon'ble Dr. *Sundar Lal* and Pandit *Vishnu Ram Mehta*, for the appellant.

Munshi *Haribans Sahai* and Pandit *Uma Shankar Bajpai*, for the respondents.

RICHARDS, C. J. and BANERJI and TUDBALL, JJ.:—This appeal arises out of a suit in which the plaintiffs claimed a declaration that they were zamindars and owners of one anna out of a 4½ anna share in each of the plots in dispute which were detailed in the plaint and are entitled to realize the rent from the defendants 2 to 4. The facts are—that one Ram Dayal owned a *patti* called Patti Ram Dayal, the extent of which was 4½ annas of the mahal. After his death, in some way which it is unnecessary to consider, a one anna fractional share therein went to the plaintiffs and the remaining 3½ annas went to the defendants 2 to 4. The rights of the defendants 2 to 4 have been acquired by defendant No. 1, the result of which was that defendants 2 to 4 became ex-proprietary tenants of the *sir* which they held prior to the acquisition of their proprietary rights by defendant No. 1. The real question is whether the defendants 2 to 4 are, in the events which have happened, the ex-proprietary tenants of the defendant No. 1 or the ex-proprietary tenants of all the proprietors in the *patti*, that is to say, of the plaintiffs and defendant No. 1. This was the question which came before a learned Judge of this Court, from whose judgment this appeal under the Letters Patent has been preferred. The learned Judge came to the conclusion that the defendants 2 to 4 were the ex-proprietary tenants of all the proprietors of the *patti*, and not of the defendant No. 1 alone. In our opinion this, in view of the circumstances of this case, is correct. It seems to us that prior to the sale all the co-sharers in the *patti* were the proprietors of all the plots that went to make up the *patti*, irrespective of the *sir* [29] rights of the several co-sharers. For the purpose of distribution of profits a hypothetical rent is in a case like the present fixed upon the *sir* land, and all the co-sharers share in this hypothetical rent. It is quite clear that if the proprietary body were the proprietors of the *sir* prior to the sale, the particular co-sharer who sells his proprietary rights cannot transfer anything more than his own share. In other words, he is not entitled to sell the whole proprietary title in the land which he held as

sir. We think it logically follows that as soon as the co-sharer ceases to be a co-sharer and becomes an ex-proprietary tenant of his *sir*, he becomes the tenant of all the co-sharers in the *patti* including the purchaser of his share. The plaintiffs were therefore entitled to share in the rent payable by the defendents 2 to 4. It is to be noted that this is not a case where the vendor is really the sole owner of the proprietary title in the lands which he holds as *sir*. There are some such cases. We dismiss the appeal with costs.

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35 A. 27=14 I. C. 399=10 A. L. J. 437.

Appeal dismissed.

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35 A. 29 (=10 A. L. J. 431=17 I. C. 792=13 Cr. L. J. 856).

REVISIONAL CRIMINAL.

Before Mr. Justice Muhammad Rafiq.

LANGRIDGE v. ATKINS.*

[26th September, 1912.]

Criminal Procedure Code, section 179—*Jurisdiction—Place where consequence of act ensued—Act No. XLV of* 1860 (*Indian Penal Code*), *section* 406—*Criminal breach of trust.*

Held that the loss caused to the person beneficially entitled to property through a criminal breach of trust is a consequence which completes the offence, and a prosecution will therefore lie at the place where such loss occurred.

Queen-Empress v. *O'Brien* (1) and *Emperor* v. *Mahadeo* (2) followed. *Babu Lal* v. *Ghansham Das* (3), *Ganeshi Lal* v. *Nand Kishore* (4) and *Sirdar Meru* v. *Jethabhai Amirbhai* (5) distinguished. *Nirbhe Ram* v. *Kallu Ram* (6) dissented from.

[Dist 29 M. L. J. 175=1914 M. W. N. 894=26 I. C. 136=38 Mad. 639; Ref. 60 I. C. 996=19 A. L. J. 69=22 Cr. L. J. 308; Fol. 38 Mad. 779; 81 I. C. 538=25 Cr. L. J. 922; 65 I. C. 687=23 Cr. L. J. 173; Fol: 74 I. C. 74=1 Rang, 56=24 Cr. L. J. 746.]

THE facts of this case were briefly as follows. Two persons of the names of Atkins and Langridge, both married, lived at Cawnpore. Atkins owned a machine and Langridge, under an agreement with Atkins, helped Atkins to work it and was remunerated by a share in the profits. Atkins fell ill at Cawnpore in 1911 and [30] died there in January 1912, leaving by will all his property to his wife. During his illness Langridge had, with Atkins' permission, taken the machine to some place in Madras to be worked at a fair for their common benefit. Langridge neither returned the machine to Mrs. Atkins nor did he account for any profits made out of it. Mrs. Atkins therefore filed a complaint against Langridge in Cawnpore. The present application was to set aside the proceedings against Langridge upon the ground that the courts at Cawnpore had no jurisdiction.

Mr. *E. A. Howard*, for the applicant.

Mr. *C. Dillon*, for the opposite party.

Babu *Lalit Mohan Banerji* (for the Assistant Government Advocate), for the Crown.

MUHAMMAD RAFIQ, J.—This is an application in revision which raises a point of jurisdiction. The applicant, George Langridge, contends that the Cantonment Magistrate of Cawnpore has no jurisdiction to try him on a

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* Criminal Revision No. 681 of 1912 from an order of W. F. Kirton, Sessions Judge of Cawnpore, dated the 19th of August, 1912.

(1) (1896) I. L. R 19 All. 111.
(2) (1910) I. L. R. 32 All. 377.
(3) Weekly Notes, 1908, p. 115.
(4) (1912) I. L. R. 34 All. 487.
(5) (1906) 8 Bom. L. R. 513.
(6) (1901) 4 O. C. 376.

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charge under section 406 of the Indian Penal Code. According to the case for the prosecution, the applicant and Atkins, the husband of the opposite party, were in the service of the East Indian Railway in 1911, and both resided with their wives in Cawnpore. The two men were friends, and they decided to improve their prospects by leaving the railway service and touring the country with an American machine called the "American Circling Wave." Atkins supplied the money for the machine, and he went with the applicant to Bombay in October, 1911, and took delivery of it. The applicant was to serve as an assistant of Atkins, and was to get part of the profits as his remuneration. Atkins remained in Bombay for about three months. He fell ill and died there on the 23rd of January, 1912. Before his death he executed a will of all his property in favour of his wife, Mrs. Atkins. During his illness he permitted the applicant to take the machine to some place in Madras to work it there during a fair for their mutual benefit. A few days after the death of Atkins, the applicant presented an agreement in writing to Mrs. Atkins for signature, claiming half the machine. Mrs. Atkins refused to sign the said agreement and denied the title of the applicant to any part of the machine. The applicant then went away without returning the machine to Mrs. Atkins or rendering to her any account of the profits made before or after the death of her [31] husband. She filed a complaint in the court of the Cantonment Magistrate of Cawnpore against the applicant, under section 406 of the Indian Penal Code. Mrs. Langridge, the wife of the applicant, also filed a complaint against him under the maintenance section in the same court. The applicant was arrested on the two warrants and taken to Cawnpore. He objected to the jurisdiction of the Cantonment Magistrate to try him on the charge of criminal breach of trust on the ground that the offence, if committed at all, was committed outside Cawnpore and in fact outside the United Provinces. The objection was overruled. The applicant preferred a revision to the court of Session which was rejected. He has come up in revision to this Court and repeats his objection. It is argued by the learned counsel for him that section 179 of the Code of Criminal Procedure, under which the Contonment Magistrate appropriates the jurisdiction to himself, and with whom the Judge has agreed, is inapplicable to the present case. The applicant has done no criminal act within the jurisdiction of the Cawnpore courts, nor has any consequence ensued modifying or completing such act within the jurisdiction of those courts. The alleged criminal breach of trust was admittedly committed outside Cawnpore; and as under the law the offence was completed as soon as the dishonest misappropriation or conversion of the machine or the profits had taken place, there was no consequence of the said misappropriation left to modify or complete the offence, with which the applicant stands charged. In support of this contention the following cases are cited :—*Babu Lal* v. *Ghansham Das* (1), *Ganeshi Lal* v. *Nand Kishore* (2), *Sirdar Meru* v. *Jethabhai Amirbhai* (3) and *Nirbhe Ram* v. *Kallu Ram* (4). For Mrs. Atkins it is contended that the jurisdiction of a criminal court is determined by the allegations made in the complaint filed before it. In her complaint she stated that the applicant was a mere agent in charge of the machine in question, permitted to exhibit it at various places for her and her husband's benefit and was bound to return it and to account to her for the profits at

(1) Weekly Notes, 1903, p. 115.
(2) (1912) I. L. R. 34 All. 487.
(3) (1903) 8 Bom. L. R. 513.
(4) (1901) 4 O. C. 376.

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her place of residence, *i.e.*, at Cawnpore. His failure to do so gives the courts at Cawnpore jurisdiction to try him on her complaint. It is admitted that the words "and of any consequence which has ensued" in [32] section 179 of the Code of Criminal Procedure, refer to a consequence which completes or modifies the act alleged to be an offence. But in criminal breach of trust loss is a necessary consequence and completes the offence. The unlawful retention by the applicant of the machine and profits of its exhibition has entailed loss on Mrs. Atkins at Cawnpore, and hence the courts at Cawnpore have jurisdiction to try him. The learned counsel for Mrs. Atkins relies on the following cases in support of his argument : *Queen-Empress* v. *O'Brien* (1) and *Emperor* v. *Mahadeo* (2). Moreover, it is urged that if the applicant's interpretation of section 179 of the Code of Criminal Procedure is allowed, Mrs. Atkins has no remedy. She does not know where the machine was at the time of her husband's death, or at the time she demanded its return, or at what places has the applicant exhibited it. In fact, she could not for a long time trace the address of the applicant and does not know even now where he is concealing the machine. It appears to me that both parties are agreed as to the interpretation of section 179 of the Code of Criminal Procedure. The point of difference between them is whether loss resulting from criminal breach of trust can be said to be such a consequence as completes the offence. This Court, if I have read the rulings rightly, has always held that loss entailed by criminal breach of trust is a consequence that completes the offence. The case of *Queen-Empress* v. *O'Brien* is directly in point. To the same effect is the case of *Emperor* v. *Mahadeo*. None of the cases cited for the applicant, with the exception of the Oudh case, helps him. In the case of *Babu Lal* v. *Ghansham Das* (3). Babu Lal was prosecuted for cheating at the instance of Ghansham Das, in the court of the Joint Magistrate of Aligarh with regard to the negotiation of certain *hundis*. It was found that as the said *hundis* were neither negotiated in the district of Aligarh, nor was any loss sustained by Ghansham Das on the negotiation of those *hundis*, the Joint Magistrate of Aligarh had no jurisdiction to entertain the complaint. The facts of the case *Ganeshi Lal* v. *Nand Kishore* (4) were, that the complainant had his principal shop in Cawnpore and a branch shop at Gauriganj, district Sultanpur, in Oudh. The profits made at the latter shop were to be remitted to the principal firm at Cawnpore. The [33] accused misappropriated some money of the branch shop. The complainant prosecuted him in Cawnpore on the charge of embezzlement. On an objection by the accused it was held by Mr. Justice Karamat Husain that the Cawnpore court had no jurisdiction. The learned Judge came to that conclusion presumably on the ground that loss was sustained primarily by the branch shop. It was for that reason that he made a distinction between the case before him and that of *Queen-Empress* v. *O'Brien* (1). He did not differ from the ruling in the case of O'Brien, nor did he question the proposition that in a criminal breach of trust loss to the victim was a consequence which completed the offence. In the case of *Sirdar Meru* v. *Jethabhai Amirbhai* (5) the complainant was assaulted by the accused and his leg broken within the Baroda territory. The complainant was taken to a hospital within the British territory where he was detained for 57 days, during which period

(1) (1896) I. L. R. 19 All. 111.
(2) (1910) I. L. R. 32 All. 397.
(3) Weekly Notes, 1908, p. 115.
(4) (1912) I. L. R. 34 All. 487.
(5) (1906) 8 Bom. L. R. 513.

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he was unable to follow his ordinary pursuits. He originally filed in a British court a complaint against the accused for causing him grievous hurt. The accused raised an objection of want of jurisdiction. It was held that as the offence of causing grievous hurt was complete within the Baroda territory, inasmuch as the leg had been fractured in that territory, the objection of the accused must prevail. This case does not help the applicant at all. It is true that the inability of the complainant to follow his ordinary pursuits was a consequence of the fracture. But that inability did not in that particular case complete or modify the offence of the accused. Had the leg of the complainant not been broken and had an injury been caused which necessitated the complainant's detention in a British hospital for twenty days or more, the decision of the Bombay High Court would, I presume, have been different. According to the definition of grievous hurt inability to follow one's ordinary pursuits for twenty days or more is only one of the tests of grievous hurt, *vide* section 320 of the Indian Penal Code. The Oudh case, as I have already remarked, is in favour of the applicant. But this Court has taken a different view as appears from the cases cited above. I therefore find that the Cantonment Magistrate of Cawnpore has jurisdiction to entertain the complaint against the applicant. The application of the latter fails and is rejected.

Application rejected.

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35 A. 34 (=17 I. C. 274=10 A. L. J. 440).

[34] FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr. Justice Tudball and Mr. Justice Chamier.

KHALIL-UD-DIN AHMAD (*Plaintiff*) *v.* BANNI BIBI (*Defendant*).*

[5th November, 1912.]

Act No. XVI of 1908 (*Indian Registration Act*), *sections* 31, 32, 52 *and* 87—*Presentation by a person not an authorized agent of the executant—Procedure—Invalid presentation not merely a question of procedure.*

Where a document is presented for registration by a person not duly authorized to present it according to the law applicable to registration of documents, such presentation is altogether invalid, and its subsequent registration, made upon the admission of the executant before an officer who had no jurisdiction to accept the document for registration, is likewise invaid. *Mujib-un-nissa* v. *Abdur Rahim* (1) followed.

THIS was a suit on a mortgage bond for Rs. 7,000, executed by one Musammat Banni Bibi, on the 11th of July, 1893, in favour of Niaz Bibi. Niaz Bibi transferred her rights to the plaintiff appellant, Khalil-ud-din, by a sale deed bearing date the 7th of November, 1896. The bond was taken to the office of the sub-registrar of pargana and district Bareilly by Muiz-ud-din, the husband of Musammat Banni Bibi. The sub-registrar endorsed on it that "the document was presented by Muiz-ud-din on Wednesday the 12th July, 1893," that "he stated that the Musammat was a *purdanashin* lady and that the document may be attested from the Musammat at her residence by means of a commission," and that "as

* First Appeal No. 170 of 1911, from a decree of Baijnath Das, Officiating Subordinate Judge of Bareilly, dated the 10th of March, 1911.

(1), (1900) I. L. R. 23 All. 238.

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the Musammat lived within the local limits of the Municipality the document may be sent to the departmental sub-registrar of Bareilly for attestation." The document was taken to the residence of the lady the same evening by the departmental sub-registrar who endorsed on it that the document had been attested and that the papers be sent back to the sub-registrar of the tahsil Bareilly. It was admitted that Muiz-ud-din held no power of attorney from Musammat Banni Bibi. The defence to the suit was, *inter alia*, that the document had not been legally registered, as it had not been presented for registration by any authorized person within the meaning of section 32 of the Registration Act. The Subordinate Judge held that the document had not been duly registered and dismissed the suit. The paintiff appealed to the High Court.

[35] Dr. *Satish Chandra Banerji* (Mr. *Ibn-i-Ahmad*, with him), for the appellant, referred to sections 31, 32, 33 of the Registration Act, XVI of 1908. Section 32 provided that except in cases governed by sections 31 and 89, every document was to be presented in a particular manner. So in cases coming within section 31 it was not necessary to present the document in person. The maxim *qui facit per alium facit per se* applied, and an agent could present the document. So when an application was to be made under section 31, any agent could make it. The question was if 'presentation' meant the physical act of handing in the document or of tendering the document for registration. There were three Privy Council cases on the point. The first was *Sah Mukhun Lall Panuay* v. *Sah Koondun Lall* (1). The observations in this case were explained in the next case of *Mohammed Ewaz* v. *Birj Lall* (2). There the vendors lived at different places; they did not come together for registration, and the question was if they could appear separately and register the document. Their Lordships held that it could be so registered. It is possible to make a distinction, viz., that presentation is the act of the party and registration that of the officer, but presentation was for registration and the act legally operative and indispensable was that of registration. The last Privy Council case was *Mujib-un-nissa* v. *Abdur Rahim* (3). There the principal was dead when the document was presented. There was no invocation of the registrar by anyone having anything to do with the deed. Here it was different. The deed was registered at the instance of the lady before whom the document was taken, who identified it, admitted execution, and who asked for its registration. The decision in 23 Allahabad did not affect the present case. With the object of satisfying the sub-registrar that there was special cause within the meaning of section 31, the husband may have taken over and shown the document. If he handed it over, that was an act without legal effect, and should not be taken into account. Strictly speaking the sub-registrar should have returned the document. Instead of that he kept with him and took it to the lady. The error of the sub-registrar was nothing more than a defect in procedure. **[36]** All that the law requires is that the document should be before the sub-registrar and he is to be requested to accept it for registration. The cases in this court were. *Ikbal Begum* v. *Sham Sunder* (4), following another in the same volume, *Har Sahai* v. *Chunni Kuar* (5) and *Hardei* v. *Ram Lal* (6). This last was considered by the Privy Council in 23

(1) (1875) 2 I. A. 210; 24 W. R. 75.
(2) (1877) 4 I. A. 166; I. L. R. 1 All. 465.
(3) (1900) I. L. R. 23 All. 283.
(4) (1882) I. L. R. 4 All. 384.
(5) (1882) I. L. R. 4 All. 14.
(6) (1889) I. L. R. 11 All. 319.

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All., and the actual decision must be considered to be overruled by it. Other cases were *Wilaiti Begam* v. *Fazal Husain Khan* (1) and *Nath Mal* v. *Abdul Wahid Khan* (2). It was admitted that the *karinda* presenting did not possess the required power of attorney. In another case—*Ram Chandra Das* v. *Farzand Ali Khan* (3)—there was no evidence to show that he did not. The only difference between *Nath Mal's* case and this was that there the mortgagor was present whereas here the lady was not. But what happened in the presence of the lady had to be taken into consideration. In *Jambu Prasad* v. *Aftab Ali Khan* (4), it was not proved that the executants were present when the registrar took in the deed and registered it. Another case was *Ishri Prasad* v. *Baijnath* (5), where it was held that neither section 31 nor 89 applied. When it is a case under section 31, the law does not require that it is any particular kind of agent who should invoke the registrar. The observations of Lord HALSBURY in *Quinn* v. *Lathem* (6), show that the observation of the Privy Council in 23 All. were to be restricted to the facts of that particular case. If presentation by the husband was at all a presentation, it should be ignored. "Present" is used in section 32 in a technical sense, and is not merely equivalent to handing in; what happened subsequently satisfied the requirements of law, and if the sub-registrar thought that the husband had presented the document and endorsed it to that effect, it was merely a defect in his procedure and could be cured by section 87. The cases in 4 All. show that the mortgagor is estopped from disputing the validity of the registration.

Mr. *B. E. O'Conor* (Babu *Lalit Mohan Banerji* with him), for the respondent.

[37] The facts were not disputed. The two processes were performed separately. The husband presented the document to the registrar, who endorsed that fact on it, and then he went to the lady's house to register it.

It is true that the lady was an assenting party to the registration with full knowledge of what was being done; but the question was if in the present view of the law the fact that it was not properly presented was not fatal to it. There were two essential processes incidental to registration, (1) presentation, and there had to be a record made of it; (2) the registrar having been put in motion by a proper presentation he proceeds to the formal registration. Going back to the history of registration we have Act XX of 1866, consolidating the law of registration. All Acts since follow each other closely—those in 1871, 1877 and 1908—both in parts and in the language used. The endorsement of presentation is mentioned in all these Acts, and the provisions are not novel, the conditions are looked upon as essential. Section 31 is in part V and section 32 in part VI of the Act. In part V are grouped together all the provisions relating to the place of registration, and in part VI there are put together provisions which relate to the mode of registration, and section 31 relates to the place of it. Part V itself is in two parts. The first says that only in a proper office can a document be registered. But there is a provision in section 33 itself for cases when the registrar goes to the abode of a person wishing to present a decument for registration. In the second we have the procedure the registrar has to follow. As between the first paragraph

(1) (1912) 9 A. L. J. 148.
(2) (1912) I. L. R. 34 All. 355.
(3) (1912) I. L. R. 34 All. 253.
(4) (1912) I. L. R. 34 All. 331.
(5) (1906) I. L. R. 28 All. 707.
(6) (1991) A. C. 495(506).

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of section 31 and the first part of 32, there is no conflict. In the second part we have the persons who are to make the presentation. There are three classes of persons. Sections 31 and 32 are not mutually exclusive. Section 31 contemplates that nothing in the shape of presentation is to take place at the office, if the Registrar goes to the abode of person wishing to register. It does not alter the formalities. The Privy Council lay stress in 23 All. on section 32, a person not authorized cannot present. If it were merely a matter of procedure it would only authorize the Registrar to go to the place asked and register the deed. There is a regular series of steps to be followed. He must act in pursuance of the Act. Failure to do so is not merely a defect of procedure. If it was not necessary [38] that presentation should be by the right person, it would not be necessary to specify the persons who could do it. Anybody might do it then. What was done could not be wiped off. The case in 23 Allahabad was authority for the proposition that registration following on a bad presentation was illegal. Presentation was not defined anywhere; but see *Bartlett* v. *Holmes* (1). Besides the person who actually went to the lady's house was only a commissioner and the document could not be presented to him. He acted merely as a post office. The lady never came before the Sub-registrar at all.

Dr. *Satish Chandra Banerji*, in reply--(on the last point).

This plea was never taken before. In any case it was a mistake of the Sub-registrar and was merely a defect in procedure and could be remedied by section 87. The District Registrar had sent the document to the Sub-registrar in the case in *Ram Chandra Das* v. *Farzand Ali Khan* (2) and there it was held to be duly registered.

If the Sub-registrar sent some one else here, it was his *bona fide* mistake; why should the parties suffer?

RICHARDS, C. J.—This appeal arises out of a suit brought on foot of a mortgage, dated the 11th of July, 1893. Various defences were pleaded, and amongst other things execution and consideration were denied. The court below has found nearly all the issues in favour of the plaintiff. It has found that the bond was duly executed by Musammat Bani Bibi, the mortgagor, and that the consideration was duly paid to her. The court, however, somewhat reluctantly found that the bond had not been duly registered. This question of registration was the question which came before a Bench of this Court. It appears that on the day on which the mortgage purports to have been registered, the husband of Musammat Banni Bibi made an application to the Sub-registrar of Bareilly tahsil. The actual application is not before us but there is endorsed on the bond the following note:—

"This document was presented by Muiz-ud-din Ahmad on Wednesday, the 12th July, 1893, between 8 and 9 A M., in the office of the Sub-registrar of pargana and district Bareilly. He stated that Musammat Banni Bibi the executant of the document, was a *pardanashin* lady. The document may be attested from the Musammat at her residence by means of a commission. As the Musammat [39] abovenamed resides within the local limits of the municipality, this document may be sent to the departmental sub-registrar of Bareilly for attestation (Sd.) Wasi-ud-din, sub-registrar (Sd.) Muiz-ud-din Ahmad, the persons presenting this document, in autograph"

(1) (1853) 22 L. J. C. P. N. S 182, 185. (2) (1912) I. L. R. 34 All. 253.

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It next appears that the departmental sub-registrar of Bareilly went the same day to the lady's house. The lady was duly identified and she admitted execution of the deed. The money was paid over, and the departmental Sub-registrar sent the document to the sub-registrar of tahsil Bareilly, who registered the same. It further appears from the endorsement upon the bond that the person who "presented" the document for registration to the Sub-registrar of tahsil Bareilly was the husband. It is clear that the Sub-registrar understood the husband to be the person who was "presenting" the document to him for registration. In the court below and in this Court it was admitted that when Muiz-ud-din Ahmad, the husband, "presented" the document for registration he was not authorized in the manner prescribed by section 32 and 33 of the Registration Act of 1877, which was then in force. It was, however, strongly contended that what subsequently happened at the residence of the lady amounted to a good "presentation" within the meaning of the Act, and that the document ought therefore to be considered has having been duly registered.

At the first hearing of the appeal in this Court it was never pointed out that the gentleman who attended at the residence of the lady was not the same Sub-registrar who had in the first place received the document from her husband, and the question which the Court considered it had before it was whether or not the lady having admitted the execution and communicated to an officer competent to accept and register the document her desire to have it registered, the document was not sufficiently "presented" within the meaning of the Act. The bench before whom the appeal came considered that it was desirable that the question should be decided by a larger Bench, and the case was accordingly referred to the Bench as at present constituted.

The arguments in the first instance entirely proceeded upon the basis that the departmental Sub-registrar was entitled to receive the document for registration if in fact it had been duly "presented" to him. It has now at the very close of the arguments been [40] pointed out, that the departmental Sub-registrar had no such authority, and the question which it was intended to have decided by this Bench does not really arise. It seems to me that we have now only to decide whether or not the "presentation" which was made by the husband can, from any point of view, be regarded as a good "presentation," and secondly, whether the fact, that the Registrar received the deed for registration from an unauthorized person, is merely a defect of procedure which might be disregarded under the provisions of section 87. It seems to me that the "presentation" by Muiz-ud-din Ahmad was a complete nullity. He had no authority whatever to present the document for registration, and in my opinion this question is completely covered by the ruling of their Lordships of the Privy Council in the case of *Mujib-un-nissa* v. *Abdur Rahim* (1). I am also of opinion that under no circumstances can what subsequently happened at the house be deemed a good presentation, because the gentleman who attended at the house had no authority to receive the document for registration. His authority was confined to ascertaining that the document had been duly executed, that is to say, to examining the executant under the provisions of section 38. I would dismiss the appeal.

KNOX, J.—I concur and have nothing further to add.

(1) (1900) I. L. R 23 All. 233.

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BANERJI, J.—I also agree in the conclusion at which the learned Chief Justice has arrived. In the case decided by the Privy Council, namely, the case of *Mujib-un-nissa* v. *Abdur Rahim*, (1) their Lordships observed :—" It is clear that the power and jurisdiction of the Registrar only come into play when he is invoked by some person having a direct relation to the deed. It is for those persons to consider whether they will or will not give to the deed the efficacy conferred by registration. The registrar could not be held to exercise the jurisdiction conferred on him if, hearing of the execution of a deed, he got possession of it and registered it, and the same objection applies to his proceeding at the instigation of a third party, who might be a busybody." In the present case the document was not presented for registration by a person having a direct relation to the deed, and the subsequent admission of execution by the executant was before an officer who had no jurisdiction to accept the document for registration. Therefore there was no presentation to a Sub-registrar having jurisdiction, and the [41] registration of the document must, according to the ruling of the Privy Council, be held to be invalid. I also would dismiss the appeal.

TUDBALL, J.—I fully concur and have nothing further to add.

CHAMIER, J.—I agree with the order proposed by the learned Chief Justice. It appears to me that there was neither in fact nor in law any "presentation" of the document by any qualified person to any person authorized to receive it for registration.

BY THE COURT.—The order of the Court is that the appeal is dismissed, but without costs. The objection raised by the respondent as to costs is also dismissed with costs.

Appeal dismissed.

35 A. 41 (=13 M. L. T. 162=1913 M. W. N. 127=11 A. L. J. 146=17 C. W. N. 453=17 C. L. J. 306=15 Bom. L. R. 426=26 M. L. J. 28.)

PRIVY COUNCIL.

RAGHUBIR SINGH (*Defendant*) *v.* MOTI KUNWAR (*Plaintiff*) AND SATI SINGH AND ANOTHER (*Plaintiffs*) *v.* MOTI KUNWAR (*Defendant*).*

Two appeals consolidated.

[1st, 5th and 26th November, 1912.]

[*On appeal from the High Court of Judicature at Allahabad.*]

Hindu law—Partition—Requisities for partition—Agreement to hold property in certain specific and defined shares, effect of—Re-union, failure to prove as alleged.

The members of a joint Hindu family came to the following agreement:—"Now we have already come to terms, and according to the shares given below we have been in possession and enjoyment of our respective shares As regards it we have with our mutual consent entered into an agreement according to the terms given below. The same share in the property which is in the possession of a particular person as given below shall be considered to be the property of that very person who is in possession thereof If any of us brings any suit in the Civil or Revenue Court to the effect that his share is less or he is a loser, it shall be considered to be false in every court. By virtue of this agreement no person shall be competent to bring any claim in any court in respect of any portion of the property other than the property detailed below" Then followed a specification of the villages belonging to the family, and the shares in which those villages were thereafter to be held. From that time the property had been

* *Present.*—LORD MACNAGHTEN, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

(1) (1900) I. L. R. 23 All. 233.

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35 A. 41=13 M. L. T. 162 =1913 M. W. N. 127=11 A. L. J. 146=17 C. W. N. 463 =17 C. L. J. 306=15 Bom. L. R. 426=25 M. L. J. 28.

entered in the register in accordance with the arrangement contained in the agreement, and the agreement had been acted upon up to the time of suit.

Held by the Judicial Committee (affirming the decision of the High Court) that on the evidence and circumstances of the case, the agreement was one which operated as a partition of shares, and the family thenceforth ceased to be joint in accordance with the principle laid down in *Appovier* v. *Rama Subba* [42] *Aiyan* (1); *Balkishen Das* v. *Ram Narain Sahu* (2) and *Parbati* v. *Nawahal Singh* (3).

There was no re-union. That was a question of fact, and there was no evidence to show that any of the members of the family re-united, or even contemplated re-union.

Two appeals consolidated from two judgments and decrees (24th November 1908) of the High Court at Allahabad, one of which reversed a judgment and decree (12th September 1907) of the Subordinate Judge of Mainpuri, and the other affirmed a judgment and decree (2nd June 1904) of the Assistant Collector of Etawah.

The facts of the case are, for the purposes of this report, stated in the judgment of their Lordships of the Judicial Committee.

The main question for determination in these appeals, was whether one Baldeo Singh, the deceased husband of the respondent Moti Kunwar, was a member of a Hindu joint family in co-parcenership with the appellants at the time of his death (as contended by the appellants), or had become separated prior to his death (as contended by the respondent).

Upon this question depended the title of Moti Kunwar, the plaintiff in the suit brought in the court of the Assistant Collector of Etawah, the object of which was to recover her share of profits of a village named Kanchausi, which was recorded in her name. The defendants were the present appellants, and the main defence was that Moti Kunwar was not a co-sharer, but a Hindu widow in a joint family who was only entitled to maintenance. The Assistant Collector decided the case on the provisions of the Agra Tenancy Act (II of 1901 of the Local Council) section 201, and held that the fact that Moti Kunwar's name was recorded as proprietor in the Revenue papers was sufficient to maintain her claim in a Revenue Court. He accordingly gave her a decree, and directed the parties to go to a Civil Court with respect to the question of title.

The appellants consequently brought the other suit in the court of the Subordinate Judge of Mainpuri against Moti Kunwar, claiming a declaration that they were the owners of the property [43] wrongly recorded in the name of Moti Kunwar, their title being that they were the surviving members of the joint family of which Baldeo Singh (Moti Kunwar's deceased husband) had been a co-parcener. Moti Kunwar contested the suit on the same title as she had set up in her own suit.

The Subordinate Judge deciding in favour of the appellants said :—

"The question is whether by this agreement Baldeo Singh and Lalta Singh intended a division with Madan Mohan Singh alone, or whether it was their intention to divide amongst themselves and also from Raghunath Singh and Sati Singh. There is strong oral and documentary evidence to show that Baldeo Singh, Lalta Singh, Raghunath Singh and Sati Singh remained joint after the agreement. The former consists of the evidence of (1) relatives, (2) respectable persons, viz. zamindars and raises, and 3) servants, of the family. The documentary evidence consists of the admission of Baldeo Singh contained in a statement made before the Tahsildar on the 28th of April 1894, wherein he admits that he had divided from Madan Mohan Singh 11 years ago, but lived jointly with

(1) (1868) 11 Moo. I. A. 75.
(2) (1908) I. L. R. 30 Cal. 788; L. R. 30 I. A. 189.
(3) 1909) I. L. R. 31 All. 413; L. R. 36 I. A. 71.

Lalta Singh, Raghunath Singh and Sati Singh; the admission of the defendant Moti Kunwar contained in her deposition before the Tahsildar in 1896, wherein she states:—'I have got my name entered for my satisfaction. All were joint during the life-time of Thakur (her husband) ; they are all joint even now. Lalta Singh and Sati Singh are the owners; they will be owners after me as they are the owners now. There is no disunion amongst us. The accounts written by Baldeo Singh showed joint collections of rent and payment of Government revenue as also that the expenses connected with the illness and the death of Raghunath Singh and those connected with the funeral of Baldeo Singh and the marriage of his daughter after his demise were made out of joint funds."

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Moti Kunwar appealed to the High Court from that decision ; and Raghubir Singh appealed from the decision of the Assistant Collector of Etawah. The appeals were heard together by a Divisional Bench of the High Court (SIR JOHN STANLEY, C. J. and BANERJI, J.) which reversed the decree of the Subordinate Judge, and affirmed that of the Assistant Collector, on the ground that Baldeo Singh had become separated from the joint family in his life-time.

In the suit in which he was defendant Raghubir Singh obtained special leave of His Majesty in Council to appeal. In the suit in which he and Sati Singh were plaintiffs they appealed in the ordinary course.

On these appeals.

[44] *De Gruyther*, *K. C.* and *B. Dube* for the appellants contended that the agreement, dated the 10th of October 1873, was executed to effect a separation in estate of Madan Mohan Singh alone, and was inoperative as regarded the other members of the family. The evidence showed that after the date of the agreement the parties to it continued to live as undivided members of a Hindu joint family. But even if the agreement did technically operate as a partition of the joint family, the acts, admissions and conduct of the parties, it was submitted, established that there was a re-union between Baldeo Singh, Lalta Singh and Sati Singh, who afterwards lived together as members of a Hindu joint family. Reference was made to Mayne's Hindu law (7th ed.), page 671, section 495: *Balkishen Das* v. *Ram Narain Sahu* (1): Evidence Act (I of 1872), sections 18 and 45: *Rewa Prasad Sukal* v. *Deo Dutt Ram Sukal* (2): *Gajendar Singh* v. *Sardar Singh* (3); and *Hoolash Kooer* v. *Kassee Prashad* (4) to show that the recording of the name of a widow, or of a member of a joint family as proprietor of a share did not operate as a separation in title: *Parbati* v. *Naunihal Singh* (5); Agra Tenancy Act (II of 1901 of the Local Council) section 201: and the United Provinces Land Revenue Act (III of 1901 of the Local Council) section 144. The view taken by the Subordinate Judge (who heard the witnesses and could best estimate the value of the evidence given by them) was the correct one, and his decision should not have been reversed by the High Court.

Ross, *K. C.* and *G. Considine O'Gorman* for the respondent contended that it was established by the evidence and by the agreement of 1873, that Baldeo Singh was not a member of the joint family at the time of his death, but had become separated prior to that event. As to the effect of the agreement they relied on the cases of *Balkishen Das* v. *Ram Narain Sahu*, and *Parbati* v. *Naunihal Singh* (5) ; and Mayne's Hindu law (7th ed.), **[45]** page 672. The decision of the High Court was right and should be upheld.

(1) (1903) I. L R. 30 Cal. 738. (750) : L. R. 30 I. A. 139 (150).
(2) (1899) I L R. 27 Cal. 515 (519) : L. R. 27 I. A. 39 (41).
(3) (1896) I. L. R. 18 All. 176 (182).
(4) (1881) I. L. R. 7 Cal. 369 (371).
(5) (1909) I. L R. 31 All. 412 (425) ; L. R. 36 I. A 71 (76).

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De Gruyther, K. C., replied.

1912, *November* 26*th*: —The judgment of their Lordships was delivered by LORD MACNAGHTEN: —

These are consolidated appeals from a judgment and two decrees of the High Court of Allahabad pronounced in favour of the respondent Musammat Moti Kunwar.

In the Court of the Assistant Collector of Etawah, Moti Kunwar, widow of Baldeo Singh who died in 1895, succeeded in making good her claim to arrears in respect of a specific share of property which undoubtedly at one time formed part of the joint property of an undivided Hindu family to which her husband belonged. Thereupon the appellants who alleged that Baldeo Singh was not separated at the time of his death, brought a suit in the Court of the Subordinate Judge of Mainpuri and obtained a declaration that they were the absolute owners of the property claimed by Moti Kunwar and that she had no right of ownership therein, but merely a right to maintenance. There was an appeal to the High Court by Moti Kunwar against the decree of the Subordinate Judge and an appeal by the present appellants against the order of the Assistant Collector. The two appeals were consolidated. The High Court reversed the decree of the Subordinate Judge and dismissed the suit of the present appellants, as well as their appeal against the order of the Assistant Collector.

The whole controversy depends upon the question whether Baldeo Singh was separate in title and interest at the time of his death.

In 1871, Madan Mohan Singh, who was a member of the undivided family, separated and received his share. For the purpose of this transaction and in settlement of all disputes "relating to the zamindari, the household articles, and the money-lending business, &c.," an agreement was executed on the 19th of December 1871 by Baldeo Singh, Lalta Prasad the adopted son of a deceased member of the undivided family, and Madan Mohan Singh. On the 10th of October 1873 another agreement was executed between and by Baldeo Singh, Lalta Prasad and Madan Mohan Singh. After declaring that the executants along with **[46]** Raghunath Singh and Sati Prasad were sharers in the villages specified below, the agreement proceeded as follows:—

"Now we have already come to terms and according to the shares given below we have been in possession and enjoyment of our respective shares. As regards it we have with our mutual consent entered into an agreement according to the terms given below,

"The same share in the property which is in the possession of a particular person as given below shall be considered to be the property of that very person who is in possession thereof. If any of us brings any suit in Civil or Revenue Court to the effect that his share is less or he is a loser, it shall be considered to be false in every Court. By virtue of this agreement no person shall be competent to bring any claim in any court in respect of any portion of the property other than the property detailed below."

Then, after some provisions which it is not necessary to set out, there followed a specification of the villages belonging to the family and the shares in which those villages were thereafter to be held. The agreement was registered on the same day. From that time the property has been entered in the register in accordance with the arrangement contained in the agreement. And on the death of Baldeo Singh his share was entered in the name of his widow, the respondent Moti Kunwar.

From the terms of the agreement of 1873, the learned Judges of the High Court rightly, as it appears to their Lordships, "gather that the members of the family were in separate possession of defined shares of

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the family property before the date of its execution " and they also gather from it " that Raghunath Singh as well as Sati Prasad," who was then a minor, so far as the latter could assent to an arrangement, had agreed to the allotment of shares specified in the instrument." The learned Judges further point out that the khewats of two of the villages specified in the agreement of 1873, which were in evidence, show that at the close of 1872 the entry of names was altered and the names of Lalta Prasad, Sati Prasad, Raghunath Singh, Baldeo Singh and Madan Mohan Singh were entered separately in respect of their separate specific shares.

As regards the share of Raghunath, who was not a party to the agreement of 1873, the partition appears to have been accepted and acted upon by him up to the time of his death, which occurred in 1879. On his death the name of his widow was recorded in his place, and she was appointed lambardar of the village which [47] had been allotted to him. On her death the names of Baldeo Singh, Lalta Prasad and Sati Prasad were entered in her place, not jointly, but in respect of specific shares.

Sati Prasad, as already stated, was a minor at the date of the agreement of 1873, but it appears that on attaining majority he made no objection to it. He seems to have recognised the partition and acted upon it until Moti Kunwar applied for complete partition in the Revenue Court.

The contention on the part of the appellants was (1) that the agreement of 1873 was a partition only as regards the share of Madan Mohan Singh, and that the other members of the family remained joint, or (2) that the other members re-united either immediately or shortly afterwards. There seems to be no foundation for the latter contention, and indeed it was only faintly put forward. Re-union is a question of fact, and there is not a scrap of evidence to show that any members of the family re-united or even contemplated re-union.

In support of their principal contention the appellants put in a mass of parol evidence which was contradicted by parol evidence on the other side. The learned Judges of the High Court thought the parol evidence vague, unsatisfactory and inconclusive.

The High Court also rejected, and in their Lordships' opinion rightly rejected, a petition of Baldeo Singh himself, in which he alleged that Raghunath's widow was entered as owner solely for her consolation. This petition was in answer to an application by the widow to remove him from the office of sarbarahkar, and is irreconcilable with an earlier petition presented by him, in which he distinctly admitted that he paid to the widow the annual profits of her share and that the agreement of 1873 had been acted upon.

The High Court also rejected as unworthy of consideration a document which was referred to as proving that Moti Kunwar herself admitted that the property registered in her name was joint family property. This document purports to be a certified copy of a certified copy of a deposition made by Moti Kunwar in another suit which was not even put to her in cross-examination, although she averred that she had never made an admission to that effect.

The High Court also rejected as inconclusive certain accounts which purported to show that the expenses of the marriage of [48] Baldeo Singh's daughter and his funeral expenses were paid out of joint family property.

In conclusion the learned Judges say that it was sufficient for them that an agreement was committed to writing, which was clear and definite

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in its terms, and they add that that agreement has been shown to have been acted upon up to the present time.

Their Lordships agree in the result at which the High Court arrived. Having regard to the agreement of 1873, they think that the case is concluded by authority. The result is entirely in accordance with the principle laid down by this Board in the judgment delivered by Lord Westbury in *Appovier* v *Rama Subba Aiyan* (1) and in the more recent cases of *Balkishen Das* v. *Ram Narain Sahu* (2) and *Parbati* v. *Naunihal Singh* (3).

Their Lordships will therefore humbly advise His Majesty that these appeals should be dismissed.

The appellants will pay the costs of the appeals.

Appeals dismissed.

Solicitors for the appellants: *Barrow, Rogers & Nevill.*
Solicitors for the respondent: *Ranken, Ford, Ford & Chester.*

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35 A. 48 (=13 M. L. T. 182=17 I. C. 737=17 C. W. N. 233=1913 M. W. N. 131=17 C. L. J. 312=15 Bom. L. R 432=25 M. L. J. 91=40 I. A. 31).

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ABDULLAH KHAN (*Defendant*) *v.* BASHARAT HUSAIN (*Plaintiff*) *and another appeal.**

Two appeals consolidated.

[7th and 29th November, 1912.]

[*On appeal from the High Court of Judicature at Allahabad.*]

Mortgage—Redemption—Construction of mortgage as to the terms of redemption—Mortgage and lease to mortgagor contemporaneously granted—Mortgage executed before Transfer of Property Act (IV of 1882) came into force—Mortgagee's security reduced by portion of property being withdrawn—Section 66 (a) of Transfer of Property Act—Right of mortgagee to compensation.

The plaintiff (respondent) mortgaged to the defendant (appellant) certain property by a deed, dated the 25th of August 1880, for Rs. 70,000 for eight years. On the 29th of August (and so practically contemporaneously with the mortgage) a lease of the mortgaged property was executed by the mortgagee in favour of the mortgagor at an annual rent Rs. 4,200, which represented interest on the mortgage debt at the rate of 6 per cent. per annum. The mortgage contained a clause that "it is agreed by mutual consent of the parties that the profits of the property [49] mortgaged shall belong to the mortgagee in lieu of the interest on the mortgage money, and I, the mortgagor, shall have no claim for mesne profits. The mortgagee also shall have no right to claim interest on the mortgage money advanced by him." The lease, after reciting the mortgage, referred to a provision in the latter that the mortgagor should be entitled to sell a certain portion of the mortgaged property on condition that he handed over the whole of the proceeds of the sale to the mortgagee in payment of the mortgage debt, and provided that "under the condition whatever sum of money the mortgagor should pay to the mortgagee in a lump sum should be credited and set off against the rent payable under the lease with interest at 8 annas per cent. per mensem." Subsequently three further charges were tacked on to the mortgage, the latest of which was dated the 13th December 1882. In June 1888, the mortgagor was in arrear with his rent and the mortgagee brought a suit against

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* *Present*:—Lord MACNAGHTEN, Lord MOULTON, Sir JOHN EDGE and MR. AMEER ALI.

(1) (1866) 11 Moo. I. A. 75.
(2) (1903) I. L. R. 30 Cal. 738; L. R. 30 I. A. 139.
(3) (1909) I. L. R. 31 All. 412; L. R. 36 I. A. 71.

him on which the mortgagor gave up possession of the property to the mortgagee In a suit for redemption (the right to redeem not being disputed). *Held* that the mortgagee was entitled under the terms of the mortgage to appropriate the profits of the mortgaged property in lieu of the interest on the mortgage money not paid by the mortgagor. Evidence of preliminary negotiations and previous conversations were not admissible to contradict or vary the terms of the mortgage (Evidence Act, section 92.)

Held also that the mortgage and the lease were both parts of one and the same transaction. But there was no inconsistency between the two instruments nor would there have been any inconsistency if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted.

Held further that the original mortgage having been executed before the Transfer of Property Act came into operation, that Act was not applicable, notwithstanding that one of the further charges was executed subsequently to that date. Whatever might be the construction of section 65 (*a*) of that Act (which was cited in support of the mortgagee's claim) he was not on the evidence and under the circumstances of the present case entitled to compensation for any loss or damage occasioned by his security being diminished owing to a portion of the mortgaged property being successfully claimed from the mortgagor.

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35 A. 48=13 M. L. T. 182=17 I. C. 737=17 C. W. N. 238=1913 M. W. N. 131=17 C. L. J. 312=13 Bom. L. R 432=25 M. L. J. 91=40 I. A. 31.

[**Ref.** 1917 M. W. N. 275=33 I. C. 655=61 I. C. 612=44 Mad. 301=12 L. W. 685=40 M. L. J. 286 (Redemption—mortgage). **Ref.** 44 I. C. 132=34 M. L. J. 179=7 L. W. 229=1918 M. W. N. 262 (construction—Mortgage). **Ref.** 27 I. C. 989=28 M. L. T. 184 (T. P. Act, s. 65—compensation)]

Two consolidated appeals from a judgment and two decrees (22nd December, 1908) of the High Court at Allahabad, which partly reversed and partly affirmed a judgment and decree (22nd December, 1906) of the Court of the Subordinate Judge of Meerut.

The suit out of which the present appeals arose was one for redemption of a mortgage, in which the right to redeem was not disputed, and the main question was whether the appellant, the mortgagee, who was in possession of the mortgaged property, was entitled to appropriate the profits in lieu of interest under the terms of the mortgage deed, and the circumstances under which it was executed.

[50] The mortgage deed was dated the 25th of August 1880, and by it the respondent (plaintiff) in consideration of Rs. 70,000 mortgaged a 10 biswa share in mauza Jeola, and a 6 biswa share in mauza Tisang for eight years nominally to Masuma Begam (but really to her husband Husain Ali Khan) now represented by the appellant (defendant). The most important provision of the deed, so far as this appeal is concerned was clause 4, which stipulated that "it is agreed by mutual consent of the parties to this document that the profits of the property mortgaged shall belong to the aforesaid mortgagee in lieu of interest on the mortgage money, and I, the mortgagor, shall have no claim for the mesne profits. The mortgagee shall have no right to claim interest on the mortgage money advanced by him." On the 29th of August 1880, the mortgagee leased the whole of the mortgaged property to the plaintiff for the term of the mortgage at a yearly rental of Rs. 4,200, which represented interest on the mortgage debt at the rate of 6 per cent. per annum.

The lease, after reciting the mortgage, referred to a provision in the latter that the mortgagor should be entitled to sell the abadi of mauza Jeola, on condition that he handed over the whole of the proceeds of the sale to the mortgagee in payment of the mortgage debt, and provided that under that condition "whatever sum of money the mortgagor should pay to the mortgagee in a lump sum, it should be credited and set off against

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35 A. 48=13 M. L. T. 182 =17 I. C. 737 =17 C. W. N. 223=1913 M. W. N. 131= 17 C. L. J. 312=15 Bom. L. R. 432=25 M. L. J. 91= 40 I. A. 31.

the rent payable under the lease with interest at 8 annas per cent. per mensem."

The mortgage and the lease were both registered on the 2nd of September 1880.

On the 24th of November, 1880, the mortgagor borrowed from the mortgagee Rs. 21,473-8-0 at 12 annas per cent. per mensem in order to purchase a 6 anna share in mauza Tisang. That sum was tacked on to the original mortgage. That purchase was never completed, and the money was attached by one of the judgment-debtors of the mortgagor.

In June, 1881, the mortgagor, being in arrears with payment of his rent, gave up possession under his lease, and the mortgagee re-entered into possession under the terms of the original mortgage deed. According to the mortgagor's case he did this by arrangement with the mortgagee, from whom the mortgagor [51] received the following letter:—"After compliments, I beg to inform you that as you have according to the mutual agreement entered into between us, already presented a petition to the Revenue department, Musammat Masuma Begam the mortgagee will now collect the rents from tenants of mauzas Jeola and Tisang herself, and after deducting Rs. 4,200. the remainder will go in payment of the principal and interest of the bond tacked on to the mortgage and the principal of the mortgage. The account begins from to-day. Dated the 11th June 1881." This document was neither witnessed nor registered and was held by the Subordinate Judge to be a forgery. The High Court was of opinion it was genuine; but their Lordships of the Judicial Committee held it to be inadmissible on the ground that it was not registered.

Subsequent to the lease being so determined the mortgagor borrowed two further sums from the mortgagee, which were tacked on to the original mortgage and made redeemable with it; namely, on the 25th of April 1882, Rs. 6,000 repayable with interest at 10 annas per cent. per mensem. and on the 13th of December 1882, Rs. 1,000 repayable with interest at 12 annas per cent per mensem.

The appellant was the successor in title of the original mortgagee under a deed of gift, dated the 9th of September 1890.

The suit was brought on the 30th of June 1906, the plaintiff after stating the facts praying that the defendant should be ordered to render an account, as from the 11th of June 1881, of the rents and profits of the mortgaged property, and that the plaintiff should be credited in such account with all moneys received by the defendant; that, subject to any amount which might be found to be due, a decree be made in the plaintiff's favour for possession of the property, and that if on adjustment of the account any sum should be found due by the defendant, the plaintiff should be granted a decree for it.

The defendant denied that the oral agreements as alleged were entered into and that Husain Ali Jan was any party to the various transactions except in his capacity as general attorney for his wife; that the terms set out in the deeds were the only terms on which the parties agreed to be bound; that any oral or other agreements purporting to qualify the rights and liabilities under the registered deeds, had been entered into by Husain Ali Jan without any authority and were not binding on the mortgagee, nor could they [52] affect the rights of the defendant under those deeds; that the lease was admitted and that the plaintiff gave up possession under it; but it had no connexion with nor formed part of the original mortgage, but that on the contrary, it was a distinct and separate

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35 A. 48=13 M. L. T. 182 =1 I. C. 737 =17 C. W. N. 283=1913 M. W. N. 131= 17 C. L. J. 312=15 Bom. L. R. 432=25 M. L. J. 91= 40 I. A. 31.

transaction, and had, now it had come to an end, no bearing on the rights of the parties, and that at the date the original mortgage was made the plaintiff led the mortgagee to believe that he was the sole owner of the property mortgaged, but that in collusion with his sister he caused her to bring a claim whereby the mortgagee lost possession of a considerable portion of the mortgaged property, and the rents and profits which would have accrued therefrom. Finally the defendant stated that he had no objection to the redemption sued for, on payment of the sums due under the original mortgage and the subsequent amounts tacked on to it, which he estimated to amount to Rs. 2,10,954.

The Subordinate Judge held that the mortgage and the lease were to be treated as separate transactions and that no extraneous evidence was admissible to prove that the mortgagee was only entitled to interest at 6 per cent. per annum under the mortgage deed of the 25th of August 1880; that there was no agreement that the mortgagee would charge interest at 8 annas per cent. per mensem, but that the lease money was to be the profit of the mortgagee as long as the lease should last; that the *rukka* produced in support of the agreement made in June 1881, was a forgery; that if any such agreement had been made it would have been binding on the mortgagee; that the mortgagee was aware that the plaintiff's sister's share was included in the mortgage and the defendant was not entitled to claim any damages by reason of such share having been lost; that all bonds (the principal mortgage bond and the three additional bonds) must be liquidated both as to principal and interest before redemption; and that the mortgagee was entitled to enjoy and appropriate the entire usufruct of the property from July 1881 and onwards, and that he could not be called upon to account for the same.

The decree was consequently partly in favour of the plaintiff and partly in favour of the defendant.

Both parties appealed to the High Court, and the appeals were heard by SIR JOHN STANLEY, C. J. and BANERJI, J. They were [53] of opinion "that the mortgage and the lease must be read together as forming one transaction . . . . . the mortgage was in fact usufructuary only in name, and that it was not intended at the date of its execution that the mortgagee should go into possession or receipt of the rents and profits. It was only when the mortgagor failed to pay the rent reserved by the lease that possession was taken . . . . . Reading the mortgage and the lease together we cannot give to the provision in the mortgage deed as to the acceptance of profits in lieu of interest its literal meaning. The language of this provision must be taken to be controlled by the terms of the lease, which provided that during the subsistence of the mortgage rent at the rate of Rs. 4,200 a year should be payable . . . . We think that the mortgage and the lease being one transaction the intention of the parties to be deduced from them was that the mortgagee if in possession, was to receive Rs. 4,200 annually as interest out of the rents and profits, and that the mortgagor should enjoy the balance It was never the intention of the parties that the mortgagee if he took possession should put into his own pockets at least Rs. 2,000 a year over and above the Rs. 4,200."

The appeal of the plaintiff was consequently allowed and that of the defendant was dismissed.

The defendant appealed from both decrees to His Majesty in Council.

On this appeal.

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35 A. 48=13 M. L. T. 182 =17 I. C 737 =17 C. W N. 233=1913 M. W. N 131= 17 C. L J. 312=18 Bom. L. R. 432 =23 M. L. J 81= 40 I. A. 31.

DeGruyther, *K. C.*, and *G. Considine O'Gorman* for the appellant contended that under the terms of the mortgage deed he was entitled to appropriate the whole of the income from the mortgaged property in lieu of interest; and that the respondent was not entitled to an account of the income. No oral or other evidence was admissible to explain the terms of the mortgage deed, which were quite clear in favour of the appellant's contention. The mortgage deed and the lease were distinct and separate transactions, and the High Court, it was submitted, had wrongly held that they should be read together as forming one transaction. In any case the lease having been determined could now have no bearing on the rights and liabilities of the parties, which must be governed solely by the terms of the mortgage deed. The *rukka*, **[54]** dated the 11th of June 1881, was not proved and the High Court erred in reversing on that point the decision of the Subordinate Judge; but even if it were proved to be genuine, it was, being an unregistered document, not admissible in evidence so as to affect immoveable property, and had been wrongly admitted by the High Court. It was also contended that the appellant was entitled to compensation for the loss of income occasioned by the withdrawal of the respondent's sister's share of mortgaged property. Reference was made to the Evidence Act (I of 1872), section 92; Registration Act (III of 1877) sections 17 and 49; and Transfer of Property Act (IV of 1882), section 65 (*a*) which, it was contended, was applicable. The decision of the High Court should be reversed, and that of the Subordinate Judge (so far as it was not adverse to the appellant) should be restored.

Sir Erle Richards, *K. C.*, and *B. Dube* for the respondent contended that the mortgage deed and the lease formed together one transaction, and that they should be so treated. The evidence produced to show what was the real intention of the parties was therefore rightly admitted by the High Court in proof of the mode in which the rents and profits of the mortgaged property were to be dealt with. The appellant had only got possession of the property in June 1881. Reference was made to *Jawahir Singh* v. *Someshwar Dat* (1) and *Balkishen Das* v. *Legge* (2). The *rukka* of the 11th of June 1881, it was submitted, was properly admitted by the High Court. Under the circumstances the appellant had no right to any compensation for any loss or damage occasioned by the reduction of his security owing to a portion of the mortgaged property being found not to belong to the mortgagor. The Transfer of Property Act, it was contended, did not apply, the mortgage having been executed before that Act came into operation.

DeGruyther, *K. C.*, replied.

1912, *November* 29*th*:—The judgment of their Lordships was delivered by LORD MACNAGHTEN:—The respondents in these consolidated appeals are the representatives of the late plaintiff Saiyid Basharat Husain, now deceased, who was the owner of valuable zamindari property, subject to a mortgage, dated the 25th of August 1880, and three further charges tacked to it. The mortgage of 1880 and these further charges are now vested in the appellant.

[55] The controversy in this case arose out of these mortgage transactions. The original mortgagee was Husain Ali Khan, who made the advances to Basharat Husain, and took the securities in the name of his wife.

(1) (1905) I. L. R. 28 All. 225.

(2) (1899) I. L. R. 22 All. 149.

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35 A. 48=13 M. L. T. 182 =17 I. C. 737 =17 C. W. N. 233=1913 M. W. N. 131= 17 C. L. J. 312=15 Bom. L. R. 432=25 M. L. J. 91= 40 I. A. 31.

Basharat Husain brought a suit for redemption. His right to redeem was not disputed. The only question was as to the terms and conditions on which the decree for redemption should be made.

On the part of the appellant it was maintained that the rights of the parties must be governed by the provisions of the mortgage deed of 1880, which was duly executed and duly registered. On the other hand, the mortgagor contended, (1) that the real intention of the parties was to be gathered, not from the mortgage deed, but from negotiations and conversations alleged to have taken place before the mortgage was executed; and (2) that on the mortgagor relinquishing the mortgaged property, which had been leased to him immediately after the date of the original mortgage, an agreement was come to between the mortgagee and the mortgagor as to the mode in which the rents and profits of the property were to be dealt with. The only evidence produced in support of this alleged agreement was a letter or *rukka*, neither registered nor witnessed, purporting to be dated the 11th of June 1881, and to be signed by the mortgagee (who died in 1886, ten years before the institution of the suit). The Subordinate Judge of Meerut, who was the Trial Judge, came to the conclusion that the document in question was a forgery. The learned Judges of the High Court considered it genuine and gave effect to it. It is not necessary for their Lordships to determine whether the document is genuine or not. By the provisions of the Registration Act (Act III of 1877) such a document being unregistered is inadmissible in evidence.

As regards the first contention on the part of the mortgagor, which appears to have been argued at great length in the Courts below, it seems impossible to support the decision of the High Court. It is no more permissible in India than it is in this country to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations. The Indian Evidence Act is clear on the point.

The consideration for the mortgage of 1880, was the sum of Rs. 70,000. The mortgage was expressed to be for the term of [56] eight years. The mortgage deed contains the following statement :—

"It is agreed by mutual consent of the parties to this document that the profits of the property mortgaged shall belong to the aforesaid mortgagee in lieu of the interest on the mortgage money, and I, the mortgagor, shall have no claim for mesne profits. The mortgagee also shall have no right to claim interest on the mortgage money advanced by him."

The mortgagee relied on this provision. The learned Judges of the High Court refused to give it any effect, holding that the mortgage was usufructuary only in form, and that the security was intended to be a simple mortgage carrying interest at the rate of 6 per cent. per annum. In coming to this conclusion the learned Judges seem to have been influenced both by the preliminary negotiations to which the mortgagor and his witnesses deposed, and by the circumstance that by a deed practically contemporaneous with the mortgage, the property was leased to the mortgagor for the period of the mortgage on very favourable terms at a rent which, worked out at 6 per cent. per annum on the sum secured. The net profits of the property in mortgage were apparently not less than Rs. 6,000. The rent reserved was only Rs. 4,200. Favourable as the terms were, the mortgagor very soon fell into arrear. The mortgagee brought a suit against him, and he then gave up possession to the mortgagee. It may be that if the mortgage deed means what it says, it would have been better for him to have fought the

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35 A. 48=13 M. L. T. 162 =17 I. C. 737 =17 C. W. N. 238=1913 M. W. N. 131= 17 C. L. J. 312=15 Bom. L. R. 482=25 M. L. J. 91= 40 I. A. 31.

case out. Such is evidently the view of the High Court. But after all, that is no concern of the Court. It was for the mortgagor to judge what was the wisest course for him to pursue.

Having regard to the eagerness of wealthy money-lenders to obtain security on zamindari property, and the competition among them for a position thought so advantageous, there does not seem to be anything strange in the apparently easy terms of the first mortgage transaction between the lender and the borrower.

Their Lordships agree with the High Court in thinking that the mortgage and the lease were parts of one and the same transaction. But there is no inconsistency between the two instruments. Nor would there have been any inconsistency if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted.

[57] One point was raised the mortgagee before the Subordinate Judge on which he failed. It was not dealt with by the learned Judges of the High Court because they were against the mortgagee on the main question. The point was raised again before this Board. It was this: Part of the property expressed to be mortgaged was withdrawn from the security in consequence of a successful claim to it by the mortgagor's sister. The mortgagee claimed damages or compensation for the diminution of his security. The Subordinate Judge rejected that claim, being of opinion that the mortgagee when he took his security was aware of the circumstances of the property and the position of the mortgagor's family. Their Lordships think that the Subordinate Judge was right They consider that the Transfer of Property Act, Act IV of 1882, section 65 (*a*), on which reliance was placed (whatever the construction of that section may be) can have no application to the present case where the mortgage was executed before the date of the Act, though one of the further charges was subsequent to it.

Their Lordships will humbly advise His Majesty that the appeals should be allowed, the orders of the High Court discharged with costs (any costs paid thereunder being repaid), and the order of the Subordinate Judge restored.

The respondents will pay the costs of the appeals.

Appeals allowed.

Solicitors for the appellant :—*Ranken, Ford, Ford & Chester.*
Solicitors for the respondent :—*Barrow, Rogers & Nevill.*

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35 A. 58 (=17 I. C. 401=13 Cr. L. J. 769=10 A. L. J. 462.).

[58] REVISIONAL CRIMINAL.

Before Mr. Justice Muhammad Rafiq.

EMPEROR *v.* RAM PRASAD AND ANOTHER.*

[3rd September, 1912.]

Act No. XLV of 1860 (*Indian Penal Code*), *section* 199—*Sanction to prosecute—Prosecution based on alleged false declaration—Declaration inadmissable in evidence.*

A declaration, before it can be made the foundation of prosecution under section 199 of the Indian Penal Code, must be one which is admissible in evidence, and which the court before which it is filed is bound or authorized by law to receive in evidence.

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* Criminal Revision No 581 of 1912 against an order of H. Bomford, District Magistrate of Cawnpore, dated the 30th of July, 1912.

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REVISIONAL CRIMINAL.

35 A. 58=
17 I. C. 401=
13 Cr. L. J.
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THE facts of this case were as follows :—

On the 19th of February, 1912, three complaints were filed in the court of the City Magistrate of Cawnpore, namely, (1) Musammat Rupia *v.* Ram Dial and Ram Sahai, (2) Ram Dial *v.* Gauri Shankar, (3) Ram Sahai *v.* Gauri Shankar. The learned City Magistrate transferred the three complaints to a Bench of Honorary Magistrates, composed of Nawab Khakan Husain and Pandit Kundan Lal, for disposal. There were several postponements during the trial of the three cases, and on the 21st of May, 1912, charge sheets were framed. On the 31st of May, 1912, three applications were filed in the court of District Magistrate of Cawnpore, by Ram Sahai and Ram Dial, for the transfer of the three cases from the Bench of the Honorary Magistrates to some other court. The applicants for transfer made certain allegations against the Honorary Magistrates. The three applications were accompanied by three declarations, the latter being made by Ram Prasad, Puttan Lal and Ala Baksh. The three declarations were not sworn to before any officer of a court. The District Magistrate called upon the Honorary Magistrates for an explanation, which was submitted on the 26th of June, 1912. On the 29th of June, 1912, an order of the transfer of the three cases to the court of the City Magistrate was made. On the 1st of July, 1912, the opposite party, namely, Musammat Rupia and Gauri Shankar, objected to the order of transfer on the ground that no notice of the application for transfer had been given to them. The District Magistrate cancelled his order of the 29th of June, 1912, and fixed the 6th of July, 1912, for the hearing and disposal of the transfer applications. On [59] that date some oral evidence was recorded by the District Magistrate and an order of transfer was made. On the 15th of July, 1912, Pandit Kundan Lal and Nawab Khakan Husain, the Honorary Magistrates, addressed a letter to the District Magistrate, denying the allegations contained in the three declarations of Ram Prasad, Puttan Lal and Ala Bakhsh, and submitting their own affidavits contradicting the said declarations. After hearing the parties concerned the learned District Magistrate sanctioned the prosecution of Ram Prasad, Puttan Lal and Ala Bakhsh, under section 199 of the Indian Penal Code. Against this order Ram Prasad applied in revision to the High Court.

Mr. *C. Dillon* (with Mr. *W. Wallach*), for the applicants.

Babu *Satya Chandra Mukerji*, for the opposite parties.

MUHAMMAD RAFIQ, J.—This is an application in revision, praying that the order of the District Magistrate of Cawnpore, dated the 30th of July, 1912, sanctioning the prosecution of the applicants under section 199 of the Indian Penal Code be set aside. The circumstances which led to the grant of sanction are as follows :—On the 19th of February, 1912, three complaints were filed in the court of the City Magistrate of Cawnpore, namely, (1) Mussammat Rupia *v.* Ram Dial and Ram Sahai, (2) Ram Dial *v.* Gauri Shankar, (3) Ram Sahai *v.* Gauri Shankar. The learned City Magistrate transferred the three complaints to a Bench of Honorary Magistrates, composed of Nawab Khakan Husain and Pandit Kundan Lal, for disposal. There were several postponements during the trial of the three cases, and on the 21st of May, 1912, charge sheets were framed. On the 31st of May, 1912, three applications were filed in the court of District Magistrate of Cawnpore, by Ram Sahai and Ram Dial, for the transfer of the three cases from the Bench of the Honorary Magistrates to some other court. The applicants for transfer made certain allegations against the Honorary Magistrates. The three applications were accompanied by three declarations, the latter being made by Ram Prasad,

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17 I. C. 401=
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Puttan Lal and Ala Bakhsh. The three declarations were not sworn to before any officer of a court. The District Magistrate called upon the Honorary Magistrates for an explanation, which was submitted on the 26th of June, 1912. On the 29th of June, 1912, an order for the transfer of the three cases to the court of City Magistrate was made. On the 1st of July, 1912, the opposite party, [60] namely, Musammat Rupia and Gauri Shankar, objected to the order of transfer on the ground that no notice of the application for transfer had been given to them. The District Magistrate cancelled his order of the 29th June, 1912, and fixed the 6th of July, 1912, for the hearing and disposal of the transfer applications. On that date some oral evidence was recorded by the District Magistrate and an order of transfer was made. On the 15th of July, 1912, Pandit Kundan Lal and Nawab Khakan Husain, the Honorary Magistrates, addressed a letter to the District Magistrate, denying the allegations contained in the three declarations of Ram Prasad, Puttan Lal and Ala Bakhsh, and submitting their own affidavits contradicting the said declarations. After hearing the parties concerned the learned District Magistrate sanctioned the prosecution of Ram Prasad, Puttan Lal and Ala Bakhsh, under section 199 of the Indian Penal Code. It is against this order that the applicant, Ram Prasad, has filed the present application. It is contended by his learned counsel that the order of the learned District Magistrate is *ultra vires*; that no valid ground for granting the sanction has been made out, and that no offence under section 199 of the Indian Penal Code has been committed by the applicant. I shall take up the last objection first. It is admitted by the applicant for the purposes of this application that declaration was filed by him in the court of the District Magistrate with his application for transfer. It is, however, argued that the declaration was not one which the District Magistrate was bound or authorized by law to receive in evidence and to act upon it, and indeed he did not consider it evidence, for he examined some witness on the basis of whose statements an order of transfer was made. Therefore, if the declaration in question contained any false statement, no offence under section 199 of the Indian Penal Code has been committed. In support of this contention the following cases have been cited :—(1) *In the matter of the petition of Iswar Chunder Guho and others* (1), *Abdul Majid* v. *Krishna Lal Nag* (2), *Chandi Pershad* v. *Abdur Rahman* (3). I think that the contention for the applicant must prevail. A declaration, before it can be made the foundation of a prosecution under section 199 of the Indian Penal Code, must be one which is admissible in evidence, and which the court [61] before which it is filed is bound or authorized by law to receive in evidence. The suggestion that there is no prohibition against the reception of such declaration in evidence does not render it admissible or the declarant amenable to the provision of section 199 of the Indian Penal Code. It is not pointed out for the opposite party that the declaration filed by Ram Prasad was one which under the Criminal Procedure Code, or any other law, the court before which the proceedings were pending was bound or authorized to receive in evidence. I therefore hold that the sanction granted by the learned District Magistrate for the prosecution of the applicant under section 199 of Indian Penal Code, cannot be upheld. It is unnecessary to discuss the other objections taken on behalf of the applicant. I, therefore, set aside the order of the learned District Magistrate, dated the 30th July, 1912, as against Ram Prasad.

Application allowed.

(1) (1887) I. L. R. 14 Cal. 653.
(2) (1893) I. L. R. 20 Cal. 724.
(3) (1894) I. L. R. 22 Cal. 131.

35 A. 61 (=17 I. C. 799=10 A. L. J. 468=13 Cr. L. J. 863).

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REVISIONAL CRIMINAL.

35 A. 61=17 I. C. 799=10 A. L. J. 468 =13 Cr. L. J. 863.

REVISIONAL CRIMINAL.

Before Mr. Justice Muhammad Rafiq.

GIGA v. MUHAMMAD AMIN.*

[4th October, 1912.]

Act No. XIII of 1859 (*Workman's Breach of Contract Act*)—*Procedure—Special procedure under the Act not applicable to ordinary loans between master and workman.*

Held that the special procedure provided by Act No. XIII of 1859 for the recovery of money advanced in the circumstances therein described is not applicable where money is advanced to a workman, not for the purpose of assisting him to complete a specific piece of work, but as an ordinary loan to be repaid out of the workman's wages. *In the matter of Annsoori Sanyasi* (1) referred to.

THE applicant Giga, having employed one Muhammad Amin to work at his shop, lent Muhammad Amin some money under an agreement by which the loan was to be repaid out of Muhammad Amin's wages. Before, however, the loan was repaid, Muhammad Amin left the service of Giga. Giga thereupon filed a complaint against Muhammad Amin under Act No. XIII of 1859 in the court of the Cantonment Magistrate of Cawnpore. The Magistrate referred the matter in dispute to arbitration. The majority of the arbitrators filed an award decreeing the sum of Rs. 51-4 to Giga, and that sum was paid. Giga, however, applied in revision to the Sessions Judge to set aside the order of the Cantonment Magistrate, and failing there, made a further application to the High Court.

[62] Mr. *E. A. Howard* (for whom Babu *Satya Chandra Mukerji*), for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) and Mr. *W. K. Porter*, for the opposite party.

MUHAMMAD RAFIQ, J.—This is an application in revision by one Giga, praying that the order of the learned Cantonment Magistrate, dated the 23rd of July, 1912, be set aside. It appears that Giga had employed Muhammad Amin, the opposite party, to work at the shop of the former. Muhammad Amin took a loan from the applicant for which he gave an agreement. Before the loan had been paid off, Muhammad Amin left the service of Giga. The latter filed a complaint under Act XIII of 1859, in the court of the Cantonment Magistrate, for the recovery of the loan or for an order directing Muhammad Amin to return to work. The learned Magistrate referred the matter to arbitration. The majority of the arbitrators filed an award decreeing Rs. 51-4-0, to Giga, the applicant. That sum, I understand, has been paid. It is contended for the applicant that the learned Magistrate had no jurisdiction to delegate his powers under Act XIII of 1859, to arbitrators. I find that the objection taken by the applicant need not be considered as his application must fail on another ground. The loans that can be recovered under Act XIII of 1859 are the loans which are advanced by employers to their workmen for doing specific work. In the present case it is admitted that the money advanced to Muhammad Amin was not advanced for doing any particular work. Whatever work he was doing at the time that he took the loan had been finished and nothing of it remained to be

*Criminal Revision No. 732 of 1912 from an order of W. F. Kirton, Sessions Judge of Cawnpore, dated the 7th of September, 1912.

(1) (1904) I. L. R. 28 Mad. 37.

done. Under these circumstances the applicant's petition to the learned Magistrate could not be entertained; see *In the matter of Annsoori Sanyasi* (1). The application fails and is rejected.

Application rejected.

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REVISIONAL CRIMINAL.

35 A. 61=17 I. C. 799=10 A. L. J. 468 =13 Cr. L. J. 863.

35 A. 63 (=17 I. C. 797=10 A. L. J. 473=13 Cr. L. J. 861.)

[63] APPELLATE CRIMINAL.

Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Rafiq.

EMPEROR v. BADRI PRASAD.*

[24th October, 1912.]

Jurisdiction—Practice—Evidence in criminal case recorded by Assistant Sessions Judge—Judgment pronounced by Sessions Judge without re-hearing the evidence.

Where a Sessions Judge decided a case upon evidence taken, not before him, but before an Assistant Sessions Judge, it was *held* that the Sessions Judge's judgment was *ultra vires* and a fresh trial was ordered.

IN this case the applicant Badri Prasad was committed to the Court of Session at Mainpuri on charges under sections 467 and 471 of the Indian Penal Code. The case was transferred to the Assistant Sessions Judge. The Assistant Sessions Judge recorded the evidence in the case; but did not proceed to judgment, on the ground that one of the issues in the case was at the same time awaiting decision under appeal in the court of the District Judge. After some interval the case was taken up by the Sessions Judge, who did not hear the evidence at all, but proceeded to judgment upon the evidence recorded by the Assistant Sessions Judge, and convicted the accused. Badri Prasad thereupon appealed to the High Court, contending, *inter alia*, that the judgment of the Sessions Judge was in the circumstances passed without jurisdiction.

Babu *Satya Chandra Mukerji*, for the appellant.

The Assistant Government Advocate, (Mr. *R. Malcomson*), for the Crown.

KNOX and MUHAMMAD RAFIQ, JJ.:—Badri Prasad has been convicted of an offence under section 471 of the Indian Penal Code and sentenced to a term of rigorous imprisonment and payment of a fine. He has appealed. We do not go into the facts of the case in view of the order which we propose to make. There has been unfortunately in the trial an irregularity which compels us to set it aside and to order a new trial. Badri Prasad was committed to the court of sessions at Mainpuri. The case was transferred by the court of sessions to the court of an Assistant Sessions Judge. The Assistant Sessions Judge heard the case so far as the evidence [64] was concerned; but did not proceed to judgment, on the ground that one of the issues in the case was at the same time awaiting decision under appeal in the court of the District Judge, and we are told that the case remained pending for a year, when it was taken by the Court of Sessions at Mainpuri sitting at Etawah. The learned Sessions Judge did not hear the evidence at all, but proceeded to judgment upon the evidence recorded by the Assistant Sessions Judge. He had no jurisdiction to do this. The judgment and sentence are a judgment and sentence passed without jurisdiction and must be set aside. We notice what is appa-

* Criminal Appeal No. 440 of 1912 from an order of E. C. Allen, Sessions Judge of Mainpuri, dated the 23rd of May, 1912.

(1) (1904) I. L. R. 28 Mad. 37.

rently a mistake of law into which the learned Sessions Judge has fallen. He says that it is settled law that in such a case the accused cannot be convicted at one and the same time of forging a document and using that document as forged and the charges under sections 467 and 471 must, therefore, be regarded as alternative. We know of no authority to this effect and none has been pointed out to us.* It must be distinctly understood that we pronounce no opinion whatever upon the evidence relating to either of these charges. Moreover, we wish to point out that it is most inexpedient for a sessions trial to be adjourned. The intention of the Code is that a trial before a court of sessions should proceed and be dealt with continuously from its inception to its finish. Occasions may arise when it is necessary to grant adjournments, but such adjournments should be granted only on the strongest possible ground and for the shortest possible period. With these remarks we allow the appeal so far that we set aside the conviction and sentence and send back the case for trial before the Court of Sessions at Fatehgarh.

Record returned.

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OCT. 24.

APPELLATE CRIMINAL.

35 A. 63=17 I. C. 797=10 A. L. J. 473 =13 Cr. L. J. 861.

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35 A. 65 (=17 I. C. 783 =10 A. L. J. 475).

[65] APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

MUNSHI LAL AND ANOTHER (*Judgment-debtors*) *v.* RAM NARAIN (*Auction purchaser*).†

[28th October, 1912.]

Civil Procedure Code, 1908, *order XXI, rules* 84, 89, 92—*Execution of decree—Sale of immoveable property—Acceptance of final bid deferred—Application to set aside sale—Limitation.*

Held that a sale of immoveable property in execution of a decree is not complete until the sale officer has accepted the final bid and the purchaser has paid in the deposit of 25 per cent. of the purchase money required by rule 84 of order XXI of the Code of Civil Procedure, 1908. The period of thirty days prescribed by rule 92 will not, therefore, begin to run against a person applying under rule 89 if for any reason the final bid remains for a time unaccepted by the sale officer.

[Ref: 78 I. C. 47.]

THE facts of this case are fully stated in the judgment of the Court.

Mr. *M. L. Agarwala*, for the appellants.

Babu *Jogindro Nath Chaudhri* and Babu *Sarat Chandra Chaudhri*, for the respondent.

TUDBAL and MUHAMMAD RAFIQ, JJ.:—The circumstances out of which the present appeal has arisen are as follows:—Certain property was put up for sale in execution of two decrees, one of which was for Rs. 11,521 and the other was for Rs. 2,521. Apparently, when the decrees were sent to the Collector for execution, there was an error in the *rubkar* sent and Rs. 1,521 was shown as the amount due under the one decree instead of Rs. 11,521. The property was duly notified for sale, and on the 22nd of August it was put up for sale. Ram Narain was the highest bidder and offered Rs. 6,400. The sale officer, as his order of the 22nd of August shows, seeing that the total amount apparently due under the

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* [But see *Queen-Empress* v. *Umrao Lal*, I. L. R. 24 All, 84.—ED.]

† First Appeal No. 47 of 1912 from an order of Muhammad Husain, First Additional Subordinate Judge of Meerut, dated the 20th of January, 1912.

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APPELLATE CIVIL.

35 A. 65=
17 I. C. 783=
10 A. L. J.
475.

decrees was Rs. 3,673, was of opinion that it was unnecessary to sell the whole of this property, and made up his mind to sell it in two lots of one-half each. It is equally clear from his order of the same date that the decree-holder at once informed him that the amount due under the one decree was Rs, 11,521 and not Rs. 1,521. The sale officer made up his mind to verify this statement from the civil court, and in his order of the 22nd of August, he distinctly states that he does not conclude the sale—'*ekhtetam-i-nilam manzur nahin kia ja sakta*"—and he postponed the matter till he received **[66]** information. On the 28th of August he received information that the correct amount due under the decree was Rs. 11,521. He accordingly noted this in his order, which distinctly states that he concludes the sale as it is unnecessary to sell the property afresh in two lots. On that same date he received from Ram Narain the one-fourth deposit which it is necessary to make under order XXI, rule 84, of the Code of Civil Procedure. On the 23rd of September, on an *ex parte* application, the civil court confirmed the sale. From the 24th of September till the 26th of October the court closed for vacation. On the 26th of October the judgment-debtor deposited the amount of the decree *plus* 5 per cent. of the purchase money as required under order XXI, rule 89, and he asked that the sale should be set aside. The learned Subordinate Judge refused to set aside the sale, being of opinion that it was impossible for him to do so after he had once confirmed the sale. The judgment-debtor comes here in appeal, and it is urged, we must admit, with considerable force that the auction sale was not concluded until the 28th of August; that the deposit made on the 26th of October was a deposit made within time, *i.e.*, within thirty days of the sale, omitting the vacation, and that the learned Subordinate Judge was not debarred from setting aside the sale merely because he had, on the 23rd of September, by an *ex parte* order, confirmed it. It is contended on behalf of the respondent that the sale in the present instance took place on the 22nd of August, and that if the judgment-debtor wished to make a deposit, he was bound to do so before the 22nd of September. In our opinion, in view of what took place on the 22nd of August and the lengthy order passed by the sale officer on that date, and the action that he took in the meantime, and his order of the 28th of August, it is quite clear that the sale was not concluded until August the 28th. We cannot accept the contention that directly a bid is made the sale is concluded. In his order of 22nd August the sale officer distinctly and in very clear language stated that he did not conclude the sale; that the final bid was not there, and that it was his intention to split up the property into lots and put up the same afresh. Under order XXI rule 84 a person who is declared to be the purchaser at a sale has immediately after such declaration to make a deposit of 25 per cent. on the amount of his purchase money to the officer conducting the sale. It is, therefore, **[67]** quite clear that for the conclusion of a sale it is necessary for the sale officer to accept the final bid and to make a declaration as to who is the purchaser and to order that purchaser to forthwith pay 25 per cent. of the purchase money. It is clear that if such deposit is not made immediately, it is open to the sale officer to continue the sale afresh, and such auction purchaser who fails to make the deposit is liable for the difference between the amount of his own bid and that of the final bid which may be accepted by the sale officer. Our attention has been called to a ruling in *Chowdhry Kesri Sahay* v. *Giani Roy* (1). It is of no assistance whatsoever

(1) (1902) I. L. R., 29 Cal. 626.

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OCT. 28.

APPELLATE CIVIL.

35 A. 65=17 I. C. 783=10 A. L. J 475.

to us in the present case, nor was the point which now arises, before the court at the hearing of that case. It seems to us that the matter is simply one for the exercise of a little common sense. The mere making of the last bid does not conclude the sale, and in our opinion in the present case the sale was concluded on the 28th of August, which is evidenced by the fact that on that date the sale officer declared Ram Narain to be the purchaser and made him pay 25 per cent. of the deposit under order XXI, rule 84. It is equally clear that the judgment-debtor could not have made a deposit and applied to have the sale set aside prior to the 28th of August. In this view it is quite clear that the deposit made on the 26th of October by the appellant was made within time. The learned Subordinate Judge was not precluded by reason of his order of the 23rd of September from accepting this deposit and setting aside the sale. An *ex parte* order passed on that date could not deprive the present appellant of his rights under the law, and it was the Subordinate Judge's duty to set aside the sale. We, therefore, allow the appeal and set aside the order of the court below. The sale of the 28th of August, 1911, will be set aside. The appellants will have their costs in both courts.

Appeal allowed.

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35 A. 68 (=17 I. C. 471=10 A. L. J. 501.)

[68] APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

MASIH-UD-DIN (*Plaintiff*) *v.* BALLABH DAS AND OTHERS (*Defendants*).*

[11th November, 1912.]

Muhammadan law—Waqf—Subsequent failure of title of waqif—Right of mutawalli to sue on indemnity bond executed in favour of waqif as purchaser—Right of plaintiff to shift basis of claim during suit—Practice.

A purchased a village, the vendors giving him an indemnity bond in case he should be dispossessed. A then made a waqf of the property purchased, naming himself as mutawalli and after him his son *M*. *A* lost the property as the result of a suit, and subsequently (A meanwhile having died) *M* sued as mutawalli to enforce the terms of the indemnity bond. *Held* that the waqf was invalid, and that M. could not be permitted to change the character of the suit by claiming as one of the heirs of *A*.

Per CHAMIER, J :—Even if the waqf was valid, the mutawalli was not entitled to maintain the suit in the absence of a transfer to him as such of the vendee's rights under the indemnity bond.

THE facts of this case were as follows :—

By a sale deed, dated the 12th of November, 1889, Seth Kishan Chand and Gokul Chand sold the village Lasra to Shaikh Abdullah, and on the same date they executed an indemnity bond to the effect that in case the village sold went out of the hands of the vendee for want of a clear title in the vendors, the former would pay back the price together with damages to the latter, and as a security for the due performance of that agreement mortgaged certain villages to Abdullah. On the 22nd of May, 1897, Abdullah made a waqf of the village Lasra and himself became a mutawalli. On his death his son, the plaintiff in this case, became mutawalli. There was some litigation with respect to Lasra, with the result that for want of title in the vendors it went out of the hands

*First Appeal No. 214 of 1911 from a decree of Achal Behari, Subordinate Judge of Banda, dated the 29th of March, 1911.

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35 A. 68 = 17 I. C. 471 = 10 A. L. J. 501.

of the plaintiff (under a decree of the High Court) on the 11th of May, 1906. He was held also liable to pay mesne profits and costs. The plaintiff, therefore, sued to enforce the indemnity bond. The defendants pleaded, *inter alia*, that the plaintiff as mutawalli was not entitled to sue as the mortgagee inasmuch as the rights arising under the indemnity bond were not included in the waqf. It was further pleaded that Abdullah having acquired no clear title in the village Lasra could not make a valid waqf of that property and the indemnity bond was without consideration. The Subordinate Judge dismissed the suit, holding that the sale was *void ab initio*; that there was no [69] valid waqf; that the waqf did not include the indemnity bond and that there was no separate legal consideration for the bond. The plaintiff appealed to the High Court.

Babu *Joyindro Nath Chaudhri* (with him Maulvi *Rahmatullah*), for the appellant, contended that Abdullah, when he became a mutawalli, could himself enforce his rights under the indemnity bond. He had in him vested all the rights arising out of that bond. In this case it could not be said that those rights did not pass to the plaintiff. He cited the Transfer of Property Act, section 55 (2). The subject-matter of the waqf must belong to the owner of the property and in this case it did belong to him under the sale deed. These rights would pass because there was a clear intention that they should. The reservation of such a right would clearly be inconsistent with the intention of the waqf. The extinction of his own rights was absolute. The waqf attached to the money. It was for the benefit of the waqf that the suit had been brought. The second position of the appellant was that if he could not enforce the indemnity bond as a mutawalli, he should be permitted to enforce it as one of the heirs of Abdullah as a personal claim.

The Hon'ble Dr. *Sundar Lal*, The Hon'ble Pandit *Moti Lal Nehru*, Babu *Durga Charan Banerji* and Pandit *Uma Shankar Bajpai*, for the respondents, were not called upon.

GRIFFIN, J.:—This appeal arises out of a suit to enforce a claim under an indemnity bond executed in favour of one Abdullah by Kishan Chand and Gokul Chand on the 12th of November, 1889. On that date Kishan Chand and Gokul Chand executed a sale deed of a village named Lasra, in favour of Abdullah. The latter apparently had some doubts as to the validity of his vendors' title, for, on the same date, he took from his vendors an indemnity bond the conditions of which have given rise to the present suit. By this indemnity bond the vendors undertook to make good to Abdullah the sale price together with any loss he might sustain on account of any defect of title in the property conveyed by the sale deed. Apparently, Abdullah entered into possession of the property sold and remained in possession until the 27th of May, 1897, when he made a dedication of this village along with others for certain religious purposes. Under the waqfnamah he appointed himself the first mutawalli [70] and nominated his son, the appellant before us, his successor. In the life-time of Abdullah, Musammat Naraini appeared as a claimant of the ownership of the village Lasra. She was the adoptive mother of one Ram Gopal, a nephew of Abdullah's vendors. Her suit was decreed by this Court on the 21st of December, 1905, and Musammat Naraini obtained possession of the village Lasra, in May, 1906. This suit was instituted on the 3rd of August, 1910, to recover a sum of Rs. 52,000 on account of the price of the village, Lasra, and the loss incurred by the

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35 A. 68=17
I. C. 417=10
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plaintiff owing to the village having passed out of his possession. The defendants 1 to 5 are transferees from the vendors of Abdullah of the village hypothecated under the indemnity bond mentioned above. Musammat Naraini, the sixth defendant, is the person who, under a decree of this Court, obtained possession of the village Lasra. The defendants 7, 8 and 9 are representatives of the vendors. They have not appeared to defend the suit, and no relief was asked as against them. Abdullah died during the pendency of the appeal in this Court in the suit brought by Musammat Naraini, and his son, who is the appellant here, was brought on the record as his representative The present suit was defended on various grounds, and we are concerned here with two only. The lower Court has upheld the contention of the defendants; first, that the waqf is invalid and therefore, the plaintiff is not entitled to maintain the suit, and secondly, that Abdullah, the vendee, at the time he created the waqf, did not at the same time convey to the mutawalli his rights under the indemnity bond. In appeal, it is contended that the court below was wrong in holding that the waqf was invalid and that the plaintiff has no right to maintain the suit because the waqfnamah contained no mention of a conveyance to the mutawalli of the vendee's rights under the indemnity bond. It is, further, contended that if the present suit cannot be maintained by reason of any defect in the plaintiff's position as mutawalli, he ought to be allowed to continue the suit as heir of the vendee, Abdullah. This Court in its decision of the 21st December, 1905, held that the sale to Shaikh Abdullah was not a valid sale and that Abdullah was not a *bona fide* purchaser under that sale. The Muhammadan law on the [71] subject of waqf, which it is necessary to refer to in this case, will be found at page 134 of Ameer Ali's Muhammadan Law, Volume I:—" The subject-matter of the dedication must be the property of the waqf at the time the waqf is made, that is, he must be in a position to exercise dominion over it. Consequently, if a waqf is made by a person of some property of which he is in unlawful possession, but which he, subsequently purchases from the rightful owner, such waqf is invalid. So also, when a man makes a waqf for certain good purposes of land belonging to another, and then becomes the proprietor of it, the waqf is not lawful, but it would become validly dedicated if ratified by the proprietor. Accordingly, when a person purports to make a waqf of property which does not belong to him, and such waqf is subsequently ratified by the true owner, the dedication is valid." Here, it will be seen that Abdullah made a dedication of certain property of which he was not the true owner. There has been no ratification of the waqf by the true owner, and I am not satisfied that, according to the Muhammadan law as set out above, the so-called waqf, so far as the particular village Lasra was concerned, was valid. I agree, therefore, with the lower court in dismissing the plaintiff's suit on that ground. I do not consider it necessary to go into the second ground as to what was the exact intention of Abdullah in regard to his rights under the indemnity bond at the time he executed the waqfnamah. As to the plea advanced on behalf of the appellant that he should be permitted to continue the suit in his capacity as heir of the deceased, Abdullah, I do not think that the request is one which should be acceded to at this stage of the case. It is not pretended that the plaintiff is the one and only heir of Abdullah, and I am not prepared at this stage of the case to allow the plaintiff to continue the suit in an entirely different capacity. In my opinion the suit was rightly dismissed by the court below, and I dismiss this appeal with costs.

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35 A. 68=17 I. C. 417=10 A. L. J. 501.

CHAMIER, J.:—I agree that the appeal should be dismissed, but I should prefer to rest the dismissal of the appeal on the ground that even if the waqf was valid, the plaintiff has no right to sue on the deed of indemnity as mutawalli of the waqf. [72] The right to sue on that deed does not appear to have been transferred to the mutawalli for the time being. Under the waqfnamah Abdullah abandoned his title to mauza Lasra, but did not mention or in any way refer to the deed of indemnity. The right to sue on that deed is not appurtenant to the interest of Abdullah in mauza Lasra and did not pass to the mutawalli for the time being under section 8 of the Transfer of Property Act or under any other provision of which I am aware. If it was intended that the mutawalli for the time being should have the right to sue on the deed of indemnity, I can only say that, in my opinion, no such intention has been expressed in the waqfnamah. I agree that the plaintiff should not, at this stage, be allowed to convert the suit by him as mutawalli into a suit by him as one of the heirs of Abdullah.

BY THE COURT :—The appeal is dismissed with costs so far as defendants 1 to 5 are concerned.

Appeal dismissed.

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35 A. 72 (=17 I. C. 465=10 A. L. J. 510).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

KARTA KISHAN, (*Plaintiff*) *v.* HARNAM CHAND, (*Defendant*).*

[15th November, 1912.]

Act No. XVI of 1908 (*Indian Registration Act*), *section* 32—"*Presentation*"—*Presentation by a servant of the mortgagor in the presence of mortgagor.*

Where a mortgage-deed was handed over to the sub-registrar for the purpose of registration by a person other than the mortgagor, but the mortgagor was present assenting to the registration of the document with full knowledge of what was being done in the office of the sub-registrar: *held* that the presentation was a valid presentation within the meaning of section 32 of the Registration Act. *Nath Mal* v. *Abdul Wahid Khan* (1) followed. *Mujib-un-nissa* v. *Abdur Rahim* (2) distinguished. *Jambu Prasad* v. *Aftab Ali Khan* (3) not followed.

[Ref: 35 All. 134.]

THIS was a plaintiff's appeal in a suit for sale upon a mortgage. Both the courts below dismissed the suit upon the ground that the registration of the document was defective, and the sole question in appeal before the High Court was whether in the circumstances the mortgage-deed was validly registered. The circumstances in which registration was effected are detailed in the judgment of the Court.

[73] Mr. *Nihal Chand* (with him Babu *Jogindra Nath Chaudhri* and Mr. *A. P. Dube*), for the appellant—

Mr. *B. E. O'Conor*, for the respondent.

RICHARDS, C. J., and BANERJI, J. :—The only question which has been argued in this appeal is whether or not the mortgage sued upon was duly presented and registered in accordance with the provisions of the

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* Second Appeal No. 51 of 1912 from a decree of W. D. Burkitt, District Judge of Saharanpur, dated the 19th of July, 1912, confirming a decree of Muhammad Shafi, Subordinate Judge of Saharanpur, dated the 26th of September, 1911.

(1) (1912) I. L. R. 34 All. 355.
(2) (1901) I. L. R. 23 All. 233.
(3) (1912) I. L. R. 34 All. 331.

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35 A. 72=
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Indian Registration Act. The document was in fact registered. It has an endorsement that it was " presented " for registration in the office of the sub-registrar. Below this is the name of a person which is variously read as Santh, Natha, or Sehua. He is described as the servant of the mortgagee. The mortgagor in answer to the interrogatories served upon him admits that he was present when the document was being registered and when it was handed over to the sub-registrar. He cannot remember apparently who actually handed over the document, but he says that some person whose name, probably, was Santha, handed over the document. It is clear, however, from the admitted facts in the case that at the time of registration the mortgagor was present assenting to the registration of the document, with full knowledge of what was being done in the office of the sub-registrar. The real question for consideration is whether or not these circumstances amount to a " presentation " within the meaning of section 32 of the Indian Registration Act. Both the Courts below have dismissed the plaintiff's suit on the preliminary point that the mortgage was not duly " presented " for registration. There has been some conflict of authority on this question and the point was very fully argued recently before a Full Bench of the Court, but unfortunately no decision was pronounced by the Court on the question now before us, the case turning on another point. In the case of *Nath Mal* v. *Abdul Wahid Khan* (1), a case in which the facts were very similar to those of the present case, it was decided that where a person who was authorized to "present" a document for registration was present assenting to the registration, the mere fact that his was not the hand to give the document to the sub-registrar did not prevent the document being regarded as duly "presented" within the meaning of the section. No doubt a somewhat contrary view was taken in the case of *Jambu Prasad* v. *Aftab Ali Khan* (2). We think under all the circumstances [74] we are entitled to consider the question on its merits without feeling bound by authority, particularly as we have had so recently the benefit of the very full arguments advanced in the Full Bench case to which we have referred.

The Privy Council decision in the case of *Mujib-un-nissa* v. *Abdur Rahim* (3) has in our opinion no application to the circumstances of the present case. In that case the person who presented the document had been the attorney of a deceased person who wished to execute and register a deed of waqf. Before the document was presented for registration the donor of the power of attorney had died. Consequently the person presenting the document for registration had no authority from any one to present the document, nor was there any other person present who could have legally " presented " the document for registration. We think that the remarks of their Lordships in this case must be read and understood in connection with the facts of the case which were before them. After full consideration we see no reason to depart from the view which he expressed in the case of *Nath Mal* v. *Abdul Wahid Khan* (1). We, accordingly, allow the appeal, set aside the decree of both the courts below and remand the case to the court of first instance, through the lower appellate court, with directions to readmit the case upon its original number in the file, and proceed to hear and determine the same according to law. Costs here and heretofore will be costs in the cause.

Appeal allowed.

(1) (1912) I. L. R. 34 All. 355. (2) (1912) I. L. R. 34 All. 331.
(3) (1901) I. L. R. 23 All. 233.

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NOV. 19.

APPELLATE CIVIL.

35 A. 74=10 A. L. J. 506 =17 I.C. 486.

35 A. 74 (=10 A. L. J. 506=17 I. C. 486.)

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

ALLAH DAD KHAN AND OTHERS (*Defendants*) *v.* SANT RAM (*Plaintiff*) AND WAHID-UN-NISSA AND OTHERS (*Defendants*).*

[19th November, 1912.]

Act No. VII of 1889 (*Succession Certificate Act*), *sections* 4 *and* 16—*Succession certificate—Holder of certificate not entitled to assign his rights thereunder.*

Held that the rights conferred by the grant of a succession certificate under Succession Certificate Act, 1889, are personal to the grantee and cannot be assigned.

[Ref: 36 All. 21; 42 All. 549=18 A. L. J. 666; Diss: 35 M. L. J. 666=48 I. C. 735;]

THE facts of this case are as follows:—

One Bahadur Khan was a mortgagee. He died, leaving Farzand Ali and others as his heirs. Farzand Ali on the 25th of [75] August, 1900, obtained a certificate under the Succession Certificate Act for the collection of the mortgage debt due to Bahadur Khan. On the 15th of March, 1904, Farzand Ali assigned the mortgage debt to Sahu Sant Ram together with his right to sue for the same, and made over to the assignee the succession certificate which he had obtained. The assignee brought a suit, on the strength of that assignment, for enforcement of the mortgage. He did not produce any succession certificate empowering him to collect the debt due to Bahadur Khan, but produced the one which was granted to Farzand Ali. The defence, *inter alia*, was that the certificate granted to Farzand Ali could not be acted upon by his assignee. This objection was overruled and the suit decreed. The defendants appealed.

The Hon'ble Pandit *Moti Lal Nehru* (with him The Hon'ble *Nawab Muhammad Abdul Majid*), for the appellants:—

The plaintiff cannot get a decree except on the production of a succession certificate granted to himself. Section 4 of the Succession Certificate Act is imperative. It has been definitely ruled that the section applies to mortgage debts as well as to simple money debts. The law does not recognize an assignment of a succession certificate; the right granted by such a certificate is a purely personal one, confined to the grantee thereof. To recognize such assignments would be to defeat the object of the Succession Certificate Act, which is to protect the debtor against the worry and uncertainty arising from disputes relating to the claimant's title. Section 16 of the Act indemnifies payments only when they are made to the person to whom the certificate has been granted. The plaintiff, by obtaining an assignment from the certificate-holder of his right to sue, cannot be deemed to have fulfilled the requirements of section 4.

Mr. *B. E. O'Conor* (for Maulvi *Muhammad Ishaq*), for the respondents:—

The requirements of section 4 have been complied with, inasmuch as a succession certificate covering the debt sued for has been produced. The section does not expressly require that the certificate should have been granted to the plaintiff personally, though in the case of a probate or letters of administration there is a distinct provision that the latter should have been granted to the plaintiff. The omission from clause (iii) of the words "to him" [76] which occur in clause (i) is significant. There is

* First Appeal No. 43 of 1912, from a decree of Pitambar Joshi, Second Additional Judge of Moradabad, dated the 18th of March, 1911.

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35 A. 74=10 A. L. J. 506=17 I. C. 486.

nothing to prohibit the assignment of the rights under a succession certificate together with an assignment of the debt itself. The recognition of such an assignment would not go against the objects of the Succession Certificate Act. The fiscal object would in no way suffer, as a certificate, in the first instance, would still be necessary. And where the debt together with the right of collection thereof granted by a succession certificate are assigned, there arises no question of involving the debtor in vexatious disputes relating to the title of rival claimants. In this case the assignee is substituted for the original grantee of the certificate and the protection against the demands of rival claimants remains unaffected. None of the objects of the Act is, therefore, frustrated. Should a fresh certificate be deemed necessary the plaintiff may now be given an oportunity of obtaining and producing it.

The Hon'ble Pandit *Moti Lal Nehru* replied.

GRIFFIN and CHAMIER, JJ.: —This was a suit upon a mortgage made in favour of one Bahadur Khan by two persons who are now represented by the appellants and others. Bahadur Khan died leaving a son, Farzand Ali, and other heirs. Farzand Ali applied for a succession certificate in respect of several debts due to his father. Some of the other heirs stated that they had relinquished their rights in his favour, and a certificate was issued to Farzand Ali, who some years later assigned the mortgage debt together with his right to sue for the same to the respondent, Sant Ram. It is, on the strength of that assignment, that the present suit was brought. The claim was resisted upon several grounds, one of which was that Farzand Ali was not competent to transfer to another the right conferred upon him by the succession certificate to sue for the recovery of the debt. The court below decided this and other questions against the appellants. Hence this appeal.

Apart from the provisions of the Succession Certificate Act, Farzand Ali, as one of the heirs of Bahadur Khan, could have sued upon the mortgage, making as defendants the heirs of Bahadur Khan who declined to join as plaintiffs. He could also have assigned his interest in the mortgage to the respondent, Sant Ram. Indeed, the assignment in favour of Sant Ram may be regarded [77] as having transferred to Sant Ram all Farzand Ali's rights under the mortgage, although the assignment purports to have been made by Farzand Ali as holder of the succession certificate. But section 4 of the Succession Certificate Act provides that no court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of a deceased person or to any part thereof, except upon the production by the person so claiming of a certificate granted under that Act or of one or other of certain other documents, which admittedly have not been produced in this case. It has been held by this Court in many cases, which we are bound to follow, that a debt secured by a simple mortgage is a debt within the meaning of the provision just quoted. A certificate under the Succession Certificate Act has been produced, but it is in favour of Farzand Ali. The question is whether such a certificate is sufficient. The Act does not in so many words say that the certificate must be one in favour of the plaintiff, but we think that that is the meaning of the provision. The declared object of the Act is to facilitate the collection of debts on successions and to afford protection to parties paying debts to the representatives of deceased persons. Section 16 of the Act protects a debtor of a deceased

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person who pays the debt in good faith to the *person to whom the certificate was granted*. An assignee of the person to whom the certificate was granted does not appear to come within the section. From this it would appear that the person to sue for the debt is the person to whom the certificate was granted. Notwithstanding the preamble to the Act, one of the objects of the Act seems to have been to prevent people from evading payment of the duty payable on certificates issued under Act XXVII of 1860. If that had been the sole object of the Legislature, there would have been much to say for the view taken by the court below. But the main object must be taken to be that stated in the preamble. The Act is designed to enable debtors to know with certainty the person to whom they can safely pay a debt due to a deceased person. If we were to hold that any person may sue for the recovery of a debt due to a deceased person provided that he produces a certificate having the debt specified in it, the debtor would have to trace the title of the plaintiff and [78] we should re-introduce the confusion which the Act was designed to remove. If the plaintiff relies upon a grant of probate or letters of administration, he must show that the grant was made to him, and we see no reason why it should be otherwise in the case of a succession certificate. The result is that the plaintiff, in our opinion, was not entitled to maintain this suit.

It was suggested that we might adjourn the case in order that the plaintiff might apply for a certificate. We cannot allow this, as the plaintiff cannot be permitted to convert a suit by him as assignee of Farzand Ali into a suit by him as holder of a certificate authorizing him to collect debts due to Bahadur Khan. The appeal is allowed and the suit is dimissed with costs.

Appeal allowed.

35 A. 78 (=14 Cr. L. J. 2=18 I. C. 146=10 A. L. J. 531).

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

ANGAN AND OTHERS *v.* RAM PIRBHAN.*

[23rd November, 1912.]

Criminal Procedure Code, sections 203, 437—*Complaint summarily rejected—Further inquiry—Notice to person complained against not necessary.*

A notice to a person against whom a complaint is made is quite unnecessary where it is sought to set aside the summary order rejecting the complaint in a proceeding to which he was actually no party.

[Ref 4 Pat. L. J. 456 ; Fol. 74 I. C. 715=24 Cr. L. J. 811.]

A complaint made against Angan and others was summarily rejected by a magistrate of the first class without calling upon persons complained against. Subsequently a fresh inquiry into the subject matter of the complaint was ordered by the District Magistrate, again without notice to Angan and others. Angan and others applied to the High Court for revision of this order upon the ground that it could not have been legally passed without notice to them.

Mr. *R. K. Sorabji*, for the applicants :—

It is a well-established principle of criminal law that no order should be passed to the prejudice of any party by a court exercising appellate or

* Criminal Revision No. 822 of 1912 from an order of E. M. Nanavatty, District Magistrate of Budaun, dated the 21st of September, 1912.

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35 A. 78=14 Cr. L. J. 2=18 I. C. 146=10 A. L. J. 531.

revisional powers without giving that party an opportunity of showing cause against the passing of such order. Although section 437 of the Criminal Procedure Code does not expressly provide for the giving of such an opportunity, yet precedents have [79] laid down the rule that it should be given. I rely on the case of *Queen-Empress* v. *Ajudhia* (1) and on the cases cited therein. It is true that those were cases where the accused person was discharged, and not cases where the complaint was dismissed forthwith under section 203, without making the accused person a party, but as regards the advisability or desirability of giving notice to the party affected there is no difference in principle between the two cases.

[TUDBALL, J., referred to *Mir Ahwad Hossein* v. *Mahomed Askari* (2) and *Queen-Empress* v. *Puran* (3)].

Mr. *G. W. Dillon*, for the opposite party, was not called upon.

TUDBALL, J.—One Ram Pirbhan *alias* Ram Parpan filed a complaint in the court of a first class magistrate against the present applicants, preferring a charge of defamation against them. The petitioner's complaint was dated the 21st August, 1912, but was filed in court on the 22nd of August. The Magistrate recorded the complainant's statement on oath and forthwith dismissed the complaint. The complainant at once went to the District Magistrate in revision and the latter ordered a further inquiry. The applicants come to this Court in revision against that order and the main contention is that the order was passed behind their back and without notice to them and is therefore bad in law. In my opinion there is no substance in the contention for the simple reason that there has been no order of discharge whatsoever. They at no time had been called upon to appear and defend. The Magistrate has simply dismissed the complaint without any inquiry whatsoever. Under rulings of this Court it would have been open to the same magistrate to accept a fresh complaint by the complainant on the same facts and to have taken action thereon and to have made an inquiry. To the same effect is the decision of a Full Bench of the Calcutta High Court. In my opinion a notice to a person against whom a complaint is made is quite unnecessary where it is sought to set aside the summary order in a proceeding to which he was actually no party. In the present instance the complaint was dismissed without inquiry and at the very least the complainant was entitled to an inquiry even though only under section 202, Criminal Procedure Code. It was open to the court to make [80] an inquiry under section 202 of the Code or after issue of summons to the accused person. My attention has been called to certain rulings of this Court, e.g. *Queen Empress* v. *Ajudhia* (1), but an examination of these rulings shows that they were all cases in which the accused was tried and discharged and a further inquiry was ordered behind his back and without notice issued to him. The present is not a case in which it was necessary to issue notice to the accused persons before ordering further inquiry. I therefore reject the application. The proceedings which have been stayed will be continued.

Application rejected.

(1) (1898) I. L. R. 20 All. 339.
(2) (1886) I. L. R. 9 All. 85.
(3) (1902) I. L. R. 29 Cal. 726.

35 A. 80 (=13 M. L. T. 194=18 I. C. 30=17 C. W. N. 333=11 A. L. J. 172=1913 M. W. N. 183=17 C. L. J. 288=24 M. L. J. 345=15 Bom. L. R. 456=40 I. A. 40).

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DEC. 10.

PRIVY COUNCIL.

35 A. 80=13 M. L. T. 194 =18 I. C. 30 =17 C. W. N. 333=11 A. L. J. 172=1913 M. W. N. 183 =17 C. L. J. 288=24 M. L. J. 345=15 Bom L. R. 456=40 I. A. 40.

PRIVY COUNCIL.

SURAJ NARAIN AND ANOTHER (*Plaintiffs*) *v.* IQBAL NARAIN AND OTHERS (*Defendants*).*

[7th and 8th November and 10th December, 1912.]

[*On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.*]

Hindu law—Joint family—Allegation of separation in suit by some members for separate share—Expression of intention to hold share separately not proved—Right to mesne profits on separation—Exclusion from joint family, allegation of—Non-receipt of share of profits of joint property—Voluntary residence not with joint family—Refusal of allowance as being inadequate.

The appellant, a member of a joint undivided Hindu family, brought a suit in 1905 against the respondents, the other members of the family, alleging a separation by him in 1901, when he had expressed his intention to hold his share separately, and claiming possession of his share, with mesne profits.

Held that what may amount to a separation, or what conduct on the part of some of the members may lead to separation of a joint undivided Hindu family, and convert a joint tenancy into a tenancy in common, must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation : but to have that effect the intention must be unequivocal and clearly expressed. Separation from commensality does not as a necessary consequence effect a division [*Rewun Pershad* v. *Radha Beeby* (1)]. A separation in mess and worship may be due to various causes, and yet the family may continue joint in estate.

In this appeal it was held (affirming the decision of the court of the Judicial Commissioner) that on the evidence in, and under the circumstances of, the case and the conduct of the party alleging division of the family there had been no separation in 1901, and the appellant was consequently not entitled to mesne profits on that ground.

[81] He also claimed mesne profits on the ground of exclusion from the joint family, as he had not since 1901 received any share of the profits of the joint property. *Held* that although he had not received any of the profits of the joint estate, the evidence was clear that the appellant was offered an allowance from the profits of the joint property which he refused to accept as being inadequate, and that would not amount to exclusion.

[Clear and unequivocal expression of intention to separate, effecting separation ;—**Fol.** 18 M. L. T. 545=31 I. C. 674 ; 28 M. L. J. 423=1915 M. W. N. 303=28 I. C. 625 ; 39 Mad. 136 ; 39 Mad. 159 ; 43 I. C. 130=33 M. L. J. 746=1918 M. W. N. 136 ; 33 M. L. J. 759 ; **Ref.** 60 I. C. 919=45 Bom. 648 ; 67 I. C. 812 ; 69 I. C. 476=34 C. L. J. 563 ; 76 I. C. 881=42 M. L. J. 124; 70 I. C. 748=1922 M. W. N. 487=16 L. W. 268 ; 70 I. C. 846; 71 I. C. 177=1922 M. W. N. 215=42 M. L. J. 507=15 L. W. 595=45 Mad. 648 (F. B.) 71 I. C. 274=14 M L.J. 45=46 Mad. 349 ; 77 I. C. 450=37 C. L. J. 233=50 Cal. 370.]

APPEAL from a decree (30th October, 1909) of the Court of the Judicial Commissioner of Oudh which varied a decree (27th August, 1908) of the Additional Judge of Hardoi.

The only question for determination on this appeal was whether the appellants were entitled to a decree for mesne profits against the respondents, in addition to the decree for partition of their joint properties.

The facts are for the purpose of this report sufficiently stated in the judgment of their Lordships of the Judicial Committee.

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* *Present* :—Lord MACNAGHTEN, Lord MOULTON, Sir JOHN EDGE, and Mr. AMEER ALI.

(1) (1846) 4 Moo. I. A 137.

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35 A. 80=13 M. L. T. 194 =18 I. C. 30 =17 C. W. N. 333=11 A. L. J. 172=1913 M. W. N. 183 =17 C. L. J. 288=24 M. L. J. 395=15 Bom. L. R. 456=40 I. A. 40.

The appellant Suraj Narain, with his two sons as co-plaintiffs, instituted the suit which gave rise to this appeal, against Bakht Narain and his family (defendants Nos. 1 to 6) and also against Ratan Lal, Madan Mohan Lal, and Kishan Lal (defendants Nos. 7 to 9). He claimed that the properties in the names of the defendants Nos. 7 to 9 belonged to the joint family, alleging that they had wrongly taken possession of them in collusion with Bakht Narain. He alleged that he had totally separated himself from Bakht Narain at the end of October, 1901, and that there had been a "legal partition" of the properties, first made in November, 1900, and completed in October, 1901, and he prayed for possession of his half share of the joint family properties, for mesne profits, and other relief.

The defence was a denial of the separation and partition alleged, and also of the right of the plaintiffs to mesne profits.

The only issue now material was the 16th, which was as follows :— Can the plaintiffs claim accounts and mesne profits from the defendants Nos. 1 to 5, and what is the amount of the latter ?

The Additional Judge of Hardoi held that Suraj Narain had separated from the family as alleged by him ; that since his separation he had been excluded from the joint family property, and that he was consequently entitled to the mesne profits of his half share. He accordingly made a decree for possession of one-half share in the joint property with mesne profits.

[82] On appeal the court of the Judicial Commissioner, Mr. L. G. EVANS, Judicial Commissioner, and Mr. T. C. PIGGOTT, 2nd Additional Judicial Commissioner, after discussing the evidence at considerable length, came to the conclusion that neither separation nor exclusion had been proved, and that the claim for mesne profits was consequently not sustainable. In the result a decree for an account was made.

On the main point in the case, the proof of separation, the judgment of the Judicial Commissioner's court (which was delivered by Mr. PIGGOTT and concurred in by Mr. EVANS, after referring to the cases which had been cited in argument, continued :—

" Mr. Justice Markby was decidedly of opinion that it followed from the principles laid down by their Lordships of the Privy Council in *Appovier's case* that one member of a joint family might turn his joint ownership of the family property into a tenancy in common within the meaning of that ruling by merely signifying to the other members of the family an intention to that effect. We have not been referred to any Privy Council case which goes so far as this; and it seems to me that the principle thus broadly stated cannot be affirmed without serious qualification. It would surely not be contended that, if one of two brothers who had upto that moment lived together as members of joint family were to say to another, at the end of some quarrel over family matters, 'Very well then, if you insist on treating me so badly, I intend to separate from you from this moment. You do not deny that my share in the family property is equal to yours, and I intend from henceforth to regard myself as the separate owner of my own half share,' such words would in themselves, and apart from any evidence of the subsequent conduct of the two brothers, have the effect of producing separation between them in law. The court would require at the very least to be satisfied that the subsequent conduct of the brother who had thus spoken was such as to put it beyond question that his words were not merely spoken in the heat of the moment, or intended as a threat to put pressure upon his brother and compel the latter to show more respect to his wishes, but embodied his deliberate purpose, consistently adhered to and evidenced by his subsequent actions. Moreover, there would have to be no room for doubt in the mind of the court that the parties concerned were entirely agreed as to the share in the family property each of them would have to take in the event of a separation. Personally I am not sure that even these qualifications are sufficient ; or perhaps I might express my point more correctly by saying that I should require clear evidence of subsequent action on the part of the brother who had expressed his intention to separate with a view to acquiring, with as little delay as was reasonably

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possible under the circumstances, the separate control and enjoyment of the share claimed by him in the family property after separation. In the absence of such action on his part, I hold that a strong presumption would arise in favour of his having reconsidered the intention expressed by him in the heat of the moment and acquiesced in the continuance of the family in a [83] state of jointness. Applying these principles to the facts of the present case, it does not seem to me that anything like a sufficient case is made out in favour of the proposition that Pandit Suraj Narain on behalf of himself and his minor sons separated from Pandit Bakht Narain and his branch of the family, either in the month of March, 1901, or at any subsequent date prior to the institution of Pandit Suraj Narain's suit on June 20th, 1905."

On the other branch of the plaintiff's case, namely, that Suraj Narain was in any event entitled to mesne profits as a member of a joint family who had been for years before the institution of the suit excluded from all participation in the joint family property, the appellate court said:—

"It must be remembered that we are dealing in this case with the members of a joint family who were often widely separated in residence, and who exercised their respective professions, or carried on various branches of business, without reference to any joint family account . . . . . Under these circumstances the mere fact of non-participation by Suraj Narain in the profits of the joint family between the years 1901 and 1905 supposing such non-participation to be fully established, could scarcely be regarded as such evidence of exclusion as would justify a subsequent claim for mesne profits . . . . . When Suraj Narain went away and took up employment in the Amethi estate without taking any further action, he seems to me, as I have already remarked, to have acquiesced in the existing state of affairs under which Bakht Narain remained in possession of the joint family property as manager, pending the settlement of outstanding accounts and disputes. Under these circumstances, I am of opinion that the claim for mesne profits cannot be brought and that the lower court was in error in passing a decree for the same."

The account directed was "an account of the income enjoyed by the defendants (and by Pandit Bakht Narain before his death) from the date of the institution of the plaintiffs' suit on June 20th, 1905, to the date on which possession was given to the plaintiffs under the decree now appealed against, from the immovable property of the joint family in respect of which the plaintiffs have been found to be entitled to a half share. The defendants will be entitled to set off against such income, not only the expenses of management, but all expenditure which the court may find to have been properly incurred on objects to which the income of the joint family may properly be applied by the manager of the same. The balance, if any, will be treated as part of the divisible assets of the joint family, under the head of moveable property, in the hands of the defendants, and the plaintiffs will be awarded one half of the same."

On this appeal—

[84] *De Gruyther*, *K. C.*, and *B. Dube* for the appellants contended that the family ceased to be a joint undivided Hindu family, so far as Suraj Narain and his sons were concerned, at latest in October, 1901. At that time the evidence established that Suraj Narain expressed his intention of holding his share (which was one half) separately. His claim was not denied, but Bakht Narain declined to partition until the debts on the estate had been discharged. One member, it was submitted, could separate himself against the wishes of all the other members of the family; and an oral expression of his intention to do so was sufficient, no writing being necessary. Reference was made to *Rewun Persad* v. *Radha Beeby* (1); *Appovier* v. *Rama Subba Aiyan* (2); *Bulakee Lall* v. *Indurputtee Kowar* (3); *Vato Koer* v. *Rowshun Singh* (4); *Raghubanund Doss* v. *Sadhu Churn*

(1) (1846) 4 Moo. I. A. 137 (168).
(2) (1866) 11 Moo. I. A. 75 (89).
(3) (1865) 3 W. R. 41.
(4) (1867) 8 W. R. 82 (83).

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Doss (1); *Sudarsanam Maistri* v. *Narasimhulu Maistri* (2); *Radha Churn Dass* v. *Kripa Sindhu Dass* (3); *Joy Narain Giri* v. *Grish Chunder Myti* (4); *Ram Pershad Singh* v. *Lakhpati Koer* (5) and *Balkishen Das* v. *Ram Narain Sahu* (6). After the date above-mentioned the appellants had been exoluded from participation in the profits of the joint family property to which they were admittedly entitled. The decree of the court below was erroneous in not giving the appellants a decree for mesne profits as claimed; and also as to the mode in which it directed the accounts to be taken.

A. M. Dunne for the respondents contended that the evidence clearly established that there had been no separation or partition as alleged by the appellants. There was an application on the record by Suraj Narain to have his name put on the Register as being the head of the joint family, but he did not ask for separation. And there had been no exclusion of the appellants from participation in the joint family profits. On the contrary, Suraj Narain had been offered a share of the profits and had declined to take it. In this view there were no circumstances which **[85]** justisfied a decree for mesne profits. The decree of the court below was right and should be affirmed.

De Gruyther, K. C. replied.

1912, *December* 10*th* :—The judgment of their Lordships was delivered by Mr. AMEER ALI :—

The point for determination involved in this appeal turns on the question whether the plaintiffs, who were admittedly members of a joint Hindu family governed by the Mitakshara law, separated, as they allege, in October, 1901, or whether they continued joint in property, if not in food and worship, as the defendants contend, up to the institution of the suit in 1905.

The parties are Kashmiri Brahmins settled in Oudh, and, with the exception of the defendant Ratan Lal, are descended from one Pandit Bishan Narain who died over 40 years ago. He left four sons, of whom Pandit Suraj Narain the first plaintiff is the only one now surviving. On Bishan Narain's death his eldest son Raj Narain became the *karta* of the joint family. On his death in 1890, Ram Narain, the next in order of seniority, assumed charge of the family estate. He died in October, 1900, leaving a daughter who is married to the defendant Ratan Lal. Her son Raj Indar Narain appears to have been adopted by Ram Narain, and although his name frequently appears in the course of the present litigation he is no party to the action. On the death of Ram Narain, the defendant Bakht Narain, who has died since the institution of this suit, applied in November, 1900, for mutation of names in the Collector's register in respect of the joint family property. On the 8th of December, 1900, Suraj Narain filed a petition objecting to the mutation being effected in Bakht Narain's name alone, and praying that his name along with the plaintiffs' and Raj Indar Narain's might be entered in equal shares.

Same action appears to have been taken by the revenue authorities on the application of Bakht Narain, but before any definite order was made, the parties came to a settlement which was embodied in a deed of compromise. This document bears date the 27th February, 1901, and

(1) (1878) I. L. R. 4 Cal. 425 (430).
(2) (1901) I. L. R. 25 Mad. 149 (156).
(3) (1879) I. L. R. 5 Cal. 474 (476).
(4) (1878) I. L. R. 4 Cal. 434; L. R. 5 I. A. 228.
(5) (1902) I. L. R. 30 Cal. 231 (235); L. R. 30 I. A. 1 (11).
(6) (1903) I. L. R. 30 Cal. 738; L. R. 30 I. A. 139.

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after reciting the facts connected with Suraj Narain's application, proceeds to state as follows:—

"Hence, in submitting this application we pray that mutation of names be effected in favour of Pandit Bakht Narain alone as the head of a joint family [86] and the status of the family has continued joint from the death of Pandit Ram Narain up to this day and shall remain so as long as any dispute does not arise among the heirs."

Bakht Narain's name was accordingly entered with regard to the entire joint estate, and matters apparently remained *in status quo* for the next two years. In consequence of some quarrel with his elder brother, Suraj Narain, on the 5th of May, 1903, applied to the revenue authorities to have his and Raj Indar Narain's names entered jointly in respect of two-thirds of the family properties.

The differences between the brothers seem to have been mainly connected with the question of the shares the two branches of the family would take upon a partition. As Bakht Narain had three sons and Suraj Narain had only two, the latter evidently apprehended that if the division were to be made *per capita* his branch would obtain a smaller share. The compromise of February 1901, which provided for a reference to the Advocate-General was really intended to remove this fear on the part of Suraj Narain.

On the 31st August, 1903, the Assistant Collector made an order in favour of Suraj Narain. This order was reversed on appeal by the Deputy Commissioner on the 30th of October, 1903. The Deputy Commissioner embodies in his judgment the actual contentions advanced before him by the parties, which afford a strong indication of the views they then took of the position of the family. Their Lordships will refer to this document when dealing with the arguments at the bar on this appeal.

After the Deputy Commissioner's order, Suraj Narain returned to the service of the Amethi Estate and remained there up to the end of 1904. In June, 1905 he, in conjunction with his surviving son, brought the present suit against Bakht Narain and his sons for a partition of the family properties. The various proceedings in the suit of Bakht Narain against Ratan Lal, in which Suraj Narain attempted to be joined as a plaintiff, have no direct bearing on the question their Lordships have to consider.

In the present action, the plaintiffs, Suraj Narain and his son, claimed to recover mesne profits from Bakht Narain and his branch of the family, on the ground that they had separated from the joint family, in October, 1901. Their contention was accepted by the Subordinate Judge who made a decree in their favour on **[87]** that basis. The Judicial Commissioners have on appeal reversed his decision; and the present appeal to his Majesty in Council is from their judgment. The learned Judges have carefully and elaborately examined the evidence on the question of the alleged separation in October, 1901; and as their Lordships agree with the main conclusions of the court below, they do not consider it necessary to deal with the matter in detail.

The principle applicable to cases of separation from the joint undivided family has been clearly enunciated by this Board in *Rewun Persad* v. *Radha Beeby* (1) and the well-known case of *Appovier* v. *Rama Subba Aiyan* (2). What may amount to a separation or what conduct on the part of some of the members may lead to disruption of

(1) (1846) 4 Moo. I. A. 137.

(2) (1866) 11 Moo. I. A. 75.

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the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed. In the present case that element appears to their Lordships to be wholly wanting. By the compromise of February the parties had agreed to retain the status of jointness which had existed till then "until any dispute arose among the heirs." Suraj Narain alleges that he separated a few months later; there is, however, no writing in support of his allegation, nothing to show that at that time he gave expression to an unambiguous intention on his part to cut himself off from the joint undivided family. The oral evidence on which the allegation has mainly rested, as the learned Judges in the court below point out, is either inconclusive or unreliable. On the other hand, his conduct, borne out by documents, is clearly against his contention. After the compromise of February, 1901, the mutation proceedings instituted by Bakht Narain in November, 1900, were continued, and on the 2nd of January, 1902, the revenue officer directed that the statements of the two brothers should be recorded "to ascertain in whose name the entry should be made." And on the 8th of February the officer in question made the following order :—

"As the statements of Pandit Bakht Narain and Suraj Narain have been received and they unanimously show their willingness for the entry of the name [88] of Bakht Narain and declare his possession also, and as no one has filed any objection, it is therefore ordered that, after expunging the name of Ram Narain, deceased, the name of Bakht Narain be entered and the file be submitted to the officer in charge of pargana for sanction."

The conduct of Suraj Narain on this occasion was certainly not consistent with his allegation that he had severed his connection with the joint family, of which Bakht Narain was the acknowledged "head" in October, 1901.

In his application of the 5th May, 1903, among other matters, he speaks of a separation in "mess and worship," but there is no mention of a division of rights in property. Had his present statement been true, some reference would unquestionably have been made to it in this document. Separation from commensality, as was observed in the case of *Rewun Persad* v. *Radha Beeby* (1) does not as a necessary consequence effect a division of the joint undivided property. A separation in mess and worship may be due to various causes, and yet the family may continue joint in estate. In the present case there is evidence to show it arose from a difference in the religious opinions of the two brothers.

But the conduct of Suraj Narain after the order of the Deputy Commissioner on the 30th October, 1903, and the statements of his pleader before that officer, leave no doubt in their Lordships' mind that his present allegation is unfounded. The passage in the Deputy Commissioner's judgment which gives the substance of these statements is important. After reciting some of the facts connected with the dispute before him, the judgment proceeds thus :

"Ultimately on the 29th February, 1901, [*sic*], by virtue of a compromise, the name of Bakht Narain was entered as *manager* and *head* of a joint Hindu family. By a clause at the end of this agreement Bakht Narain was to remain so recorded so long as there should be no dispute among the *warisan*. There is now a discussion as to the meaning of the word *warisan*.

(1) (1846) 4 Moo. I. A. 137.

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"Mr. Jackson for appellant argues that it clearly refers to the *heirs* of the executant of the compromise. Mr. Champat Rai for the respondent maintains that it refers to the executants themselves; and as they are now in disagreement he wishes to have his client's name recorded in the Government registers.

"Here it is necessary to say that there is a third party, Raj Indar Narain, said to be the adopted son of Ram Narain.

"Bakht Narain now denies the validity of the adoption."

And the order is, "I think that Suraj Narain and Raj Indar Narain" (the applicants in that case) "should go to the Civil Court and get their shares clearly defined."

[89] The statement of Mr. Champat Rai appears to their Lordships to involve a clear admission that the joint status had continued till then; and that as the parties were, to use his words as recorded by the Deputy Commissioner, "now in disagreement," he wished to have his client's name recorded in the Government registers.

After the dismissal of his application, as already observed, Suraj Narain went away to Amethi without making an attempt to go to the Civil Court. Although Suraj Narain made various attempts to come in as a plaintiff in the suit Bakht Narain had brought against Ratan Lal, it may be taken as well established that after the Deputy Commissioner's order matters remained *in status quo* until the present action was instituted. Their Lordships are of opinion that the allegation regarding a separation in October, 1901, of rights in property fails, and that the view of the learned Judges in the court below is well founded, that the plaintiffs are not entitled to claim mesne profits on that basis.

But it is urged that as the plaintiffs did not, after the disputes arose between the two brothers, receive any profits from the joint estate, they are entitled to mesne profits on the ground of exclusion. The evidence is clear and distinct on this point, and shows that Bakht Narain was all along offering Suraj Narain an allowance of Rs. 200 a month, which he refused to accept as being inadequate. This certainly does not, in thir Lordships' judgment, amount to exclusion from the joint estate.

On the whole their Lordships are of opinion that this appeal fails and ought to be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the Appellants:—*Barrow, Rogers and Nevill.*
Solicitors for the respondents:—*Pemberton, Cope, Gray & Co.*

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35 A. 90 (=11 A. L. J. 11=14 Cr. L. J. 47=18 I. C. 271.)

[90] APPELLATE CIVIL.

Before Mr. Justice Banerji.

BHADESAR TIWARI AND OTHERS (*Applicants*) *v.* KAMTA PRASAD AND ANOTHER (*Opposite Parties*).*

[22nd November, 1912.]

Criminal Procedure Code, section 195, *clauses* (*b*) *and* (*c*)—*Sanction to prosecute—Power of appellate court to grant sanction—Appeal—Revision.*

* First Appeal No. 101 of 1912, from an order of E.E.P. Rose, Addititional Judge of Gorakphur, dated the 13th of June, 1912.

Held that the appellate Court, equally with the court of first instance, has power to grant sanction for a prosecution in respect of a document filed or evidence recorded in the suit.

Held, also, that a petition under section 195 (6) of the Code of Criminal Procedure seeking the cancelment of an order under section 195 (1) should be classed as a criminal appeal.

[Dist. 41 Mad. 787 ; Ref. 72 I. C. 383.]

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APPELLATE CIVIL.

35 A. 90=11 A. L. J. 11 =14 Cr. L. J. 47=18 I. C. 271.

THE facts of this case were as follows :—

A suit was brought on a bond in the court of the Munsif of Basti. In the course of that suit, the appellants produced the original bond, which was the basis of the claim, with an endorsement on it purporting to be an endorsement of payment of the amount due upon the bond. Witnesses were examined to support the endorsement. The court of first instance held that the endorsement was a forgery. An appeal was preferred and was heard by the Addional Judge of Basti. He also was opinion that the endorsement was forged and the evidence given in support of it was false. He affirmed the decree of the court of first instance. An appeal preferred to the High Court was dismissed under the provisions of order XLI, rule 11, of the Code of Civil Procedure. After these proceedings in the Civil Court, the plaintiffs to the suit made an application to the Additional Judge of Basti for sanction to prosecute Bhadesar Tiwari and others, and this application was granted. The persons against whom the sanction was thus given thereupon filed a petition in the High Court under section 195 (6) of the Code of Criminal Procedure.

Mr. *A. H. C. Hamilton* for the appellants.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

BANERJI, J.:—This is an appeal from an order of the Additional Judge of Basti granting sanction for the prosecution of the appellants for offences punishable under sections 471 and 193 of the Indian Penal Code. The appeal, being one from an order passed [91] under section 195 of the Code of Criminal Procedure, should be deemed to be an appeal under that Code and thus a criminal appeal. It should have been registered as such, and I have heard it as a criminal appeal. It appears that a suit was brought on a bond in the court of the Munsif of Basti. In the course of that suit, the appellants produced the original bond, which was the basis of the claim, with an endorsement on it purporting to be an endorsement of payment of the amount due upon the bond. Witnesses were examined to support the endorsement. The court of first instance held that the endorsement was a forgery. An appeal was preferred and was heard by the Additional Judge of Basti. He also was of opinion that the endorsement was forged and the evidence given in support of it was false. He affirmed the decree of the court of first instance. An appeal preferred to this Court was, I am informed, dismissed under the provisions of order XLI, rule 11, of the Code of Civil Procedure. After these proceedings in the Civil Court, the plaintiffs to the suit made an application to the Additional Judge of Basti for sanction to prosecute the present appellants, and on this application the order giving sanction now complained of was made.

It is urged on behalf of the appellants that the Additional Judge of Basti had no jurisdiction to give the sanction asked for. In my opinion, this contention is untenable. The document which was found to be forged was given in evidence in the suit, which, in the stage of appeal, was pending in the court of the Additional Judge. It was thus given in evidence in a proceeding in the court of the Additional Judge. Similarly, the false evidence was given in a proceeding which was pending in the stage of

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appeal in the Additional Judge's court. Therefore, under clauses (*b*) and (*c*) of section 195 the learned Additional Judge was competent to sanction the prosecution of the appellants. It is true that the document was not produced in his court but it was given in evidence in the appeal which was pending in that court. That appeal was certainly a proceeding within the meaning of section 195. The Additional Judge had, therefore, jurisdiction to make the order appealed against and this appeal must fail. I accordingly dismiss it.

[But see *Mehdi Hasan* v. *Tota Ram*, I. L. R. 15 All. 61.—ED.]

Appeal dismissed.

35 A. 92 (=18 I. C. 577=11 A. L. J. 33).

[92] APPELLATE CIVIL.

Before Mr. Justice Tudball.

CHHABRAJI KUNWAR AND OTHERS (*Defendants*) *v.* THE COURT OF WARDS AND OTHERS (*Plaintiffs*).*

[22nd November, 1912.]

Act No. VII of 1870 (*Court Fees Act*), *section* 7, *clause IX—Decree on mortgage—Separate liabilities of distinct properties—Appeal in respect of distinct properties.*

In a suit for sale on a mortgage a decree was passed declaring the separate liabilities of the different properties mortgaged. One of the defendants, whose property was held liable for specific sums of money, appealed. *Held* that the proper court fee payable on the memorandum of appeal was a fee calculated on the sum of money for which the defendant's property was held liable, and not one calculated on the full amount of the decree.

THIS was a reference as to amount of court fee payable in this case on the memorandum of appeal. The following report of the office gives the material facts:—

"The plaintiff brought the suit out of which this appeal has arisen for recovery of Rs. 48,000 principal and interest on foot of a mortgage, dated the 28th of March, 1909, by enforcement of hypothecation lien. The original document, the basis of the suit, was not produced, as it could not be found, and the suit was brought on the basis of a copy of the bond.

"The suit was resisted on various grounds. However, the court below decreed the plaintiff's claim for Rs. 14,554-7-0 of the amount claimed together with *pendente lite* interest and proportionate costs and made the different properties liable for the rateable contribution. The property of mauza Bisoha was made liable to contribute Rs. 6,215-0-8, and of Tehra Man Rs. 1,012-11-5. These are the two properties with which we are concerned in this appeal.

"A decree for sale under order XXXIV, rule 4, was prepared. The decree awarded to the plaintiffs—

1. Rupees 14,554-7-0, principal and interest on foot of mortgage.
2. Rupees 11,220-14-0, *pendente lite* interest.
3. Rupees 622-9-6, proportionate costs.

Total, Rs. 26,397-14-6.

"Against the said decree the defendants abovenamed have preferred this appeal praying that the suit may be dismissed against them. The appeal is valued at Rs. 7,227-12-1 the [93] contribution money in respect

* Stamp Reference in First Appeal No. 13, of 1913.

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APPELLATE CIVIL.

35 A. 92=
18 I. C. 577=
11 A. L. J. 33.

of the two villages mentioned above and a court fee of Rs. 305 has been paid thereon. I may say here that the proper court fee payable on the said valuations is Rs. 365. The first four grounds of appeal taken in the memorandum of appeal affect the whole decree obtained by the plaintiffs in the suit, and if they succeed the plaintiffs would naturally be deprived of the decree obtained by them in the suit.

"On the authority of a ruling of the Hon'ble Taxing Judge in F. A. No. 197 of 1912, *Jugal Kishore* v. *Hirde Narain* the defendants appellants are liable to pay a court fee of Rs. 915 on the amount of decree *i.e.*, Rs. 26,397-14-6. A court fee of Rs. 305 having been paid, there is, therefore, a deficiency of Rs. 610 to be made good by the defendants appellants on this memorandum of appeal."

The matter was referred to the Taxing Officer, who referred the question to the Taxing Judge with the following remarks :—

"The appellants in this case are defendants Nos. 5 to 8.

"The facts of the appeal are stated in taxing clerk's note of 31st October, 1912, and the latter stated that court fee amounting to Rs. 915 was payable on the whole amount of the decree Rs. 26,397-14-6.

"The learned advocate for the defendants appellants maintained that court fees should be paid on the value of the appeal, only, Rs. 7,227-12-1. This would amount to Rs. 365.

"This case is, I consider, similar to F. A. No. 197 of 1912, in which you passed an order, dated the 23rd February, 1912. In that order you stated that 'the defendants contest the mortgage as a whole, and they can only save their property from the operation of the decree by succeeding in their pleas mentioned above. If they so succeed, the mortgage falls to the ground.'

"The learned advocate for the defendants appellants urges a distinction, however, between this case and that of F. A. No. 197 of 1912. Here, he says, the liability of each property for the proportionate amount of the mortgage debt is defined : in the other case, it was a joint mortgage and the liability of each property was not separately defined. He also declares that the result of this appeal cannot affect the parties who are not appealing.

[94] "In the face, however, of your order of 23rd February, 1912, order XVI, rule 33, of Civil Procedure Code, and taxing officer's ruling of 27th February, 1912, in S. A. No. 680 of 1911, where a part of the property was exempted in the decree, I do not agree.

"But the matter is one of general importance, and under section 5 of the Court Fees Act, I beg to refer the matter."

The following decision was given by the Taxing Judge.

TUDBALL, J :—This case is clearly distinguishable from the case in F. A. No. 197 of 1912. Here various properties have been held separately liable for separate sums of money. The present appellants are transferees of two parts of property which have been held liable for specific sums of money. If they succeed in their appeal it is only those properties which will be released from the operation of the decree and it is only these sums which the decree-holder will lose. The rest of the decree-holder's decree for various other sums and for various other properties will still hold good even if the appellants' appeal succeeds. The correct stamp on this appeal will be Rs. 365. I allow one fortnight to make good the deficiency.

Order accordingly.

1912
NOV. 25.

APPELLATE CIVIL.

35, A. 94=18, I. C. 365=11 A. L. J. 20.

35 A. 94 (=18 I. C., 365=11 A. L. J. 20).

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BALDEO SINGH AND ANOTHER (*Plaintiffs*) *v.* KALKA PRASAD AND ANOTHER (*Defendants*).*

[25th November, 1912.]

Act No. VII of 1870 (*Court Fees Act*), *section 7, clause IX—Suit for sale on a mortgage —Court fee payable in appeal—Value of the subject matter—Amount declared due on date fixed for payment.*

A decree for sale on a mortgage declared that on the date fixed for payment a specified sum would be due from the mortgagor, which included interest *pendente lite*.

Held that the court fee payable in appeal from such decree was to be assessed, not on the amount claimed in the suit but upon the amount with interest *pendente lite* found due by the court of first instance at the date fixed for payment.

[Dist. 36 All. 40.]

THE question in this case was as to the amount upon which the court fee is payable on a memorandum of appeal against a decree awarding mortgage money with interest *pendente lite* to date [95] of payment and declaring the amount so awarded. The following extract from the office report gives the material facts.

"The plaintiffs brought a suit for recovery of Rs. 1,191-11-6 on account of principal and interest calculated up to the date of suit on foot of a mortgage, dated the 7th December, 1885, executed by the ancestor of the defendants in favour of one of the plaintiffs and ancestors of the other plaintiffs.

"The court of first instance decreed the plaintiffs' claim with future interest till the expiry of six months from the date of decree at the bond rate and allowed no interest thereafter. A decree for sale under order XXXIV, rule 4, of the Code of Civil Procedure was accordingly drawn up which awarded to the plaintiffs a sum of Rs. 1,487-7-6 composed of the following items:

Rs. 1,191-11-6 amount claimed.

Rs. 129-12-0 *pendente lite* interest.

Rs. 166 costs of the suit.

Total Rs. 1,487-7-6.

"Against the said decree the defendants preferred an appeal to the lower appellate court valuing it at Rs. 1,191-11-6, the amount originally claimed by the plaintiffs, and paying a court fee of Rs. 85, as was paid by the plaintiffs on the plaint, and praying for a reversal of the decree of the court of first instance. The only ground taken in the memorandum of appeal was to the effect :—" It is fully proved from the evidence and probabilities that the consideration of the bond in suit has been paid off. The lower court is not right in its finding to the contrary." The lower appellate court allowed the appeal and dismissed the plaintiffs' suit. Hence the plaintiffs have preferred this second appeal.

"According to the long established practice of this Court I reported on 18th June, 1912, that the proper valuation of the appeal inclusive of *pendente lite* interest was Rs. 1,321-6-6 on which a court fee of Rs. 95

* Second Appeal No. 251 of 1912 from a decree of E. C. Allen, District Judge of Mainpuri, dated the 21st of December, 1911, reversing a decree of Pratap Singh, Additional Subordinate Judge of Etawah, dated the 10th of July, 1911.

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APPELLATE CIVIL.

35 A. 94=
=18 I. C. 365
=11 A. L. J. 20.

was payable, and that a court fee of Rs. 85 having been paid there was therefore a deficiency of Rs. 10 due by the defendants for the lower appellate court. The report was initialled by the learned vakil for the defendants respondents on the 20th June, 1912. He did not dispute the accuracy of the report within three weeks thereafter under rule 10, [96] chapter III. The report was laid before the Hon'ble Judge receiving applications by order of the taxing officer. The Hon'ble Judge ordered the matter to be laid before the taxing officer who after referring the matter to the learned counsel, and consulting the Hon'ble Taxing Judge, to the best of my recollection, passed the following order on the 22nd July, 1912. 'It is not open to the learned vakil to dispute the accuracy of the office report now. He should have objected within three weeks of the 20th June, 1912. He is time-barred by rule 10, chapter III, High Court Rules.'

"On the matter coming on again before the Hon'ble Judge receiving applications on 6th August, 1912, the report was disputed a second time, and it was directed that the matter should be referred to the Bench hearing the appeal.

"In spite of the order of the taxing officer with reference to the Hon'ble Court's Rules quoted above, it is, I respectfully submit, expedient that the question of *pendente lite* interest should be decided once for all as there are several other similar objections raised by the learned vakils in other cases and our present taxing officer has been pleased to order that they should be kept in abeyance pending orders of the Hon'ble Court in this particular case."

The taxing officer thereupon recorded as follows:—"It is important that a final decision should be reached on the questions raised by the taxing clerk. I am in entire agreement with the decisions of the previous taxing officers Messrs. Hose and Burkitt."

Babu *Sital Prasad Ghose* for the respondent.

The words "*the* amount claimed" in section 7 of the Court Fees Act mean, the specific amount claimed in the plaint, that is, the amount of principal and interest up to the date of the suit. There being no provision in the Act for paying court fees upon interest *pendente lite*, upon the analogy of the provision of section 11 of the Court Fees Act relating to mesne profits, it follows that the words "subject matter in dispute" in article 1, schedule 1 of the Act must mean either the whole or a portion of the "amount claimed" which was the only thing upon which the parties joined issue. In the present case the appellants in the lower [97] appellate court did not challenge the adjudication of the court of first instance with regard to interest *pendente lite* under section 34 of the Code of Civil Procedure. Therefore no question of such interest ever formed "the subject matter in dispute in appeal" to that court.

The Hon'ble Dr. *Sundar Lal*, for the appellant, was not called on to reply.

TUDBALL and MUHAMMAD RAFIQ, J. J.:—This suit was one for sale on the basis of a mortgage. The plaintiffs claimed a certain sum as principal with interest up to the date of institution together with *pendente lite* and future interest and in default of payment, asked for sale of the property. The main defence was that the debt had been satisfied. The first court held in favour of the plaintiffs and passed a decree, which is worded as follows:—

"This suit coming on this 10th of July 1911, it is hereby declared that the amount due to the plaintiffs on account of principal, interest

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APPELLATE CIVIL.

35 A. 94=18
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and costs, calculated up to the 9th day of January, 1912, is Rs. 1,487-7-6 and it is decreed as follows. No order is passed as to future interest.

(1) That if the defendant pays into court the amount so declared due on or before the said 9th day of January, 1912, the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the property and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him.

(2) That, if such payment is not made on or before the said day of 9th January, 1912, the mortgaged property or a sufficient part thereof, be sold, and that the proceeds of the sale, &c."

From this decree the defendants appealed, and the sole ground of appeal was that it had been fully proved by evidence that the consideration of the bond had been paid off. They valued the appeal at Rs. 1,191-11-6, the amount of the principal, plus interest up to the date of the institution of the suit, as claimed by the plaintiffs, and they paid court fees accordingly. The lower appellate court held in their favour and dismissed the suit on a preliminary point. The plaintiffs have come up here on appeal. The taxing officer has reported that the defendants on their **[98]** memorandum of appeal to the lower appellate court ought to have paid court fees on Rs. 1,321-7-6, the amount decreed against them by the court of first instance, which included interest subsequent to the date of institution. The court fee payable by the defendants in the lower appellate court is an *ad valorem* fee according to the amount or value of the subject matter in dispute in appeal. In view of the wording of the decree granted by the court of first instance it is quite clear that the amount or value of the subject matter in dispute is Rs. 1,321-7-6 (exclusive of costs) which the defendants had been ordered to pay on or before the 9th of January, 1912. It may be that the decree is not properly drawn up, but we cannot go behind the decree in deciding this matter. It is quite clear that as the decree stood it imposed on the defendants a liability to pay a sum of Rs. 1,321-7-6 on a fixed date and by the appeal they sought to set aside that liability. An argument has been strongly pressed upon us that in the circumstances of the present case the subject matter of the appeal is the same as the subject matter of the suit, *i.e.*, the value of the plaintiff's claim. In our opinion, the decree being as it is, there is no force in this contention. The value of the subject matter of the appeal before the court below is as we have stated above. The defendants must make good the deficiency as reported by the taxing officer.

Order accordingly.

35 A. 98 (=11 A. L. J. 25=18 I. C. 573).

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NOV. 27.

APPELLATE CIVIL.

35 A. 98=11 A. L. J. 25= 18 I. C. 573.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

SAIYID ALI (*Plaintiff*) *v.* ALI JAN (*Principal defendant*) AND SAJJAD HUSAIN AND OTHERS (*Pro forma defendants*).*

[27th November, 1912.]

Civil Procedure Code (1908), *section* 92 (*i*)—*Procedure*—*Muhammadan law*—*Waqf*—*Trust for a public purpose of a religious or charitable nature.*

Where a trust is a trust created for a public purpose of a religious or charitable nature (in this case a waqf under the Muhammadan law) no suit can be maintained for the removal of a duly appointed trustee, save in conformity with the provisions of section 92, sub-section (1), of the Code of Civil Procedure.

[Ref. 31 M. L. J. 280 ; 35 A. 459.]

THE facts of this case were as follows :—

One Sahib Ali erected a mosque and an *Imambara* at Jaunpur. After his death his wife Bikani Bibi became owner, and in 1856 she executed a deed of endowment with respect to this [99] property, and it was provided therein that Himavat Ali, the brother of her deceased husband, was to be the first mutawalli and after him his descendants, generation after generation, whoever among them was a fit and proper person. After Himavat Ali his son Mehdi Hasan became mutawalli. During his tenure of office a suit was brought by two persons seeking for the removal of Mehdi Husain on the ground that he had been guilty of breaches of trust. He was removed by the District Judge and filed an appeal before the High Court. During the pendency of that appeal he died. His counsel brought his son, the present plaintiff, on the record as his legal representative. Subsequently the appeal was dismissed. The plaintiff then instituted the present suit for a declaration that he was rightful mutawalli, as he was a descendant of Himavat Ali, and for the removal of the defendant, who had been appointed to that office by the District Judge when he removed Mehdi Husain. The lower court dismissed the suit on the grounds (1) that plaintiff had not obtained the sanction required by section 92 of the Code of Civil Procedure and that the court had no jurisdiction to hear the suit, (2) the question was *res judicata* and (3) the suit was time-barred. The plaintiff appealed to the High Court.

Dr. *S. M. Sulaiman* (with him Mr. *S. A. Haidar*, Maulvi *Ghulam Mujtaba* and Maulvi *Rahmat Ullah*) for the appellant :—

Under the Muhammadan law the office was to devolve according to the provisions of the deed of endowment and the appointment of the defendant was bad. The suit was not one under section 92 of the Code of Civil Procedure at all. It was not brought by the plaintiff as a member of the Shia community to which the waqf belonged. The plaintiff sought to enforce his private right to be appointed mutawalli. Waqfs under Muhammadan law were not necessarily public, they might be for the benefit of a family. The law of procedure could not override the provisions of Muhammadan law. In the former suit the question was not as to the qualification of the present plaintiff. Section 92 refers to suits brought on behalf of the public :—*Budree Das Mukim* v. *Chooni Lal*

* First Appeal No. 119 of 1911 from a decree of Keshab Deo, Subordinate Judge of Jaunpur, dated the 16th of January, 1911.

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APPELLATE CIVIL.

35 A. 98=11 A. L. J. 25 =18 I. C. 573.

Johurry (1). The purpose of the section was to limit the number of suits brought on a representative basis : it could not affect the right of [100] a private individual. Further, the District Judge was not competent to appoint the defendant. The section no doubt was wide enough to enable a court to appoint a Christian or a Hindu. It was unlikely that it would do so, but there was nothing to prevent its doing so. Besides, an *imambara* was not a public place: *Delrus Banoo Begum* v. *Kazee Abdoor Rahman* (2) [BANERJI, J.—Referred to *Tajammul Husain* v. *Fazal Rasul* (3).]

Babu *Satya Chandra Mukerji*, for the respondent was not called upon.

RICHARDS, C. J., and BANERJI, J.:—The facts connected with this appeal are shortly as follows:—In the year 1856 one Musammat Bikani Bibi made a deed of waqf of certain property for the purpose of meeting the expenses of a certain mosque and *imambara*. The deed provided that she had appointed one Syed Himayat Ali, son-in-law of her husband's eldest brother, to be the nazir and mutawalli and that after him the fittest and ablest in the family, who should be a follower of the Shia sect, and a good and religious man, should be appointed, generation after generation, as nazir and mutawalli of the waqf. In the course of time the office of mutawalli was held by the plaintiff's father. During his incumbency a suit was instituted before the District Judge of Jaunpur alleging that he had been guilty of breaches of trust and seeking to remove him from being mutawalli. That suit was instituted under the provisions of section 539 of the Code of Civil Procedure of 1882, which was then in force. The result of the suit was that the learned District Judge removed the plaintiff's father from the office of trustee and appointed the defendant Syed Ali Jan Bahadur mutawalli in his place. An appeal was taken to this Court against the decree of the District Judge, but pending the hearing the plaintiff's father died. At the instance of the present plaintiff he was brought on to the record as the representative of his father, the appellant, but when the case came on for hearing it was dismissed, the appellant's counsel stating that he was unable for certain reasons to press the appeal.

The present suit has now been instituted claiming various reliefs, but there can be no question that in substance the plaintiff asks that the present mutwalli should be removed and that he [101] should be appointed mutawalli in his place, and that he should have a declaration that he is entitled to hold the trust property as mutawalli. The plaintiff claims that he fulfils the various conditions mentioned by the maker of the waqf as essential qualifications of the mutawalli.

The court below has dismissed the suit upon the ground that the suit is not maintainable. It was contended amongst other things that the trust was not a trust for a public purpose of a charitable or religious nature within the meaning of section 92. In our opinion, having regard to the terms of the waqf, and its decription as given in the plaint itself, it is impossible to hold that the present trust was not trust created for public purposes of a charitable and religious nature, and we do not consider it necessary to say anything further upon this point.

As already stated the plaintiff himself had his name brought on the record as the representative of his deceased father, and the appeal was

(1) (1906) I. L. R. 33 Cal. 789, 807.
(2) (1875) 23 W. R. 453.
(3) (1907) 4 A. L. J. 774.

decided with him as a party. This perhaps would be almost sufficient ground for dismissing the present appeal. It is however urged that he could not legally have been brought on to the record because the cause of action did not survive. He was there, it is said, not as his father's son and heir, but as a person claiming to be, in the events which had happened, the person who was entitled to be appointed mutawalli. We therefore do not decide the appeal upon this ground. The important question is whether or not the present suit is maintainable. Bearing in mind that the trust was a trust created for a public purpose of a religious or charitable nature, it is clear that the defendant now is and was at the time of the institution of this suit in fact the duly appointed mutawalli of the trust. It is, therefore, obvious that the plaintiff seeks in the present suit to have him removed from his office and to have himself appointed mutawalli instead of the defendant. There is an express provision in section 92 of the present Code of Civil Procedure that no suit claiming relief of this nature can be instituted, save in conformity with the provisions of sub-section (1), that is to say, it can only be brought by two or more persons after sanction has been obtained in the manner provided by the section.

Appeal dismissed.

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NOV. 27.
APPELLATE CIVIL.
35 A. 98=11 A. L. J. 25 =18 I.C. 573.

35 A. 102 (=18 I. C. 344=11 A. L. J. 15=14 Cr. L. J. 56.)

[102] REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* PHULEL.*

[29th November, 1912.]

Act No. XLV of 1860 (*Indian Penal Code*), *sections* 182, 193—*Complaint—Statement made to the Magistrate as head of the police and not as a magistrate.*

P. appeared before a District Magistrate and made a statement in which he accused a certain police officer of having beaten him, demanded a bribe of him and locked him up in the police *hawalat*. He stated, however, that he did not wish to make a complaint, but only desired that an inquiry should be made. Nevertheless the Magistrate examined *P.* on oath, and subsequently, the charge having been found to be baseless, *P.* was convicted under sections 182 and 193 of the Indian Penal Code. *Held* that, inasmuch as P. had expressly stated that he did not wish to make a complaint, the statement must be taken to have been made to the District Magistrate, not as magistrate, but as head of the district police, and the conviction under section 193 of the Code could not be upheld.

The facts of the case are fully set forth in the judgment of the Court.

Babu *Lalit Mohan Banerji* (for Mr. *W. Wallach*), for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

TUDBALL, J.:—The applicant Phulel went to the District Magistrate and made a statement before him that a certain police officer had beaten him, demanded a bribe from him and locked him in the police *hawalat*. He added that he did not wish to make a complaint, as it would not be possible to prove the complaint, but he wished the District Magistrate to make an inquiry so as to prevent the police officer behaving tyranically towards him. In spite of the fact that he stated that he did not wish to make a complaint, the Magistrate made him take the oath and make a statement.

*Criminal Revision No. 844 of 1912 from an order of R. C. Tute, Additional Sessions Judge of Meerut, dated the 11th October, 1912.

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NOV. 29.

REVISIONAL CRIMINAL.

35 A. 102=18 I. C. 344=11 A. L. J. 15=14 Cr. L. J 56.

Inquiry disclosed that the charge was groundless. Phulel was put on his trial under sections 211 and 182, Indian Penal Code. The Magistrate came to the conclusion that section 211 did not apply as the man distinctly refrained from instituting a complaint, but held that he was guilty of offences under sections 182 and 193, Indian Penal Code, and sentenced [103] him to separate sentences for each of those offences. On appeal the learned Additional Judge held that the man had committed only one offence and that he should not be punished twice over for the same act. He held that the facts established an offence under section 193, Indian Penal Code. He maintained the conviction and sentence under that section and set aside the conviction and sentence under section 182. It is quite clear that when the applicant stated that he did not wish to institute criminal proceedings or make a complaint, the Magistrate was not moved *qua* Magistrate, but only as district head of the police. It was unnecessary and perhaps unlawful for the Magistrate under these circumstances to have forced the man to take an oath. As the Additional Judge has said, the man committed only one offence. He either committed an offence under section 182 or 211, Indian Penal Code. The conviction under section 193 cannot stand. I, therefore, alter the finding of the court below to a conviction under section 182, Indian Penal Code, and I maintain the sentence of three months' rigorous imprisonment which was originally imposed under that section.

Conviction altered.

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35 A. 103 (=11 A. L. J. 16=14 Cr. L. J. 63=18 I. C. 351).

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

BANERSI DAS *v.* PARTAB SINGH.*

[27th November, 1912.]

Criminal Procedure Code, section 125—*Security to keep the peace—Procedure—Appeal—Jurisdiction.*

A District Magistrate taking action under section 125 of the Code of Criminal Procedure cannot treat an application made under that section as an appeal and reverse the order of a first class Magistrate on the facts. If he considers the order to be wrong on the merits he can exercise his revisional powers and submit the record to the High Court, but the cancellation of bonds contemplated by section 125 can only be on the ground that the bonds are no longer necessary.

[Ref. 51 I. C. 478=20 Cr. L. J. 489=41 All. 651; fol. 67 I. C. 350=20 A. L. J. 521=23 Cr. L. J. 398; 71 I. C. 668=24 Cr. L. J. 204: Rel. 73 I. C. 504=24 Cr. L. J. 616.]

In this case one Partab Singh was bound over by a magistrate of the first class to keep the peace. Partab Singh applied to the District Magistrate under section 125 of the Code of Criminal Procedure for cancellation of the bonds. The District Magistrate treated this application as an appeal; went into the evidence; passed an order accepting the appeal, and cancelled [104] the bonds. Against this order Banarsi Das, who had applied to have Partab Singh bound over, applied in revision to the High Court, and his main contention was that the District Magistrate had no jurisdiction to treat the application under section 125 as an appeal and to consider the merits of the first class Magistrate's order.

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* Criminal Revision No. 802 of 1912 from an order of an Mahadeo Prasad, Officiating District Magistrate of Muzaffarnagar, dated the 19th of September, 1912.

Babu *Satya Chandra Mukerji* for the applicant.

Mr. *C. C. Dillon* for the opposite party.

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REVISIONAL CRIMINAL.

35 A. 103=11 A. L. J. 16 =14 Cr.L. J. 63=18 I. C. 351.

TUDBALL J:—The facts of this case are briefly as follows:—The present applicant Banarsi Das applied to a Magistrate of the first class asking him to bind over the opposite party to keep the peace. The Magistrate after recording all the evidence passed an order that the opposite party should furnish security for a certain period. The opposite party Partab Singh made an application to the District Magistrate which purported to be one under section 125 of the Code of Criminal Procedure. The grounds of this application were, however, directed against the order of the Magistrate binding him over to keep the peace. The application was treated as an appeal by the officiating District Magistrate, was registered as such and he went into the evidence on the record, and his order ended as follows:—"I accept the appeal and cancel the order of the lower court; all the bonds are cancelled." It is quite clear that the officiating District Magistrate who passed the order on the application treated the matter before him as an appeal and he came to the conclusion that the Magistrate's order was a bad one *ab inito*. An examination of the Code will show to the officiating District Magistrate that no appeal whatsoever lies to him from an order of this description by a first class Magistrate. It was only in his power to examine the record, and if he found that an improper order had been passed, to submit the case to this Court for the exercise of its revisional power. His order is not an order which can be passed under section 125 of the Code. The cancellation of bonds contemplated in that section can be only on the ground that the bonds are no longer necessary. The Magistrate has decided the appeal without having any jurisdiction to do so. His order is void, and I therefore set it aside. The matter, however, is one concerning the peace of the district; and I think it advisable [105] in the circumstances of the case that the record should be placed before the present District Magistrate so that he may examine it himself and see whether or not it is any longer necessary to keep the opposite party under his bond. I direct accordingly.

Order set aside.

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35 A. 105 (=18 I. C. 364=11 A. L. J. 18).

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BALDEO PRASAD AND ANOTHER (*Plaintiffs*) *v.* KUNWAR BAHADUR AND ANOTHER (*Defendants*).*

[3rd December, 1912.]

Code of Civil Procedure (1908), *order IX, rule* 8—*Appeal—Dismissal for non-appearance of appellant—Appellant present but unrepresented and unable to argue the appeal himself—Procedure.*

On the date fixed for the hearing of an appeal one of the two appellants (the other being a woman) appeared before the court and applied for an adjournment to enable him to procure the attendance of his pleaders. He was called on to argue his appeal, but he said he had nothing to say, and thereupon the appeal was dismissed on the ground that it had not been supported. *Held* that in these circumstances the court was not justified in dismissing the appeal for

* Second Appeal No. 371 of 1912 from a decree of H. E. L. P. Dupernex, District Judge of Farrukhabad, dated the the 20th of December, 1911 confirming a decree of Gauri Shankar, Subordinate Judge of Fatehgarh, dated the 17th of March, 1911.

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DEC. 3.

APPELLATE CIVIL.

35 A. 105=18 I. C. 364=11 A. L. J. 18.

want of prosecution, but was bound to consider the grounds of appeal and to decide the case on the merits.

IN this case the appellants, Baldeo Prasad and Musammat Ram Piari filed a partnership suit in the court of the Subordinate Judge of Fatehgarh. The suit was dismissed. They filed an appeal in the court of the District Judge. This appeal was adjourned several times either on the application of the parties or by the court *suo motu*. Finally it was fixed for the 20th of December, 1911. On that date the male appellant appeared and asked for two days' adjournment to procure the attendance of his pleaders. Thereupon the court called upon him to argue the case himself, and, on his confessing his inability to do so, proceeded to dismiss the appeal as not being supported. The appellants perferred the present appeal to the High Court.

Dr. *Tej Bahadur Sapru* and Babu *Durga Charan Banerji* for the appellants.

Babu *Sarat Chandra Chaudhri* (for Dr. *Satish Chandra Banerji*) for the respondents.

[106] TUDBALL and MUHAMMAD RAFIQ, JJ. :—This appeal arises out of the following circumstances. The plaintiffs appellants Baldeo Prasad and Musammat Ram Piari filed a partnership suit in the Subordinate Judge's Court against the two respondents. The suit was dismissed. They filed an appeal, which was admitted on the 17th March, 1911, in the court of the District Judge. The date fixed for the hearing of the appeal, was the 6th of June. On the 31st of May on the application of the respondents the court fixed the 12th of July instead of the 6th of June. On that date the appeal was not heard, as the District Judge had no time by reason of other work. It was adjourned to the 28th of July. Again the court *suo motu* adjourned the appeal to the 28th of September. On that date at the appellant's request and with the consent of the respondents the appeal was adjourned to the 8th of November. On the 3rd of November the court of its own motion fixed the 6th of December for the hearing of the appeal. On this date the respondent's pleader was absent having gone to the Delhi Durbar. The case was adjourned for this reason to the 20th of December. So far the case had been adjourned only once at the request of the appellants and twice at the request of the respondents and three times for the convenience of the court. On the 20th of December the male appellant Baldeo Prasad appeared and applied for two days' adjournment to secure the attendance of his pleaders. One of them had gone to Agra and was expected back on the 22nd of December. The other had gone into the camp. There is no order on the application, but apparently it was rejected and the Judge called on the male appellant to argue the case. Not being a lawyer, the man was unable to do so, and fairly said that he had nothing to say. The learned Judge's judgment runs as follows :—"Respondents' pleader urges that as the appeal is not supported it should be dismissed. I agree." For this reason the District Judge dismissed the appeal without going into the merits. The female appellant Musammat Ram Piari subsequently filed an application for hearing on the ground that sufficient cause for her non-appearance could be established. This application was rejected. There are two appeals before us, one from the original decree and the other from the order rejecting the application of Musammat Ram Piari. **[107]** It is quite clear that the learned District Judge is wrong. To ask a non-legal appellant to argue his case is asking for what is practically impossible. The application for adjournment shows

clearly and distinctly that he did not wish to drop his appeal. He wished to press it. The bare fact that he could not argue it did not justify the District Judge in dismissing it. It was necessary for him under the circumstances to consider the grounds of appeal and to decide the case on the merits. This he has not done. We therefore admit the appeal, set aside the decree of the District Judge and remand the case to his court with directions to readmit the appeal to its original number in the register and to dispose of it on the merits. Costs will follow the event.

Appeal allowed and cause remanded.

1912
DEC. 3.

APPELLATE CIVIL.

35 A. 105=18 I. C. 364=11 A. L. J. 18.

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35 A. 107 (=18 I. C. 609=11 A. L. J. 66).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Jutice, and Mr. Justice Banerji.

SABTA PRASAD AND ANOTHER (*Defendants*) *v.* DHARAM KIRTI SARAN AND OTHERS (*Plaintiffs*).*

[18th November, 1912.]

Arbitration—Award—Party to the suit not made party to the submission to arbitration—Party so omitted not a necessary party to the suit.

Held that an arbitration and an award made in the course of a suit would not be rendered invalid by the mere fact that a party whose name was on the record, but who was not a necessary party to the suit, was not made a party to the arbitration proceedings.

[Cf. 8 A. L. J. 645; 43 I. C. 169=27 C. L. J. 339; 42 Mad. 632=36 M. L. J. 538=51 I. C. 155; 14 I. C. 562; 36 Mad. 353=21 M. L. J. 990; 5 Pat. L. T. 239=1923 Pat. 225.]

IN a suit for partition of the property of a joint Hindu family between two branches thereof, the widow of one of the members of the family was made a party defendant. The subject matter of the suit was referred to arbitration, but to the submission the widow was not a party. An award was made, upon which a decree followed which was in accordance with the reward. Against this decree the defendants appealed upon the ground that the widow was no party to the arbitration proceedings upon which the decree rested.

Mr. *B. E. O'Conor* and Maulvi *Ghulam Mujtaba* for the appellants.

Mr. *A. H. C. Hamilton*, The Hon'ble Pandit *Madan Mohan Malaviya*, Babu *Jogindro Nath Chaudhri*, Babu *Satya Chandra Mukerji*, Munshi *Girdhari Lal Agarwala*, Munshi *Benode Behari* and Pandit *Rama Kant Malaviya*, for the respondents.

[108] RICHARDS, C. J., and BANERJI, J.:—This and the connected appeal No. 20 of 1911 arise out of two suits brought for partition of certain property which originally belonged to Sahu Radha Kishan.

The plaintiffs to the two suits are the descendants of Sahu Ganga Sahai and Sahu Gokal Prasad, two of the sons of Sahu Sadha Kishan. One Musammat Janki was made a defendant to the suit, she is the widow of Sahu Shiam Saran, one of the sons of Sahu Ganga Sahai. All the parties to the two suits referred their disputes to arbitration, save and except Musammat Janki, who did not join in the submission. A decree was made by the arbitrator, who was the Subordinate Judge in whose

* First Appeal No. 264 of 1910, from a decree of S. R. Daniels, District Judge of Moradabad, dated the 8th of May, 1909.

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NOV. 18.

APPELLATE CIVIL.

35 A. 107=18 I. C. 609=11 A. L. J. 66.

court the suits were filed, and who was appointed arbitrator not only with the consent of the parties but also with the sanction of the Government. Decrees have been passed in both the suits in accordance with the award, and it is against these decrees that the two appeals before us have been preferred as also the appeal No. 21 of 1911 in which Musammat Janki is the appellant. The decree having been made in accordance with the award, a preliminary objection has been taken on behalf of the respondents that no appeal lies. If the award is legally valid, the decree being in accordance with the award no appeal can be preferred from the decree and the objection must prevail. We have therefore to determine whether the award is a legally valid award.

Mr. *O'Conor*, who appears for the appellants, challenges the validity of the award on the sole ground that Musammat Janki was not a party to the submission. If Musammat Janki was not a necessary party to the suit, the fact of her not joining in the submission would not in our opinion affect the validity of the award. As regards Musammat Janki the allegation of the plaintiff was that she was in possession of some villages in lieu of maintenance. Her statement was also to the same effect, and what she claimed was that her right of maintenance should not in any way be affected by the partition claimed in the two suits. It thus appears that all parties were agreed that she was not a necessary party having regard to the nature of her rights. Had the case gone to trial no question of her rights could have been determined in a partition suit. So that it is manifest that she was not, as the parties themselves also practically admitted, a **[109]** necessary party to the suit. The fact that she did not join in the submission did not therefore in our opinion vitiate the award. The decree having been passed in accordance with the award, no appeal lies and these two appeals must fail.

We accordingly dismiss this appeal with two sets of costs, one set to be obtained by Parsotam Saran respondent and the other by Sahu Dharam Kirti respondent. The objections under order XLI, rule 22, fail and are dismissed with costs.

Appeal dismissed.

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35 A. 109 (=18 I. C. 896=11 A. L. J. 56=14 Cr. L. J. 144).

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* UDIT NARAIN DUBE AND OTHERS.*

[27th November, 1912.]

Criminal Procedure Code, section 439—Revision—Powers of High Court—District Registrar.

A District Registrar is not a court subordinate to the High Court either on the civil, criminal or revenue side, and the High Court has no power to interfere with the order of the Registrar impounding a document and calling upon the applicants to show cause why they should not be prosecuted for forgery.

THE facts of this case were as follows:—

The District Registrar of Mirzapur had before him an application with reference to a certain document for an order of compulsory registration of that document. The Sub-Registrar had refused to register it on the

* Criminal Revision No. 857 of 1912 from an order of W. R. G. Moir, District Registrar of Mirzapore, dated the 27th of July, 1912.

ground of denial. After making some inquiry the District Registrar refused to register it on the ground that he believed the document to be a forgery. He passed the order on the 27th of July, 1912. Immediately below the order he recorded the following order :—

"The deed in question is impounded. An inquiry will be held by me under section 476, Criminal Procedure Code, on my return from leave. The writer of the deed, the attesting witnesses, Khub Lal and Udit Narain, will be called on to show cause why they should not be prosecuted for forgery."

1912
NOV. 27.

REVISIONAL CRIMINAL.

35 A. 109=
18 I. C. 896=
11 A. L. J.
56=14 Cr. L.
J. 144.

The parties against whom this order was made applied in revision to the High Court asking that it might be set aside.

Mr. *D. R. Sawhny* for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

[110] TUDBALL, J. :—This application has arisen out of the following facts :—

The District Registrar of Mirzapur had before him an application in reference to a certain document for an order of compulsory registration of that document. The Sub-Registrar had refused to register it on the ground of denial. After making some inquiry the District Registrar refused to register it on the ground that he believed the document to be a forgery. He passed the order on the 27th of July, 1912. Immediately below the order he recorded the following order :—

" The deed in question is impounded. An inquiry will be held by me under section 476, Criminal Procedure Code, on my return from leave. The writer of the deed, the attesting witnesses, Khub Lal and Udit Narain, will be called on to show cause why they should not be prosecuted for forgery."

So far no action appears to have been taken by the District Registrar. Presumably the present application, though it does not say so, asks this Court on the criminal side to pass an order that the District Registrar should make no such inquiry. The District Registrar may or may not have power to pass such an order *qua* District Registrar. He may or may not have power as District Registrar to make the inquiry *qua* District Registrar or even as a private person. But with that I have nothing to do. I fail to see that I have power to forbid a District Registrar to make an inquiry into the matter if he so pleases. He is not a court subordinate to this Court either on the civil, criminal or revenue side, and it is a matter in which at this stage I see no 'ground for interferng even if I had power to do so. The application is rejected.

Application rejected.

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35 A. 111 (=11 A. L. J. 57=18 I. C. 21).

[111] APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Rafiq.

AJUDHIA PANDE AND OTHERS (*Plaintiffs*) v. INAYAT-ULLAH AND OTHERS (*Defendants*).*

[5th December, 1912.]

Civil Procedure Code (1908), *section* 11—Res Judicata—*Prior and subsequent mortgagees—Suit by first mortgagee impleading second, but no decree as to rights of first mortgagee—Suit for sale by prior mortgagee not barred.*

* Second Appeal No. 965 of 1911, from a decree of E. E. P. Rose, Additional Judge of Gorakhpur, dated the 15th of August, 1911, reversing a decree of Harbandhan Lal, Additional Subordinate Judge of Gorakhpur, dated the 20th of March, 1911.

1912
DEC. 5.

APPELLATE CIVIL.

38 A. 111=11 A. L. J. 57 =18 I. C. 21.

A second mortgagee brought a suit for sale on his mortgage, in which he impleaded the first mortgagee and asked to redeem The first mortgagee did not appear. The plaintiff got a decree for sale, but the decree did not either give him redemption of the first mortgage or direct the property to be sold subject to the first mortgage. *Held* that the first mortgagee was not precluded from subsequently bringing a suit for sale on his mortgage. *Srinivasa Rao Saheb* v. *Yamunabhai Ammall* (1), *Katchalai Mudali* v. *Kuppanna Mudali* (2) followed. *Sri Gopal* v. *Pirthi Singh* (3), *Nattu Krishnama Chariar* v. *Annangara Chariar* (4) and *Gopal Lal* v. *Benarasi Pershad Chowdhry* (5) distinguished.

[Fol. 18 C. W. N. 1013=24 I. C. 42 ; Ref: 80 I. C. 389.]

THE facts of this case were, briefly, as follows:—The mortgage bond in suit was executed in favour of the plaintiff No. 1 and the ancestor of the other plaintiffs. A subsequent mortgage was executed in favour of Ram Saran. In a suit brought by Ram Saran on foot of his mortgage he admitted the existence of the plaintiff's prior mortgage and impleaded the plaintiff No. 1 and some of the predecessors in interest of the other plaintiffs as prior mortgagees. Among the reliefs claimed in that suit Ram Saran offered to be allowed to redeem the prior mortgage. In that suit the prior mortgagees, who had been thus impleaded, entered no appearance and made no defence. The decree which was passed embodied a copy of the plaint in which the prior mortgage was mentioned, but in the operative part of the decree there was no mention of that mortgage and no direction that the sale should be subject to any prior incumbrance. The property was sold in execution of that decree and purchased by Inayatullah, who obtained possession. Thereafter the plaintiffs brought the present suit on foot of their mortgage. The court of first [112] instance decreed the suit. On appeal the District Judge held that the suit was barred by *res judicata*, inasmuch as the present plaintiffs had taken no steps about their mortgage although they had been impleaded in Ram Saran's suit. The plaintiffs thereupon appealed to the High Court.

Munshi *Jang Bahadur Lal*, for the appellants:—

The suit is not barred by *res judicata*; for the matter now in issue, namely, the mortgage sued on, was not at all in issue in the previous suit. In that suit the existence of this mortgage was admitted in the plaint itself and was not denied by any party. There was no dispute about the matter, and it was, therefore, not in issue between the parties. So there was no need for the present plaintiffs to appear and prove their mortgage in that suit. The case is thus different from those relied on by the lower appellate court namely:—*Sri Gopal* v. *Pirthi Singh* (3), *Gopal Lal* v. *Benarasi Pershad Chowdhry* (5) and *Nattu Krishnama Chariar* v. *Annangara Chariar* (4). In the first two cases the prior mortgage upon which the subsequent suit was brought was not set out or admitted by the plaintiffs in the previous suit; in fact the holder of that prior mortgage was impleaded not as such but in a different capacity. It was, therefore, his duty to disclose and prove his prior mortgage. The third case was that of a holder of two successive mortgages who had obtained a decree on foot of his first mortgage without disclosing the second, and then brought a suit upon the second mortgage. In the present case the plaintiff in the former suit not only disclosed and admitted the prior mortgage but actually offered to redeem it. Nothing, therefore, remained to be done by the prior mortgagees in that suit the omission to do which can operate as a bar under explanation IV to section 11 of the Code of Civil Procedure. I

(1) (1905) I. L. R. 29 Mad. 84.
(2) M. W. N. 1912, p. 41.
(3) (1902) I. L. R. 24 All. 429.
(4) (1907) I. L. R. 30 Mad. 353.
(5) (1904) I. L. R. 31 Cal. 428.

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rely also on the following cases:—*Katchalai Mudali* v. *Kuppanna Mudali* (1), *Arunachala Reddi* v. *Perumal Reddi* (2), *Srinivasa Rao Saheb* v. *Yamunabhai Ammall* (3). The same remarks which have already been submitted with reference to the cases relied on by the lower appellate court apply to the two [113] following cases:—*Gajadhar Teli* v. *Bhagwanta* (4), *Mahabir Pershad Singh* v. *Prabhu Singh* (5). In the latter case the existence alone of the mortgage had been admitted and not its priority, which should, therefore, have been established.

Maulvi *Muhammad Ishaq*, for the respondents:—

The suit is barred by *res judicata*. Although in Ram Saran's suit the existence of the prior mortgage was admitted by him and he offered to redeem it, yet the decree that was passed in that suit did not provide for the prior mortgage but ordered the sale free from any incumbrance. It was the duty of the prior mortgagees, who were made parties, to safeguard their interests by taking care to see that a proper decree, making due provision for their rights, was passed. They did not do so, nor did they get the decree amended or corrected. The result is that they have lost those rights and cannot enforce them in a subsequent suit. *Vide* p. 437 of I. L. R. 24 All. cited already. This duty of theirs could not be dispensed with by reason merely of the fact that Ram Saran had admitted their mortgage. Moreover, the mortgagors, who were parties to Ram Saran's suit, did not admit the prior mortgage. It was the duty of the prior mortgagees, therefore, to prove their mortgage as against the mortgagors. In the case in I. L. R. 29 Mad. 84, the mortgagor, too, had admitted the prior mortgage. As regards the mortgagors or their representatives in interest, therefore, the prior mortgagees are precluded from setting up their mortgage. The cases relied on by the lower appellate court and the last two cases cited by the appellants support me.

Munshi *Jang Bahadur Lal*, in reply:—

The fact that the decree in the previous suit did not in terms reserve the rights of the prior mortgagees does not necessarily defeat those rights. *Vide* I. L. R. 29 Mad. 84, and M. W. N. 1912, p. 41, cited above.

KNOX and MUHAMMAD RAFIQ, JJ.:—It appears that one Ram Phal Man Tiwari executed a deed of mortgage in favour of Guptar Pande and Ajudhia Pande on the 20th of September, 1890. Ram Phal Man executed another mortgage subsequently in 1892 in respect of the same property in favour of Ram Saran. In 1897 [114] Ram Saran brought a suit on the basis of the mortgage of 1892 for the recovery of the mortgage money by sale of the hypothecated property. The suit was brought against Ram Phal Man mortgagor and against Ajudhia Pande and some of the legal representatives of Guptar Pande, who had died prior to the institution of the suit. Some other subsequent transferees were also impleaded in the case as defendants. Ram Saran prayed for the relief, among others, that he should be allowed to redeem the prior mortgage of 1890 in favour of Guptar Pande and Ajudhia Pande. The mortgagor and the prior mortgagees did not defend the suit or put in any appearance in court. The court trying the case of Ram Saran framed two issues only which related to the execution and registration of the mortgage deed of 1892 by Ram Phal Man. A decree was passed in favour of Ram Saran for the amount of the mortgage money, which was to be realized by sale of the hypothecated

(1) M. W. N. (1912), p. 41.
(2) (1910) 21 M. L. J. 635.
(3) (1905) I. L. R. 29 Mad. 84.
(4) (1912) I. L. R. 34 All. 599.
(5) (1908) 9 C. L. J. 78.

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35 A. 111=11 A. L. J. 57=18 I. C. 21.

property. The decree did not declare any charge of the prior mortgage on the property to be sold in execution of the decree of Ram Saran. In execution of the latter decree Inayat-ullah Chaudhri became the purchaser of the property sold.

On the 2nd of August, 1910, Ajudhia Pande and the legal representatives of Guptar Pande deceased instituted a suit in the court of the Subordinate Judge of Gorakhpur to recover the mortgage money due on the mortgage of the 2nd of September, 1890. The claim was brought against the legal representatives of the original mortgagor, Inayat-ullah Chaudhri, the auction purchaser, and some subsequent transferees. The claim was resisted on the ground, among others, that it was barred by *res judicata*, inasmuch as the prior mortgagees being defendants in the suit of Ram Saran failed to prove the amount of their debt, in consequence of which the relief of Ram Saran regarding the redemption of the prior mortgage could not be allowed.

The court of first instance did not accept this defence and decreed the claim. On appeal the learned Additional Judge of Gorakhpur accepted the plea of *res judicata* and reversed the decree of the first court and dismissed the claim of the prior mortgagees. The learned Judge came to the conclusion that the plea of *res judicata* barred the claim of the plaintiffs appellants [115] on the authority of the cases:—*Sri Gopal* v. *Pirthi Singh* (1). *Nattu Krishnama Chariar* v. *Annangara Chariar* (2) and *Gopal Lal* v. *Benarasi Pershad Chowdhry* (3).

The case has been argued before us fully and at some length by the learned counsel for both sides and some additional authorities have been cited before us. The cases referred to by the learned Additional Judge and some other cases on the same point go to show that if a prior mortgagee is a defendant in the suit brought by the subsequent mortgagee in which the debt of the prior mortgagee, *i.e.*, the debt prior to the debt in suit is not mentioned and the prior mortgagee omits to set up his claim on his prior mortgage, a subsequent suit would be barred under section 11 of the Code of Civil Procedure. These cases are no authority for holding that the plea of *res judicata* applies to the present case. In the case before us the debt of the prior mortgagee was admitted by Ram Saran in his plaint, and in fact he offered to redeem that debt. There was no occasion for the prior mortgagees to come to court and to bring to its notice their prior debt. In fact in two cases, namely, *Srinivasa Rao Saheb* v. *Yamunabhai Ammall* (4) and *Katchalai Mudali* v. *Kuppanna Mudali* (5), it has been held that under such circumstances the plea of *res judicata* does not apply. We are therefore of opinion that the claim of the plaintiffs appellants is not barred by section 11 of the Code of Civil Procedure. We accept the appeal, set aside the decree of the lower appellate court and remand the case to that court for determination according to law. The appellants will get their costs in this Court. Other costs will follow the event.

Appeal decreed and cause remanded.

(1) (1902) I. L. R. 24 All. 429.
(2) (1907) I. L. R. 30 Mad. 853.
(3) (1904) I. L. R. 31 Cal. 428.
(4) (1905) I. L. R. 29 Mad. 84.
(5) M. W. N. (1912) p. 41.

35 A. 116 (=18 I. C. 14=11 A. L. J. 62).

[116] APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

KALIAN AND OTHERS (*Defendants*) *v.* SADHO LAL AND OTHERS (*Plaintiffs*).*

[9th December, 1912.]

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DEC. 9.

APPELLATE CIVIL.

35 A. 116=18 I. C. 14=11 A. L. J. 62.

Civil Procedure Code (1908), *order XXXIV, rule* 8—*Execution of decree—Decree for sale on a mortgage conditioned on redemption of prior mortgages—Power of court to extend time for payment of redemption money.*

When a suit for sale by a subsequent mortgagee became by reason of the intervention of a prior mortgagee also a suit for redemption of the prior mortgage and a decree was passed accordingly, it was *held* that the court had power under order XXXIV, rule 8, to extend the time for payment of the sum found necessary to redeem the prior mortgage, the plaintiffs having through a *bona fide* mistake paid into court an insufficient amount.

The facts of this case were, briefly, as follows :—

The plaintiffs, who were subsequent mortgagees, brought a suit for sale upon their mortgage in which they impleaded certain prior mortgagees. The prior mortgagees appeared to answer the suit and claimed to be redeemed, and in the end a decree was passed in favour of the plaintiffs providing for redemption of the prior mortgages as a condition precedent to the sale of the mortgaged property by the plaintiffs. The plaintiffs paid into court within the time limited by the decree what they believed to be a sum sufficient to satisfy it, but, owing to a miscalculation, the sum was as a matter of fact not enough. The court, however, allowed time to the plaintiffs to make good the deficiency. Against this order the prior motgagees appealed to the High Court.

Babu *Sarat Chandra Chaudhri* (with him Dr. *Satish Chandra Banerji*), for the appellants :—

The plaintiffs having failed to deposit the whole money within the time fixed by the decree their suit stood dismissed. Section 148 of the Code of Civil Procedure could not be called in aid as the court had no power to extend the time fixed in the decree for the deposit of the whole amount of mortgage money : *Het Singh* v. *Tika Ram* (1).

[TUDBALL, J. :—Section 148 of the Code certainly does not apply, but the proviso to order XXXIV, rule 8, would apply because this was a compound suit involving a sale of the property as well as redemption].

[117] In order to determine whether the rule in question would apply one has to look to the scope of the suit. The rule speaks of a suit for redemption, pure and simple, whereas the present suit was one for sale. The nature of the suit depends upon the relief asked and redemption was not the relief sought in this case. Therefore the rule would not apply. Even assuming that the rule applied, the court was not entitled to extend the time because no good cause was shown for such extension. The decree provided that the money was to be deposited to the credit of defendants 17, 19, 20 and 21. But the respondents deposited the money to the credit of defendant 17 and one Bidhi Chand, who at the date of the suit possessed no interest in the property. The deposit therefore was made in contravention of the express terms of the decree. The principle of the

* First Appeal No. 129 of 1912, from a decree of Shekhar Nath Banerji, Second Additional Subordinate Judge of Agra, dated the 13th of February, 1912.

(1) (1912) I. L. R. 34 All. 388.

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I. C. 14=11
A. L. J. 62.

following case applies to the present case as showing that such a deposit is not valid : *Debendra Mohan* v. *Rani Sona Kunwar* (1).

The Hon'ble Munshi *Gokul Prasad* (with the Hon'ble Dr. *Sundar Lal*), for the respondents :—

No appeal lay from an order of the lower court granting an extension of time. Order XLIII, rule 1, clause (*o*) gives a right of appeal from an order *refusing* to extend the time for the payment of mortgage money. The latter order being expressly provided for as appealable, an order like the one now in question cannot form the subject-matter of an appeal, under the provisions of the Code. The mistake in the deposit was a *bona fide* one because in the decree it was provided that the money should be deposited to the credit of defendant 17 and Bidhi Chand. The respondents were misled by that provision in the decree.

Babu *Sarat Chandra Chaudhri*, in reply :—

The order passed in the present case is a decree : *Rahima* v. *Nepal Rai* (2). According to the appellants' contention the court below had no jurisdiction to extend the time and consequently this Court can deal with the matter in the exercise of its revisional jurisdiction.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—This appeal arises out on the following circumstances. The respondents to this appeal brought a suit for sale on the basis of a mortgage. They impleaded [118] certain persons as subsequent transferees. It appears that there were three prior mortgages, one in favour of Bidhi Chand and two in favour of Kalian. Bidhi Chand sold his rights to Kalian and the other three appellants before us. At the trial of the suit these four persons thought fit to stand upon their rights as prior mortgagees and claimed that the plaintiffs should redeem them before they sold the mortgaged property. The result of this was a compound decree in favour of the plaintiffs to the following effect. The court ordered the original mortgagors to pay up the plaintiffs' debt within three months. It then ordered that if they failed so to pay, the plaintiffs should pay within a further period of one month to the present appellants the sums due on the three prior mortgages, and conditional upon their so doing, the decree gave the plaintiffs power to consolidate the amounts due on all the mortgages and to put the property to sale for the full amount. It went on to say that if the plaintiffs failed to pay off the amounts due on the prior mortgages within the time allowed, the suit should stand dismissed. The original mortgagors failed to pay the money within the time allowed. Therefore the plaintiffs within a further time of one month deposited Rs. 3,690-0-0, stating in their application depositing the money that the amount is due to Bidhi Chand and Kalian. The money was really payable to Kalian and the other three appellants, who had acquired the rights of Bidhi Chand. The sum which ought to have been deposited by the decree-holders really amounted to something over Rs. 4,000-0-0. There had been an error in calculation and therefore after the period of one month Kalian and his co-appellants put in a petition of objection in which they pointed out that the amount deposited was not the full amount and therefore the plaintiff's claim under the terms of the decree should be dismissed. They made no mention of the error in entering Bidhi Chand's name in the application. The decree-holders in reply pleaded that the deficiency in deposit was due to miscalculation. They also pointed out the error in entering Bidhi Chand's name and asked for

(1) (1904) I. L. R. 26 All. 291.

(2) (1892) I. L. R. 14 All. 520.

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35 A. 116=18 I. C. 14=11 A. L. J. 62.

further extension of time to make good the deficiency. The court allowed the application. Hence the present appeal.

The argument of the appellants is that the court had no power whatever to extend the time ; that section 148 of the Code of Civil [119] Procedure does not cover the case in which a time is fixed by the decree for the doing of some act mentioned in the decree, and that order XXXIV, rule 8, would not cover the case as the suit was not one for redemption. On behalf of the respondents it is contended that the order being an order extending time, no appeal whatsoever lies, as order XLIII, rule 1, clause (*o*), only grants appeals when the court refuses to extend time. The reply to this is two-fold, first that the order granting time is a decree within the meaning of section 47 of the Code, and secondly, that even if it be not a decree, the order passed is without jurisdiction and the court has power to set it aside in revision. In our opinion the order passed by the lower court was with jurisdiction and was justified by order XXXIV, rule 8. It is true that in its inception the suit was not a suit for redemption. It was a suit for sale, but directly the present appellants determined to stand upon their prior rights and demanded redemption, the suit became a compound suit and as a matter of fact the decree was both for sale and redemption, and so far as the decree between the present parties is concerned, it is clearly and simply a decree for redemption. In our opinion the proviso to rule 8 of order XXXIV, clearly applies and the lower court had power to pass the order. So far as the merits of the case are concerned we think the order of the court below is correct. The objection taken by the present appellant was simply as to the amount and the court below was satisfied that there was a *bona fide* mistake in calculation. As to the entry of Bidhi Chand's name the error was pointed out by the plaintiffs themselves. The lower court's order has done material justice. We see no reason to interfere and dismiss the appeal with costs.

Appeal dismissed.

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35 A. 119 (=11 A. L. J. 83=17 I. C. 728.)

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

SATYA SHANKAR GHOSHAL AND OTHERS (*Decree-holders*) *v.* MAHARAJ NARAIN SHEOPURI AND OTHERS (*Judgment-debtors*).*

[9th December, 1912.]

Execution of decree—Stay of execution of decree under appeal—Jurisdiction—Procedure.

Held that the court which passed a decree has no power to stay execution thereof whilst the decree is under appeal; neither has a court which has executed [120] its own decree awarding possession of immovable property power to restore to possession the party whom it has ejected.

THE facts of this case were as follows :—

The plaintiffs obtained a decree against the defendants for possession of a house and for mesne profits on the 26th of January, 1912. In that decree the defendants were allowed one month's time within which to vacate the premises in dispute. The decree-holders applied for execution of their decree for possession, for costs and the mesne profits, on the 11th of April, 1912. and on the 23rd of April, 1912, obtained possession of the

* First Appeal No. 194 of 1912 from a decree of Srish Chandra Basu, Subordinate Judge of Benares, dated the 25th of April, 1912.

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DEC. 9.

APPELLATE CIVIL.

35 A. 119=11 A. L. J. 83 =17 I. C. 728.

house through the court amin and got some movable property of the judgment-debtors attached. In the meantime the judgment-debtors had filed an appeal against the decree in the High Court on the 20th of April, 1912, and without applying for an order for the stay of execution in that Court put in an application on the 24th of April, 1912, in the court which passed the decree, praying for the restoration of possession to them pending the decision of the appeal in the High Court. On the 25th of April, 1912, the Subordinate Judge ordered restoration of possession to the judgment-debtor and accepted Rs. 2,500 as security from them. The decree-holders appealed.

Babu *Hurendra Krishna Mukerji* (with him Babu *Jogindra Nath Chaudhri* and Babu *Amulya Chandra Mitra*), for the appellants:—

The order of the lower court is illegal and without jurisdiction on several grounds. An appeal having been filed against the decree, the court which passed the decree had no power to stay execution or restore possession to the judgment-debtors after having once given possession to the decree-holders. The only court where such an application could then be made was the appellate court which had seisin of the suit and no other: *Chunni Lal* v. *Anant Ram* (1). Moreover, there can be an application for stay of execution, only where there is something to stay and not where a decree has been executed: *Dharram Singh* v. *Kishen Singh* (2). In the present case, possession having been given by the court to the decree-holders, there was nothing left to be done so far as that portion of the decree was concerned, and the execution court had become *functus officio*. The execution of the decree having been [121] completed even the appellate court could not grant a stay order, much less the court whose decree had been appealed against.

Babu *Sital Prasad Ghosh* (with Dr. *Satish Chandra Banerji* and Dr. *Surendro Nath Sen*), for the respondents:—

The lower court may have been technically wrong in superseding its own order passed on a previous occasion. But that court having taken security from the judgment-debtors this Court should not interfere. In any case justice will surely be done if this Court simply upsets the order of the court below which is under appeal without prejudice to the judgment-debtors now applying to obtain a stay order from this Court, which is seised of the matter as the appellate court.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—The circumstances out of which this appeal has arisen are as follows:—The decree-holder, on the 26th of January, 1912, obtained a decree for possession of certain house property together with mesne profits and costs. Under the decree the judgment-debtors were directed to vacate the house within one month, *i.e.*, the judgment-debtors were allowed one month's grace to remove their property. On 11th of April, 1912, the decree-holder applied to execute the decree. He asked to be put in possession of the house by ejectment of the judgment-debtors because the latter had not vacated it. They also asked for attachment and sale of movable property in order to recover the costs and mesne profits. On the 20th of April, 1912, the judgment-debtors filed an appeal against the original decree in this Court. No application was made at the time for stay of execution. On the 23rd of April, 1912, the Amin in the court below gave possession to the decree-holders and duly ejected the judgment-debtors. Moveable property was also attached. On the 24th of April, 1912, the

(1) (1898) I. L. R. 25 Cal. 893. (2) (1883) 12 C. L. R. 582.

judgment-debtors filed an application stating that they had filed an appeal in the High Court and had also applied to that Court for stay of execution (which was incorrect), and they asked the court executing the decree to postpone the proceedings until the order of the High Court was received. On the 25th of April they made another application to the court below stating that they had filed the appeal, but the decree-holders had in execution dispossessed them and attached their property; that they had money ready as security: and they asked the court to release the property and restore them [122] to possession. The court thereupon ordered the money to be deposited in the treasury as security, released the movable property and passed an order to the Amin to replace the judgment-debtors in possession. Accordingly the decree-holders were dispossessed and the judgment-debtors replaced in possession. It is against this order that the present appeal has been made. In the first place, on filing an appeal against the original decree, if the judgment-debtors wished to secure stay of execution they ought to have applied at once to this Court for that purpose. The lower court had no longer any power to stay execution after the appeal had been filed in this Court. In the next place, the decree having been executed in so far as possession of the house was concerned, that portion of the decree could no longer be stayed, it having been executed. The utmost that the lower court could have done on the 25th of April was to stay its hands and go no further. It had no power whatsoever to go backward, to drive the decree-holders out of possession and replace the judgment-debtors in possession. Its order was clearly passed without jurisdiction and was completely *ultra vires*. We accept the appeal, set aside the order of the court below and direct that the decree-holders be at once restored to the possession which will be theirs until the decree is set aside. The appellants will have their costs in this Court.

Appeal allowed.

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DEC. 9.

APPELLATE CIVIL.

35 A. 119=11 A. L. J. 83 =17 I. C. 728.

35 A. 123 (=18 I. C. 575=11 A. L. J. 29.)

[123] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

KAMTA PRASAD (*Defendant*) *v.* PANNA LAL (*Plaintiff*).*

[4th December, 1912.]

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 28, 29, 30 and 34—Exproprietary tenant—Mortgagee from exproprietary tenant holding over after ejectment of mortgagor—Rent not fixed by agreement or by a decree of the Court—Right of zamindar to recover rent.

G and *H* were zamindars who owned some *sir* land and an occupancy holding. They executed a usufructuary mortgage of their *sir* land and occupancy holding in favour of *K* and the predecessor of *J*. In execution of a money decree against *G* and *H* their zamindari rights were sold and *P* purchased the same. Subsequently, in execution of a decree for arrears of rent, *P* got *G* and *H* ejected by the Revenue Court. Later on *P* got *K* and *J* the mortgagees also ejected by the Revenue Court. *P* then brought a suit against *K* and *J* for arrears of rent for the period between the ejectment of *G* and *H* and their own ejectment.

Held that *P.* was not entitled to recover the rent in regard to the period of time between the two ejectments as the rent had not been fixed either by agreement between the parties or by a decree of court.

* Appeal No. 52 of 1912 under section 10 of the Letters Patent.

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DEC. 4.

APPELLATE CIVIL.

35 A. 123=13 I. C. 575=11 A. L. J. 29.

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case are stated in the judgement under appeal, which was as follows:—

"This and the connected appeal No. 343 of 1911 arise out of two suits brought by the respondent Panna Lal for arrears of rent under the following circumstances. Godha and Hamir Singh owned certain zamindari shares to which some *sir* lands appertained. They had also an occupancy holding in another share of which they were not proprietors. On the 10th of March, 1897, they executed a usufructuary mortgage of their *sir* and occupancy lands in favour of Kamta Prasad and Malkhan. The rights of Malkhan subsequently vested in Jhandu. In execution of a money decree against Godha and Hamir Singh their zamindari rights were sold by auction and were purchased by the plaintiff Panna Lal. On the 6th of September, 1906, Panna Lal sued Godha and Hamir Singh for arrears of rent of the *sir* land. Kamta Prasad and Jhandu were not parties to this suit. On the 15th of September, 1906, the claim of Panna Lal was decreed, the defendants Godha and Hamir Singh having filed a confession of judgement. On the 29th of November, 1906, these persons were ejected from the holding. Kamta Prasad, however, continued in possession, and accordingly, on the 25th of August, 1909, Panna Lal sued him and Jhandu in the Revenue Court for ejectment. They set up their mortgage, but the court of first instance held that they were tenants without rights of occupancy and ordered their ejectment. From the order of the court of first instance they appealed first to the Commissioner and afterwards to the District Judge. The [124] latter held that the appeal was time-barred and dismissed it. From the decision of the District Judge, the application for revision, No. 4 of 1912, which has just now been decided, was filed. That application having been dismissed, the order of the District Judge has become final, and necessarily the order of ejectment made by the Assistant Collector on the 12th of March, 1910, has become final. In pursuance of this order Kamta Prasad and Jhandu have been ejected. On the 22nd of March, 1910, Panna Lal brought the two suits out of which this and the connected appeal arise for arrears of rent for the period between the date of the ejectment of Godha and Hamir Singh and that of the ejectment of Kamta Prasad and Jhandu. The claim was decreed by the court of first instance and the decision of that court was affirmed by the lower appellate Court. The first contention in this appeal is that the mortgage of the *sir* lands included a mortgage of the proprietary rights in those lands and that, therefore, the purchase by the plaintiff was subject to the mortgage in favour of Kamta Prasad and Malkhan and the present suit for arrears of rent could not be brought against the appellant. As to this the terms of the mortgage deed of the 10th of March, 1897, clearly show that what was mortgaged was only the right to cultivate the *sir* lands and the lands held as an occupancy holding. The proprietary rights in the *sir* lands were not included in the mortgage. The mortgage deed in specific terms recites that it was a mortgage of the right to cultivate (*haq kasht*), so that it was a mortgage of the right to cultivate the *sir* lands. As after the sale of the zamindari, the *sir* lands ceased to be *sir*, the mortgage may be deemed to have attached to the expropriatory rights acquired by Godha and Hamir Singh on the sale of the zamindari right. Therefore Kamta Prasad and Jhandu became, as regards the *sir*, mortgagees of the expropriatary rights. For non-payment of arrears of rent the mortgagor having been ejected, their rights as mortgagees determined with the determination of the expropriatary tenancy. If the mortgagees wished to maintain the expropriatary rights, they ought to have paid the rent payable in respect of the expropriatary holding and they ought to have paid off the amount on the decree passed against the expropriatary tenants. There was no obligation on the landholder to sue the mortgagees. He properly sued his tenants and obtained a decree for rent and for non-payment of the amount of the decree he took out ejectment proceedings and thereby determined the tenancy, so that, as regards the *sir* lands, the appellant cannot contend that his rights as mortgagee still subsist. As I have said above, the appellant was ejected under the decree passed by the Assistant Collector on the 12th of March, 1910, but during the interval between the determination of the tenancy and the final ejectment of the defendant appellant he remained in possession. He was allowed to continue in possession, and, as the courts below find that his possession must be deemed to have been that of a tenant on the same rent on which Godha and Hamir Singh held the lands, it was not necessary to sue to assess him with rent. As pointed out above, upon the determination of the tenancy the mortgage also determined, and subsequently to such determination the mortgagees must be deemed, as held by the Revenue Court, to have been the plaintiff's tenants. As such tenants they were liable to pay rent, and it is reasonable to infer that their tenancy was one on the understanding that the rent which their mortgagors paid should be paid by them. In my opinion the view taken

[125] by the court below is right and this appeal must fail. I, accordingly, dismiss it with costs.

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APPELLATE CIVIL.

35 A. 123=13 I. C. 575=11 A. L. J. 29.

Against this decision an appeal was preferred under section 10 of the Letters Patent.

Munshi *Girdhari Lal Agarwala*, for the appellant.

Munshi *Benode Behari*, for the respondent.

RICHARDS, C. J., and TUDBALL, J.:—The facts out of which this and the connected appeal No. 51 of 1912, have arisen are set out at length in our judgment in L. P. A. No. 49 of 1912. Those two appeals arise out of the two suits for rent therein mentioned.

We find it impossible to hold that the plaintiff respondent is entitled to recover the rent which he claims in regard to the period of time between the two ejectments. Admittedly no rent was fixed as between the present parties, either by agreement or by decree of court. Section 34 of the Tenancy Act (II of 1901, Local) clear by does not, and was never intended to, apply to the circumstances of the present case. It relates to the case of a person taking possession for the purpose of cultivating as a tenant without the consent of the landholder.

Here the present appellant defendant took possession with the full consent of the landholders Jodha and Hamir Singh in the year 1897. It is true that the latter by operation of law became the exproprietary tenants and have been ejected and that the appellant continued to occupy the land. Section 34 clearly does not apply.

Section 28 of the Act applies to the case of a sub-letting by a tenant before the commencement of the Act or a sub-letting subsequent to the Act in accordance with the provisions thereof. In the present case there was no sub-letting prior to the Act by a tenant and there has been no sub-letting since the Act came into force, in accordance with the provisions thereof. This section, therefore, does not apply.

Where the tenant has sub-let, otherwise than in accordance with the provisions of the Act, section 29 applies. It gives the landholder the option of enforcing or not the covenants between the tenant and sub-tenant. In the present case the plaintiff respondent is not seeking to enforce any such covenant ; nor there was any sub-letting subsequent to the acquisition by Jodha [126] and Hamir Singh of their exproprietary rights, unless we hold that mortgage operated as a sub-lease with effect from the date of the acquisition of exproprietary rights. Section 30 of the Act merely states that the interest of a sub-tenant ceases with the extinction of the interest of the tenant for whom he holds. The plaintiff does not in the present suit seek to enforce the terms of the contract between the appellant and Godha and Hamir. He puts them entirely on one side. Therefore we can find no provision in the law which enables him to enforce, as against the appellant, the contract between himself and the exproprietary tenants.

Unless he is entitled to recover this rent by some provision of the law, in the absence of a contract between the parties or a decree of court, he is not entitled to recover it.

For these reasons we must hold that the suit fails. We allow the appeal. The suit will stand dismissed with costs in all courts.

Appeal allowed.

1912
DEC. 10.

APPELLATE CIVIL.

35 A. 126=11 A. L. J. 126 =17 I. C. 846.

35 A. 126 (=11 A. L. J. 76=17 I. C. 846).

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BHAGWATI PRASAD (*Plaintiff*) *v.* BHAGWATI PRASAD AND OTHERS (*Defendants*).*

[10th December, 1912.]

Act (*Local*) *No. III of* 1901 (*United Provinces Land Revenue Act*), *sections* 111, 112, 233 (*k*)—*Partition—Hindu law—Joint Hindu family—Minor—No necessity for minor to be specially represented in partition proceedings.*

Where a partition of the property of a joint Hindu family in which one of the members was a minor was found to have been properly carried out with due regard to the interests of the minor, it was *held* to be no ground for upsetting the partition, were such a course possible having regard to section 233 (*k*) of the United Provinces Land Revenue Act, 1901, that the minor was not represented in the partition proceedings by a formally appointed guardian. In such circumstances a minor member of the family is suitably represented by the managing member or members.

[Ref: 25 I. C. 620.]

THIS was a suit for a declaration that the plaintiff was not bound by certain partition proceedings. The facts are fully set forth in the judgment. Shortly they were as follows:—

The proceedings were instituted by the defendants against the plaintiff and other members of his family. The plaintiff was a minor when those proceedings were instituted. No guardian was formally appointed to represent the plaintiff, but the major [127] members of the family acting for themselves and the plaintiff arrived at an arrangement with the opposite party in accordance with which the partition proceedings were carried out. The plaintiff brought this suit to set aside these proceedings. The court of first instance decreed the suit, but the lower appellate court reversed the decree. The plaintiff appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellant:—

There was no formal appointment of a guardian for the appellant in the partition proceedings. Therefore the appellant cannot be held bound by the partition carried out by the Revenue Court. The minor might have been a member of a joint Hindu family, the managing member of which was made a party to the proceeding, but that did not make an express provision of the law, namely, that a minor must be represented by a *formally* appointed guardian in order to bind him, unnecessary and superfluous. As regards the question of the Civil Court's authority to question a partition carried out by a Revenue Court, it should be noted that what was challenged in this case was not the validity of the partition proceedings of the Revenue Court but the mode of distribution of the mahals which involved a question of proprietary title and as such was maintainable in a Civil Court.

The Hon'ble Dr. *Sundar Lal* (with whom Mr. *E. A. Howard*), for the respondents:—

There may have been some irregularity in not appointing a guardian to the minor in the Revenue Court during the course of the partition proceedings, but there are several circumstances in the present case

* Second Appeal No. 626 of 1911 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 1st of May, 1911, reversing a decree of Harbandhan Lal, Additional Subordinate Judge of Gorakhpur, dated the 26th of November, 1910.

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which bind the minor, in spite of that technical defect. The minor was a member of a joint Hindu family, all the members of which, including the plaintiff appellant, were made parties to the partition proceedings. The interest of the minor was identical with that of the other members; no fraud was practised, nor was there even any allegation of it by the plaintiff, and the interest of the minor did not in any way suffer in carrying out the partition. Under these circumstances there is no doubt that the minor was bound by the partition proceedings. Moreover, a suit to set aside a partition proceeding is not a suit in which a question of proprietary title is raised and does not fall under the provisions of either section 41 or section 112 of the Land Revenue [128] Act and therefore section 233 (*k*) of that Act will bar such a suit.

Dr. *Tej Bahadur Sapru* was heard in reply.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—The facts out of which this appeal has arisen are as follows :—

The plaintiff, Bhagwati Prasad, together with his half brothers, Jokhu and Lachman, and his uncles Umrao and Ram Nath, and the widow of his deceased uncle Nandan, constituted a joint Hindu family. The family owned a share in mauza Dibaria Buzurg. The defendants, first party, Bhagwati Prasad No. II, minor, &c., were also co-sharers, and so also were the defendants, third party. These three groups of co-sharers cultivated their seperate *sir* lands. The defendants, second party, are the plaintiffs' half brothers and uncles and aunt. The first set of defendants applied to the Collector under the Land Revenue Act for partition of their share into a separate mahal. The plaintiff was then a minor, and, as the names of all the members of the family were recorded in the khewat, his name was also recorded therein under the guardianship of his half brother, Lachman. There was no objection to the partition, nor is it denied even now that the parties to the partition were the owners in possession of their recorded shares. In the wajib-ul-arz there was recorded the express wish of the then co-sharers that at the time of partition, if it occurred in the future, the various co-sharers should be maintained in possession of the various lands which they then held. This is also in accordance with the provisions of the Land Revenue Act and it is a rule regularly followed in all partitions unless it is not possible to divide the mahal fairly and justly between the co-sharers, in which case the rule has perforce to be broken. Provision is made for this in the Act. In the partition proceeding there was an entry to the effect that the rule was to be followed. But apparently the defendants, first party, and the plaintiffs' brothers and uncles came to an agreement out of court and threw their *sir* lands into the hotchpot and the whole mahal was divided into shares. Fraud, collusion and dishonesty were alleged by the plaintiff in the present suit, against both his own relations and the first set of defendants, but he has utterly failed to prove these allegations, and the courts below have held against him on this point and it is not now put forward. It may [129] therefore be taken for granted that the partition was justly and fairly carried out, and it was completed and sanctioned by the Collector on the 30th of September, 1908. The plaintiff at that time, though a minor, was not far from his majority, for he instituted the present suit on 27th May, 1910, as being major and of full age. He attained his majority in fact on November 25th, 1908 (*vide* his plaint). In the course of the partition many plots of land which he and his family cultivated as *sir*, were

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placed in the mahal of the first defendants. In the course of the partition case the Revenue Court omitted to make any formal appointment of a guardian *ad litem* for the present plaintiff. The application for partition was made on the 19th of February, 1908. On the 2nd of April a petition was filed by the plaintiff's brothers and uncles to the effect that they had no objection. It was not signed by Lachman, but by Jokhu on his behalf and the plaintiff's name was omitted. On the 2nd of July, 1908, the agreement mentioned above was written and it was filed on the 3rd of July, 1908, and with it a mukhtarnamah signed with Lachman's name. Plaintiff's name was entered in this application (or agreement). Jokhu again appears to have signed for Lachman. On the same day Jokhu filed an application that the plaintiff was a co-sharer and his share should be entered in Lachman's patti. His name was then entered in all papers from which it had been omitted. After the partition lots had been drawn up the family apparently concluded that it was a mistake not to retain their *sir* plots in their own shares. Accordingly Umrao and Ramnath, the two uncles, and Jokhu filed a petition of objection on the 31st of August, 1908. This was disallowed. Thereupon Lachman and others appealed to the Commissioner and this was also disallowed. The partition was completed.

The present suit was brought by the plaintiff alleging—

(1) Fraud and dishonesty on the part of his own brothers and uncles with intent to ruin his interests.

(2) That though Lachman was nominated as a guardian *ad litem* the court did not formally appoint him.

(3) That he was unfit to ac as guardian and not entitled to the post as the minor's mother was alive.

(4) That be did not, as a matter of fact, look after the minor's interests.

[130] (5) That the Revenue Court did not grant any sanction to the agreement in regard to the mode of partition of the lands and that the said partition had been detrimental to the minor's interests.

On these allegations he asked for a declaration that the partition was unlawful and void and that defendants, first party, had no right or share in the five anna, four pie share of the family and those plots of land which had been the *sir* and *khudkasht* of plaintiffs' family and which had been allotted to them (the defendants). In the alternative he asked to be put into possession of those specific plots. The court of first instance held that the plaintiff was entitled to maintain the suit in respect only to his own share and granted a declaration that the partition was not binding on him and that the defendants, first party, were not entitled to the possession of the plots (of *sir* and *khudkasht*) in dispute belonging to the plaintiff's share. It was further declared that the decree did not affect the rights of the defendants, first party, regarding so much of the lands in dispute as appertained to the share of the defendant, second party. This decree clearly was one which, if it were to have any effect, would really upset the whole partition. It did not even make the plaintiff restore to the other party those lands which he received in lieu of his *sir* and *khudkasht* plots in dispute. On appeal the District Judge dismissed the suit *in toto*. He was of opinion that the managing members of the joint family were parties to the partition, and as there was no fraud or collusion proved all members of the family were bound by it and could not go behind it, and that the present suit was one brought at their instigation to get behind the partition and to attain the object which they failed to attain in the Revenue Court by their objections and appeal. The plaintiff appeals.

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In the beginning we have to point out—

(1) that no fraud has been established;

(2) that it has nowhere been shown that the partition has been made to the detriment of the plaintiff or that he has not received his fair share of the parent mahal;

(3) that his objection to it is directed not to a question of proprietary title but merely to the mode in which the lands have been distributed;

[131] (4) That the Revenue Court is not in any way subordinate to the Civil Court in respect to the mode of distribution of the land.

The suit must fail. Firstly section 233, clause (*k*), of the Land Revenue Act clearly states that no person shall institute any suit or other proceeding in the Civil Court with respect to the partition of mahals except as provided in sections 111 and 112 of the Act. The present suit does not fall under either of these two latter sections. Of course a person who was no party to a partition proceeding in the Revenue Court could hardly be held to be bound by such a partition, but the Civil Court, while giving him relief in such a case, could not go behind the partition and redistribute the land. It would have to take the new mahals as they were and give the plaintiff adequate relief. The plaintiff's case is that by reason of the omission of the Revenue Court to formally appoint a guardian he was really no party to the partition, and that, even if this formal defect be not fatal to the partition, his brother, Lachman, was unfit for the post and did not look after his interests and ought not to have been appointed in the presence of the plaintiff's mother. But whatever might otherwise have been the result of the Revenue Court's irregularity, there is in the present case a circumstance which is fatal to the plaintiff's case. His family was a joint family, *i. e.*, one legal entity and it was duly represented by the adult male members. The whole body of adult members was made a party to the proceeding. Their interests and the minor's interests were one and the same. There was no fraud, and nothing has been put before the Court to show that the interests of the family or the minor have in any way suffered. There has, therefore, been a partition fairly carried out between the family on one side and the other defendants on the other. The minor was duly represented either by Lachman or the managing member or members of the family. In regard to Lachman the plaintiff in his evidence stated:—"Lachman was master and did all my business after my father's death." We are therefore of opinion that, even though no guardian was formally appointed for the plaintiff in the Revenue Court, he was duly represented, and a partition fairly and honestly obtained against the managing members of the family is binding on him. We would note here that we allowed the plaintiff an [132] opportunity of taking the matter of the partition on review to the Board of Revenue, the highest court of appeal and revision on the revenue side, so that any injustice might, if it existed, be set right. The Board has rejected his application and nothing has been shown to us which goes to prove that the partition was other than just and equitable.

In the circumstances, therefore, we hold that the suit was properly dismissed. We dismiss the appeal with costs.

Appeal dismissed.

35 A. 132 (=18 I. C. 699=11 A. L. J. 104).

1912
DEC. 13.

REVISIONAL CIVIL.

35 A. 132=
18 I. C. 699=
11 A. L. J.
104.

REVISIONAL CIVIL.

Before Mr. Justice Tudball.

RALLI BROTHERS (*Applicants*) *v.* AMBIKA PRASAD (*Opposite party*).*

[13th December, 1912.]

Master and servant—Clerk engaged on a monthly salary—Relinquishment of employment without consent of master—Clerk not entitled to salary for broken portion of month in which he left his service.

Held that an office clerk engaged on a monthly salary is not entitled to any salary for the broken portion of a month in the course of which he leaves his service without the consent of his employer. *Ridgeway* v. *Hungerford Market Company* (1). *Dhumee Behara* v. *Sevenoaks* (2) and *Ramji Manor* v. *Little* (3) referred to.

ONE Ambika Prasad was a clerk in the service of Messrs. Ralli Brothers on a monthly salary of Rs. 50. He left his service in the middle of a month without the consent of his employers and thereafter sued the firm to recover his salary for the broken portion of the month in which he left. The court of Small Causes at Cawnpore gave him a decree. Messrs. Ralli Brothers thereupon applied in revision to the High Court.

Mr. *A. H. C. Hamilton*, for the applicants.

The opposite party was not represented.

TUDBALL, J :—The opposite party to this application was a clerk in the employment of Ralli Brothers on a monthly salary of Rs. 50 per month. He left his service in the middle of the month without the consent of his employers, and he then brought the suit out of which this application has arisen to recover the salary for the broken portion of the month. He gave no previous **[133]** notice of his intention to resign. The lower court has held that, as he is an office clerk and not a menial servant, the rule as to notice does not apply, and therefore he is entitled to recover the salary claimed. The question is one between master and servant. The plaintiff was engaged on a monthly salary, and he would therefore have been, in the absence of a contract to the contrary, entitled to one month's notice before dismissal. Equally his master was entitled to one month's notice before he left service. The lower court is of opinion that this rule applies only to menial servants. This opinion is by no means correct, and has probably arisen because cases of this description usually arise in regard to menial servants. The English cases on the subject are to be found in Smith's Law of Master and Servant, 5th edition, beginning at page 182. The case of *Ridgeway* v. *Hungerford Market Company* (1) is the case of a clerk of a public company whose salary was paid quarterly and who was discharged for improper conduct. The judgement in that case runs as folllows :—"*Turner* v. *Robinson*, and many other cases have shown that if a party hired for a certain time so conducts himself that he cannot give the consideration for his salary, he shall forfeit the current salary even for the time during which he has served." See also *Dhumee Behara* v. *Sevenoaks* (2) and *Ramji Manor* v. *Little* (3). The same principle applies when the servant refuses to work in the course of one of the periods

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* Civil Revision No. 112 of 1912.

(1) (1835) 3 A. and E. 171.
(2) (1836) I. L. R. 13 Cal. 80.
(3) (1873) 10 Bom. H. C. Rep. 57.

for which the salary is due. The decision of the court below is incorrect and on the findings the suit should have been dismissed. I grant the application and dismiss the suit with costs in both courts.

Application allowed.

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DEC. 13.

REVISIONAL CIVIL.

35 A. 132=18 I. C. 699=11 A. L. J. 104

35 A. 134 (=18 I. C. 697=11 A. L. J. 99).

[134] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

ATMA RAM AND OTHERS (*Plaintiffs*) *v.* UGRA SEN AND OTHERS (*Defendants*).*

[16th December, 1912]

Act No. XVI of 1908 (*Indian Registration Act*), *section* 32—*Registration*—"*Presentation*"—*Physical delivery of document by person not authorized to* "*present*" *but executant present and assenting while registration was going on.*

Where it is shown that, prior to the registration of the document by the duly authorized official, a person who is competent to present the document for registration was present before that official assenting to the registration, the requirements of the Registration Act are sufficiently complied with.

Mujib-un-nissa v. *Abdur Rahim* (1) and *Karta Kishan* v. *Har Narain* (2) referred to.

IN this case the plaintiffs' suit had been dismissed by the court of first instance upon the ground that the documents upon which it was based had not been registered in accordance with the provisions of the Indian Registration Act, 1908. The facts relating to the registration of the documents in question were these. The documents were brought to the Sub-Registrar by persons who were not duly authorized to present them for registration. But on the same date, and possibly at the same time, the mortgagor himself, who was a person entitled to present them for registration, came to the Sub-Registrar's office and admitted execution, and thereupon the documents were in fact registered. The plaintiffs appealed to the High Court.

The Hon'ble Pandit *Moti Lal Nehru*, for the appellants.

The Hon'ble Dr. *Sundar Lal*, for the respondents.

RICHARDS, C. J.:—The only question which has been argued here is whether the documents, the foundation of the present suit, were or were not duly registered. It appears that the documents were brought to the Sub-Registrar by persons who were not duly authorized to present the documents for registration in the manner prescribed by the Registration Act. It, however, also appears that on the same date, is not at the same time, the mortgagor, [135] being a person who was entitled to present the documents for registration, came to the Sub-Registrar's office and admitted execution, and that thereupon the documents were in fact registered. The question is whether or not this amounts to a good presentation within the meaning of the Registration Act. There cannot be the least doubt that the mortgagor was present as an assenting party to the documents being registered. The question involved was very fully argued before a Full Bench of this Court in a recent case. At the conclusion of the

* Second Appeal No. 1357 of 1911 from a decree of W. D. Burkitt, District Judge of Saharanpur, dated the 19th of July, 1911, confirming a decree of Muhammad Safi, Subordinate Judge of Saharanpur, dated the 29th of September, 1910.

(1) (1900) I. L. R. 23 All. 233. (2) (1912) I. L. R. 35 All. 72.

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APPELLATE CIVIL.

35 A. 134=
18 I. C. 697=
11 A. L. J.
99.

arguments, however, the case turned on another point and no decision was actually given. Practically speaking precisely the same questoin arose in *Karta Kishan* v. *Har Narain* (1), and a Bench of this Court decided on the 15th day of November, 1912, that registration under circumstances very similar to those of the present case was a good registration. In my opinion where it is shown that prior to the registration of the document by the duly authorized official, a person who was competent to present the document for registration was present before the Sub-Registrar assenting to the registration the Registration Act is sufficiently complied with. I have nothing to add to the views which I expressed in the decision to which I have referred.

TUDBALL, J.—I fully concur. It seems to me quite clear that the present case comes well within the principle which is set forth in the decision of their Lordships of the Privy Council in *Mujib-un-nissa* v. *Abdur Rahim* (2). Their Lordships therein observed :—"When the terms of section 32 are considered with due regard to the nature of registration of deeds, it is clear that the power and jurisdiction of the Registrar only come into play when he is invoked by some person having a direct relation to the deed." In the present case it is perfectly clear that, prior to the registration, the mortgagor, who was a person having a direct relation to the deed, did come forward and invoke the Registrar to exercise his power and jurisdiction, and this action was tantamount to a presentation for registration. I do not think that there is any magic in the mere physical handing over of the document.

BY THE COURT.—The order of the Court is that we allow the appeal, set aside the decrees of the two courts below and remand [136] the case to the court of first instance, through the lower appellate court, with directions to re-admit the suit under its original number in the file and proceed to hear and determine the case on its merits. Costs here and in the courts below will be costs in the cause.

Appeal decreed and cause remanded.

35 A. 136 (=18 I. C. 682=11 A. L. J. 92=14 Cr. L. J. 122).

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* RAMA AND OTHERS.*

[2nd January, 1913].

Act No. XLV of 1860 (*Indian Penal Code*), *section* 188—*Order duly promulgated by public servant—Order forbidding persons to enter railway premises except for travelling.*

Held that the public have a right to enter upon railway premises for many purposes other than travelling, and an order forbidding persons to enter a railway station except for *bona fide* purposes of travelling would be an illegal order.

In the particular instance, however, it did not appear that the order in question was issued by any authority which, supposing it to be otherwise legal would have had power to issue it.

THE facts of this case were as follows :—

An order was published at Bindhachal railway station on the East Indian Railway for bidding *pandas* to go on the railway station except for

* Criminal Reference No. 1003 of 1912.

(1) (1912) I. L. R. 35 All. 72. (2) (1900) I. L. R. 23 All. 233.

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35 A. 136=18 I. C. 682=11 A. L. J. 92=14 Cr. L. J. 122.

bona fide purposes of travelling. Certain *pandas* who were found at the station soliciting pilgrims were accordingly charged with an offence under section 188 of the Indian Penal Code for disobedience to this order. They were convicted and sentenced to certain fines.

The Sessions Judge of Mirzapur acting under section 438 of the Code of Criminal Procedure thereupon referred the case to the High Court with the recommendation that the convictions and sentences should be set aside.

Neither the accused nor the Crown were represented.

TUDBALL, J.—Certain persons have been convicted by a Magistrate of an offence under section 188, Indian Penal Code, and have been sentenced to pay certain fines. The case has been referred to this Court by the Sessions Judge with the recommendation that the [137] convictions and sentences be set aside and the fines refunded. As far as it is possible to do so from the record I gather the facts to be more or less as follows:—Some officer or other has published an order forbidding the accused, who are *pandas*, from going on the railway station at Bindhachal except for *bona fide* purposes of travelling. The record does not show by whom that order was issued and whether he had power to issue it. There is nothing to show that it was issued to the accused personally: apparently it was generally proclaimed. The record shows that the accused went on to the platform and importuned certain pilgrims. The Magistrate has therefore held them guilty under section 188, Indian Penal Code. That section runs as follows:—

"Whoever knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both."

There is nothing on the record to show that any order was promulgated by a public servant lawfully empowered to promulgate such order. It is true that the case was tried summarily, and in a summary trial the evidence need not be recorded, but the record shows that no evidence whatsoever was taken to prove the order that was promulgated or to prove that the person who issued the order was authorized to issue it. Moreover, if the order be, as described in the opening clause of the judgment, forbidding persons to enter railway quarters except for *bona fide* purposes of travelling, such an order is far from being legal. The public have a right to go to the railway premises for many other purposes than travelling and orders forbidding persons to enter railway premises except for travelling purposes could not legally be issued. It would indeed defeat many other purposes for which railways are intended. For this reason the order must be set aside.

There are other grounds, as pointed out by the learned Sessions Judge, on which it is open to this Court to set aside these convictions, but I do not think it necessary to discuss them. It is incumbent on the prosecution to prove the necessary ingredients which go to constitute an offence. Unless the proof is before the court it cannot be said that the offence has been established. [138] I therefore set aside the convictions and sentences and direct that the fines if paid be refunded.

Convictions set aside.

35 A. 138 (=18 I. C. 246=11 A. L. J. 101).

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JAN. 3.

APPELLATE CIVIL.

35 A. 138=
18 I. C. 246=
11 A. L. J.
101.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

NARAIN DEI (*Plaintiff*) *v.* DURGA DEI AND ANOTHER (*Defendants.*)*

[3rd January, 1913.]

Civil Procedure Code (1908), *section* 66—*Execution of decree*—Benami *purchase*—*Claim against certified purchaser, but not by representative of the real purchaser.*

The widow of one Bhola Nath purchased a house at a civil court auction sale in the name of her son-in-law Baldeo and incorporated it into another house left by her husband who had died sonless. On her death one of her daughters claimed the house as an heir of her deceased father. The son-in-law in whose name the house was purchased raised the plea that he was the certified auction purchaser and the suit was barred by section 66 of the Code of Civil Procedure. *Held* that as the plaintiff did not claim through the widow, but through the widow's husband, her father, the suit did not come within the purview of section 66 of the Code. *Ram Narain* v. *Mohanian* (1) distinguished.

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case are fully set out in the judgment under appeal, which was as follows :—

"In order to understand this appeal, it will be better in the beginning to set out, that one Bhola Nath had a wife, named Musammat Sunder Dei. Of these two, were born four ladies, Musammat Narain Dei, Musammat Durga Dei, Musammat Uttam and Musammat Piari. Bhola Nath died leaving his widow, and these four ladies him surviving. Musammat Sunder Dei is now dead, and the dispute relates to property which is said to be the property of Musammat Sundar Dei. It will be well to note also, that the lady, Mussammat Durga Dei, married one Baldeo. In this appeal the parties are Musammat Narain Dei, who was the plaintiff in the court of first instance, Musammat Durga Dei and her husband Baldeo. The property with which this appeal is concerned, is a house situate in muhalla Mandi Said Khan in the city of Agra. This house was put up to sale by the Civil Court at Agra. It was purchased—so the sale certificate sets out—by Baldeo The sale certificate shows that it was sold subject to a lien of Rs. 119-14-0, arising out of a deed, dated the 3rd June, 1891, of which one Ganga Prasad was the holder. Musammat Narain Dei came into court and asked for possession of this property as being part of the property left by Musammat Sundar Dei. After setting out the pedigree, she alleges that Mussammat Sundar Dei, her mother, got possession of all the property left by Bhola Nath, and that in her life-time she purchased the house in dispute, adjoining the house left by [139] Bhola Nath, and included it in one house. The purchase was made, she says, by Musammat Sundar Dei, out of the money which she had inherited, but she adds that the name of Baldeo was entered fictitiously. According to her Musammat Sundar Dei always remained in possession of the property. She puts the cause of action as arising on the 10th of March, 1907. In the written statement the defendants distinctly denied that the house in dispute was purchased by Musammat Sundar Dei; they deny that she was the owner of it, they specifically deny that the property was purchased fictitiously in the name of Baldeo, and that Musammat Sundar Dei was ever in adverse possession of it. The court of first instance holding that Musammat Sundar Dei was in the receipt and enjoyment of the rent of the house in dispute up to the date of her death, and that Baldeo had no right after her death—the date of wrongful possession as against the legal heirs of Musammat Sundar Dei—decreed the plaintiff's claim for possession of a one-third share in the house in dispute, and directed that it should be partitioned. In appeal, the lower appellate Court held that section 66 of the Code of Civil Procedure of 1908 barred this suit. It held that Baldeo was the purchaser certified by the court, and in consequence decreed the appeal which had been brought by Baldeo and Durga Dei and modified the decree of the court of first instance, directing that the suit for possession by partition of the house in Mandi Said Khan be dismissed together with mesne profits for the same. Musammat Narain Dei

* Appeal No. 87 of 1912 under section 10 of the Letters Patent.

(1) (1903) L. R. 28 All. 82.

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18 I. C. 246=
11 A. L. J. 101.

comes here in appeal and contends, first that section 66 of Act V of 1908 has no application; secondly, that the plea was for the first time raised in appeal, and the lower appellate Court should not have entertained it. There is a third plea by which it is contended that the whole of the house in muhalla Mandi Said Khan was not purchased by a sale of the Civil Court, that only one-third of it was so purchased and the remaining two-thirds were the result of a private purchase. The fourth plea raised is one regarding the mesne profits of the house.

"To take plea No. 2 first, the question raised is a question of law. The shadow of it had certainly been cast in the pleadings and I think, the lower appellate Court was fully justified in considering the plea. There remains the question how far section 66 of the Civil Procedure Code of 1908, is or is not, a bar to the suit as brought. The contention of the appellant, as I understand it, is that this is a suit by an heir claiming inheritance to the property left by Musammat Sundar Dei, that section 66—if it applies at all—allows a suit of this kind to be brought under the second clause of the same section. The contention was that when Musammat Sundar Dei purchased the property in the name of Bhola Nath, the appellant, as her reversioner, could have brought a suit to challenge this act, and she is within her rights in so doing after Musammat Sundar Dei's death. The plea raised is a very ingenious one, but it does not seem to me to be strong enough to take it out of the clear words of section 66. The first clause of section 66 is practically the same as the old section 317, clause (1). That clause has been the subject of several rulings by this Court, one of them being a Full Bench ruling. The words used in section 317 were the subject of careful consideration by five Judges of this Court, and they arrived unanimously at the conclusion that this section was intended to preclude the institution of a suit against the certified purchaser, [1140] by the beneficial owner or the successor in title of the beneficial owner. In the present case, the beneficial owner is said to have been Musammat Sundar Dei. The appellant, if she has any standing, is a successor in title of the beneficial owner, and unless the Code of Civil Procedure of 1908 has introduced any change, the ruling of this court holds that she, the appellant, is precluded from instituting a suit against Baldeo. But it is contended that the second clause of section 66 enables the suit to be brought. There is no doubt that Act V of 1908 has introduced new words which did not exist in the second clause of old section 317. So far, I am with the learned counsel for the appellant, but I confess considerable difficulty in following him, as he applies the new words to the present case. Is this a case in which a third person is claiming to proceed against property sold ostensively to a certified purchaser for a *benamidar* on the ground that he is liable to satisfy a claim of the third person against the real owner? Take it that the real owner was Musammat Sundar Dei. What claim has Musammat Narain Dei against Musammat Sundar Dei which gives her a right to proceed against this property though ostensively sold to Baldeo? It is to meet this, that her position as reversioner is put forward. It seems to me that it would require a great deal of twisting to make these words fit in with the claim as now brought. My attention was directed to the case of *Achhaibar Dube* v. *Tapsi Dube* (1). In that case, the finding of this Court was that the purchase was not a purchase made secretly by one person for another, the ostensible purchaser having no interest in the purchase, and the real purchaser wishing for some reason that his name should not appear. In other words, the finding of the Court was, that it was not *benami* purchase. In the present case, however, the contention, right through, of the appellant—as the lower appellate Court points out—has been, that Baldeo was a *benami* purchaser for Musammat Sundar Dei and with her knowledge. An attempt was made to bring the present case within the purview of two rulings of the Madras High Court—*Monappa* v. *Surappa* (2) and *Sankunni Nayar* v. *Narayanan Nambudri* (3), and the contention was that section 66 applies not to purchases made by an agent and does not apply when possession has been transferred. Neither of these views have, at any time, so far as I know, found favour with this Court.

"There remains the third plea, *viz.*, to the effect that one-third of the house in dispute was the purchase made at the auction held by the Civil Court and two-thirds were the subject of a private purchase. The purchase is one of a nature similar to that which is made, times out of number, in Civil Court sales. I have been referred to no authority which held that under the circumstances of this kind, namely, where property is sold subject to a lien, the purchaser purchased one fraction at the Civil Court sale and the remaining fraction when he paid off the lien. What the purchaser purchased is the whole of the property subject to any demands that may be made by the

(1) (1907) I. L. R. 29 All. 557.
(2) (1886) I. L. R. 11 Mad. 234.
(3) (1893) I. L. R. 17 Mad. 282.

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lien advertised at the time of the auction. The appeal fails and is dismissed with costs."

Pandit *Shiam Krishna Dar*, for the appellant.

Dr. *Tej Bahadur Sapru*, for the respondents.

[141] RICHARDS, C.J., and BANERJI, J.:—The facts out of which this Letters Patent appeal arises are very clearly stated in the judgment of the learned Judge of this Court. The judgment is reported in 10 A. L. J. R. 97. The suit is to recover, amongst other things, a share in a house by partition and also for mesne profits. The court of first instance decided in favour of the plaintiff. On first appeal the decision of the court of first instance was reversed so far as the property now in dispute was concerned, on the ground that the claim in respect thereof was barred by the provisions of section 66 of the Code of Civil Procedure. This decision was in due course affirmed by a learned Judge of this Court, and against his decision the present Letters Patent appeal has been preferred.

When the case was before us on a previous occasion we determined that we would consider the evidence in the case without remanding the case and so avoid putting the parties to the expense and delay of referring issues. We granted time to the parties in order that the evidence might be looked into. As a result we are able to consider the present case upon a state of facts which have to be admitted. The house in question was purchased by one Musammat Sundar Dei, the widow of one Bhola Nath. This house was subsequently incorporated into another one which admittedly belonged to Bhola Nath and formed part of his estate. It is quite clear therefore that it was the intention of his widow that this house should be part of her husband's estate and should not remain her separate property. Dr. *Tej Bahadur* has further to admit that he cannot contend on the evidence that the house was not in fact purchased on behalf of the widow, though the purchase was made in the name of Baldeo. We are also satisfied upon the evidence that Musammat Sundar Dei remained in possession of the house up to the time of her death, and that during her life-time Baldeo never pretended that the property was his, or that the auction purchase had been made in reality for his benefit.

The only question therefore for decision in the case is a purely legal one, namely, whether under the circumstances of the present case section 66 of the Code of Civil Procedure prevents the present suit being brought. It is no doubt a suit against a certified auction purchaser, and so far it is within the words of section 66. However, it is contended by the appellant that the plaintiff does not [142] claim through Musammat Sundar Dei, but through her own father Bhola Nath; that consequently the suit is not a suit brought on the ground that the purchase was made on behalf of the plaintiff or on behalf of any one through whom she claims, and that therefore the suit is not barred by the provisions of section 66. In our opinion this plea is well founded. The learned Judge of this Court refers in his judgment to the Full Bench case of *Ram Narain* v. *Mohanian* (1). In that case one Ram Sahai had represented himself to be the owner of certain property. It turned out that he had no title to part of the property at the date of the mortgage. Subsequently, however, that part of the property to which he had no title was put up to sale in execution of a simple money decree against the real owner and purchased in the name of Musammat Mohanian, the wife of Ram Sahai. The plaintiffs in the suit, who were the mortgagees of Ram Sahai,

(1) (1903) I. L. D. 26 All. 82.

claimed that the purchase of Mohanian was *benami* for Ram Sahai and that under the provisions of the Transfer of Property Act any estate which Ram Sahai subsequently acquired in the property which purported to mortgage became subject to the mortgage. It was held that the plaintiffs were not entitled to maintain the suit having regard to the analogous section 317 of the Code of Civil Procedure of 1882. Referring to the case the learned Judge of this Court, says :—" The words used in section 317 were the subject of careful consideration by five judges of this Court, and they arrived unanimously at the conclusion that this section was intended to preclude the institution of a suit against the certified purchaser by the beneficial owner or the successor in title of the beneficial owner". We do not think that the decision in the Full Bench case justified these remarks of the learned Judge of this Court. True it is that the learned Chief Justice says in his judgment (at page 87) :—" It appears to me clear that the section was intended to preclude the institution of a suit against a certified purchaser by the beneficial owner or the successors in title of the beneficial owner." It is quite clear when the learned Chief Justice uses the words "successors in title" he was referring to a claim which was being made by a person who derived title from the alleged beneficial owner. It is quite clear that the plaintiff mortgagee was claiming directly through the [143] mortgagor, whose wife, it was alleged, had purchased the property *benami* for him. The judgment of two of the members of the Court in the most express language decided the case upon the ground that the plaintiff was claiming through Ram Sahai, and that inasmuch as Ram Sahai could not have maintained the suit against Mohanian, the persons who claimed through him had no better right to do so. We think that under the circumstances of the present case the plaintiff's claim is as heir of her father Bhola Nath, that she is not claiming in any way through her mother Musammat Sundar Dei and that therefore her suit does not come within the provisions of section 66. The facts being as already stated, she, in our opinion, was entitled to recover possession by partition of the property in dispute and was also entitled to mesne profits as held by the court of first instance.

We therefore allow the appeal, set aside the decree of this Court and also of the lower appellate court and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

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35 A. 143 (=18 I. C. 885=11 A. L. J. 117=14 Cr. L. J. 133).

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

CHHEDI v. MUHAMMAD ALI.*

[4th January, 1913.]

Act XIII of 1859—*(Workman's Breach of Contract Act)—Magistrate not competent to take proceedings under, unless moved by the employer.*

The provisions of Act XIII of 1859 can only be applied at the instance of the employer. A magistrate has no jurisdiction *suo motu* to pass orders under that Act as an alternative to taking action under the Indian Penal Code.

THE facts of this case were as follows :—

One Muhammad Ali made a complaint against Chhedi of cheating. Process was issued, but before the witnesses for the prosecution had been

* Criminal Revision No. 942 of 1912.

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35 A. 143=18 I. C. 885=11 A. L. J. 117 =14 Cr. L. J. 133.

cross-examined or any defence witnesses had been called or a charge framed, the Magistrate passed an order, purporting to be under Act No. XIII of 1859, to the effect that Chhedi was either at once to pay Rs. 60 which had been advanced to him by Muhammad Ali or to give security for Rs. 60 with one surety that he would make two pairs of boots every week for Muhammad Ali; in default he was to undergo two months' rigorous [144] imprisonment. The Sessions Judge of Cawnpore referred the case to the High Court recommending that the order should be set aside.

Mr. *A. P. Dube*, for the applicant.

Munshi *Satya Narain* and Maulvi *Kamaluddin Ahmad Jafari*, for the opposite party.

TUDBALL, J.—In this case one Muhammad Ali made a complaint against the present applicant, Chhedi, charging him with the offence of cheating, under section 420 of the Indian Penal Code. He had prior to that preferred a complaint under Act XIII of 1859, but had withdrawn that complaint and preferred a complaint of cheating. The Magistrate issued process to Chhedi; a date was fixed; evidence of the prosecution witnesses was taken, and then a further date was fixed for their cross-examination. There were a few postponements and the cross-examination did not take place. Then, suddenly, without examining the accused or framing any charge against him or taking any defence, and relying on the statements in chief of the prosecution witnesses, the Magistrate passed an order purporting to be under Act XIII of 1859, to the effect that Chhedi was either at once to repay the advance of Rs. 60 or give security for Rs. 60 with one surety that he would make two pairs of boots every week for Muhammad Ali: in default of carrying out one of the two orders already mentioned, he was to undergo rigorous imprisonment for two months. Chhedi was sent to jail. The case has been referred to this Court by the learned Sessions Judge with the recommendation that the order be set aside. Further comment is unnecessary. The Magistrate has acted quite illegally. There was no case under Act XIII of 1859 before the Magistrate. That Act can only be put in motion by the employer. I set aside the order of the Magistrate and direct that the complaint of Muhammad Ali be heard *de novo* by some other Magistrate to whom the District Magistrate may think fit to transfer it and not by the Magistrate whose order has just been set aside.

Order set aside.

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35 A. 145 (=11 A. L. J. 115=18 I. C. 728).

[145] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

PRAG NARAIN AND OTHERS (*Plaintiffs*) *v.* KADIR BAKHSH AND OTHERS (*Defendants*).*

[4th Janaruy, 1913.]

Act No. IV of 1882 (*Transfer of Property Act*), *section* 111, *clause* (*g*)—*Landlord and tenant—Denial of title—Suit for ejectment of tenant—Landlord's intention to take advantage of denial of title to be expressed before suit.*

The denial of his landlord's title by a tenant, in order to work a forfeiture under section 111 (*g*) of the Transfer of Property Act, 1882, must be an unequivocal and unambiguous denial: mere non-payment of rent or even the mortgaging of the premises as belonging to the tenant does not necessarily constitute

* Appeal No. 72 of 1912 under section 10 of the Letters Patent.

such a denial. A landlord wishing to take advantage of his tenant's denial of title to determine the lease must do some act showing his intention to do so before he can file a suit for ejectment.

[Fol. 24 I. C. 624; Ref. 41 Mad. 629=45 I. C. 743.]

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APPELLATE CIVIL.

35 A. 145=11 A. L. J. 116 =18 I. C. 728.

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case are stated in the judgment under appeal, which was as follows:—

"These appeals arise out of a suit brought by the respondent for the ejectment of the appellants from a plot of land in the city of Agra. The case stated in the plaint was that the six defendants were tenants of the land, paying three annas a month as rent, that for five years preceding the suit the defendants had paid no rent, though they had been repeatedly required to do so, and that they had forfeited their lease by non-payment of the rent. There were other allegations regarding constructions on the land with which we are not now concerned. The defendants filed their written statements in June, 1910. In September, 1910, the plaintiffs applied to the court for permission to amend their plaint by inserting in it an allegation that two of the defendants had denied the plaintiffs' title to the land. The plaint was amended and the defendants were given an opportunity of filing a fresh written statement. They then denied that they had forfeited their lease either by non-payment of rent or by denying the plaintiffs' title. They pleaded that they were perpetual lessees of the land, and also that the suit was not maintainable as the plaintiffs had not given them formal notice to quit.

"The Munsif found that the plaintiffs' title in respect of half of the land had been denied by the defendant, Khuda Bakhsh, and he gave the plaintiffs a decree for the ejectment of that defendant and for possession of half of the land. On appeal the Subordinate Judge gave the plaintiffs a decree for possession of the whole of the land, holding that they had forfeited their lease both by non-payment of rent and also by denial of plaintiffs' title.

"The first question discussed in this Court was, whether the defendants held as perpetual lessees or as tenants from month to month. In the view which I take of the case it is unnecessary to decide this question.

"The next question is, whether the defendants have forfeited their lease by non-payment of rent. It is neither alleged nor proved that it was a [146] condition of the lease that it should be forfeited in case of non-payment of rent. This ground fails.

"The next question is whether the defendants forfeited their lease by reason of their denial of the plaintiffs' title. One of the defendants, Khuda Bakhsh, mortgaged part of a house, expressly including the land. Another defendant, Kadir Bakhsh, mortgaged half the house on the land but did not expressly include the land in the mortgage. In the former case it seems that there was a denial of the plaintiffs' title to the land. In the latter it cannot be said that there was a denial of their title. It has been held that denial of a landlord's title by one of several lessees does not cause a forfeiture of the lease. But I need not discuss this question further, for in my opinion the plaintiffs' suit must be dismissed even if it be proved that the defendants denied the plaintiffs' title. Section 111 of the Transfer of Property Act, which admittedly applies to this case, provides that a lease of immoveable property determines in various ways, amongst others, by forfeiture. Clause (*g*) of the section runs as follows:—'By forfeiture, that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter, or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person, or by claiming title in himself; and in either case the lessor or his transferee does some act showing his intention to determine the lease."

"It is contended on behalf of the defendants that it has neither been alleged nor proved that the lessors did any act showing their intention to determine the lease. On behalf of the plaintiffs it is contended that the institution of the suit was sufficient to show their intention to determine the lease within the meaning of the clause. In the case of *Anandamoyee* v. *Lakhi Chandra Mitra* (1) it was held by Ghose and Pargiter, JJ., that in a suit of this kind it must be shown that the plaintiff declared his intention to determine the lease of the defendant and that such intention was declared by some act or otherwise before the institution of the suit. In my opinion that decision was correct. It is contended by Dr. *Tej Bahadur* that section 112 of the Transfer of Property Act shows that a forfeiture may be completed by the

(1) (1906) I. L. R. 33 Cal. 339.

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institution of a suit, but it appears to me that section 112 does not show this. The opening words of the section are 'a forfeiture under section 111, clause (*g*).' The word 'forfeiture' must mean a complete forfeiture and not merely that a tenant has incurred liability to have his lease forfeited. The closing words of clause (*g*) of section 111 seem to add something to the English law on the subject and were possibly inserted in order that there might be no doubt that an alleged forfeiture must be complete before a suit is brought. The construction adopted by the Calcutta High Court is in accordance with the general rule that a cause of action must be complete at the date of the institution of a suit, and cannot be completed either by the plaint or by the written statement or any other pleading in the suit. I hold that the institution of the suit was not an act showing an intention to determine the lease within the meaning of section 111, clause (*g*).

"I was asked by the learned advocate for the plaintiffs to follow the course taken by the Calcutta High Court in the case cited, namely to remit an issue to the court below for a finding as to whether an intention to determine the [147] tenancy was declared by the plaintiffs before the institution of the suit. In the present case, I think, I ought not to do so. As already stated, the allegation that a forfeiture had occurred by denial of the landlord's title was not in the plaint when it was filed, but was added several months afterwards. The petition begins with the words '*Daryaft karne se malum hua.*' If these words mean anything, they mean that the plaintiffs have come to know of the denial after the institution of the suit. If the plaintiffs were not aware of any act having been committed by the tenants, which rendered the lease liable to be forfeited, they could not have indicated an intention to determine the lease on that account. To frame and remit an issue would, under the circumstances, be an encouragement to the production of false evidence. I allow the appeal, set aside the decree of the courts below and dismiss the plaintiffs' suit with costs in all three courts. The plaintiffs are at liberty to withdraw the sum deposited in the court below on account of rent. Mr *Ghulam Mujtaba* states on behalf of his clients that they have no objection to this."

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellants.

The denial of the landlord's title took place when the tenant mortgaged the house with the land, and the tenant was, therefore, liable to ejectment. The deed hypothecated the land which the mortgagor said belonged to him, along with the house. The point for decision was whether the filing of the suit was sufficient intimation for determining the lease, within the meaning of section 111 (*g*) of the Transfer of Property Act. It was submitted that it was. Section 111, clause (*g*), was to be read with section 112. It was not necessary to do any act other than that of filing a suit to determine the lease. There was a denial of title, and there was nothing to show that there was any act of waiver on the part of the landlord.

Maulvi *Ghulam Mujtaba*, for the respondents, was not called on to reply.

RICHARD, C. J. and BANERJI, J.:—This appeal arises out of a suit in which the plaintiffs sought to recover certain household property situate in the city of Agra. The plaintiffs based their claim on an alleged forfeiture. The acts which the plaintiffs contended constituted a forfeiture were, first, non-payment of rent and secondly, a denial of the plaintiffs' title. So far as non-payment of rent is concerned, the court below has held, and we think rightly, that mere non-payment of rent is not, in itself, sufficient to work a forfeiture of a tenant's interest. The other act was the making of two mortgages. In one of these mortgages the house without the land is mortgaged. In the other mortgage the house as well [148] as the land is mortgaged. The mortgagor states in the mortgage, that he mortgages the house together with the land, which belong to him, without the participation of any other sharers. No further evidence of acts by the lessees denying the plaintiffs' title has been given, nor has it been shown that the lessors, prior to the institution of the suit, did any

act showing their intention to determine the tenancy as the result of the alleged denial of their title by the tenants. It may well be doubted whether the mere making of the mortgages, in more or less ambiguous terms, amounted in fact to a denial of the plaintiffs' title at all. They were acts which might very well have been explained by the tenants, had they been allowed an opportunity of doing so. The denial in our opinion ought to be an unequivocal and unambiguous denial of the plaintiffs' title. The learned Judge of this Court, however, accepted the contention that the making of the mortgage, in which the land as well as the house was mortgaged, did amount to a denial of the plaintiffs' title. But he held that the plaintiffs had no right to institute the present suit until they had complied with the provisions of section 111 of the Transfer of Property Act, which provides that where the lessee has denied his landlord's title the lessor must do some act showing his intention to determine the lease. It was contended at the first hearing in this Court, as also in this present Letters Patent appeal, that the institution of the suit was sufficient compliance with the section. In our opinion the learned Judge of this court was right in holding that the institution of the suit was not a sufficient compliance. In our judgment the act showing the intention to determine the lease must have been done before the suit was instituted. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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35 A. 145=11 A. L. J. 115 =18 I. C. 728.

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35 A. 149 (=18 I. C. 698=11 A. L. J. 106).

[149] APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

BASANT LAL (*Plaintiffs*) *v.* CHHIDAMMI LAL AND ANOTHER (*Defendants*).*

[7th January, 1913.]

Act No. IX of 1908 (*Indian Limitation Act*), *schedule I, articles* 91 *and* 120—*Limitation—Suit for declaration that nominal lessee is not the beneficial lessee but merely* benamidar *for the plaintiff.*

Held that a suit for a declaration that the defendant, whose name appeared in a certain lease as lessee, had no interest under the lease and that the person really interested in the lease was the plaintiff, was governed as to limitation by article 120 and not by article 91 of the first schedule to the Indian Limitation Act, 1908, the cause of action accruing to the plaintiff when his position as a lessee was challenged.

THIS was a suit asking for a declaration that the first defendant whose name appeared as lessee in a certain lease, had no interest under the lease and that the person really interested in the lease was the plaintiff, for whom the first defendant acted as benamidar. The court of first instance dismissed the suit as barred by limitation, applying article 91 of the first schedule to the Indian Limitation Act, 1908. The plaintiff appealed to the High Court.

Munshi *Haribans Sahai*, for the appellant.

Mr. *Ibn Ahmad*, for the respondents.

GRIFFIN and CHAMIER, JJ.:—The suit of the appellant has been dismissed by the court below on the ground that it is barred by article 91 of the first schedule to the Limitation Act. The view taken by the

* First Appeal No. 288 of 1911, from a decree of Pitambar Joshi, Second Additional Judge of Moradabad, dated the 24th of May, 1911.

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35 A. 149=18 I. C. 698=11 A. L. J. 106.

Subordinate Judge is that the suit is one to cancel or set aside an instrument and that time began to run against the appellant more than three years before the suit was brought. On examining the plaint we find that the suit is not one to cancel or set aside an instrument. The appellant has asked for a declaration in effect that the first defendant whose name appears as lessee in a certain lease has no interest under the lease and that the person really interested under the lease is the appellant for whom the first defendant acted as benamidar. It seems to us that the suit is governed by article 120 and that the cause of action accrued to the appellant when his position as a lessee was challenged by the first defendant. We allow this appeal, set aside the decree of the court below and remand the case to that court to be disposed of according to law. Costs in this Court will be costs in the cause.

Appeal decreed and cause remanded.

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35 A. 150 (=18 I. C. 251=11 A. L. J. 107).

[150] APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

SHAMI NATH SAHI AND ANOTHER (*Defendants*) *v.* LALJI CHAUBE AND ANOTHER (*Plaintiffs*).*

[8th January, 1913.]

Act No. IX of 1875 (*Indian Majority Act*), *section* 3—*Guardian and minor—Effect of appointment of Hindu widow as guardian of her minor sons—Sale of minor's property.*

A Hindu died leaving a widow and two minor sons. The widow was appointed in 1890 guardian of the two sons, and in 1891 obtained sanction from the District Judge for the sale of half of the property of the minors. In 1906, the widow and the elder son, who had then attained majority, sold part of the property of the sons amounting to somewhat less than half. Within three years of his coming of age the younger son sued for a declaration that the sale of 1906, and mortgage executed in 1902 were not binding on his interest in the property purporting to be dealt with thereby.

Held (1) that the appointment of the mother as guardian had the effect of prolonging the minority of both sons until they reached the age of twenty-one years; and (2) that the sanction of the Judge given in 1891 could not validate a sale which was not made until 1906. *Gharib-ullah* v. *Khalak Singh* (1) distinguished.

[Ref. 81 I. C. 680=38 C. L. J. 218.]

THE facts of this case were as follows:—

One Udit Narain Chaube died several years ago leaving a widow, Musammat Rukmina, and two sons, Lalji Chaube and Gopal Chaube, respondents to this appeal. Both sons were minors when their father died. Mutation of names seems to have been effected in favour of the widow as well as the two sons. But it is common ground that the two sons only succeeded to the property with which we are now concerned, namely, a five anna four pie share in a village called Koelaswa. In September, 1890, the widow was appointed by the court to be the guardian of her two sons, and in the following year she obtained from the District Judge permission to sell half the share in the village. No action seems to have been taken on

* First Appeal No. 371 of 1911 from a decree of Jagat Narain, Subordinate Judge of Gorakhpur, dated the 5th of August, 1911.

(1) (1903) I. L. R. 25 All. 407.

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that permission. On the 10th of February, 1906, the widow and the elder son, Gopal, who had attained majority, sold a two anna, 3 pie, 13½ chitaks share to the appellants for a stated consideration of Rs. 5,774. The younger son, Lalji, alleging that he came of age less than three years before the institution of the suit, sued for a declaration that the sale deed of the 10th of February, 1906, and a mortgage, dated the 1st December, 1902, were not binding on him, and prayed that they may be cancelled and that he might be put [151] in possession of the share which was sold. The court below decreed the claim so far as it relates to the plaintiff's own share, that is, as to half of the property covered by the deed of sale. The purchasers appealed to the High Court.

Mr. *D. R. Sawhny*, for the appellants.

Munshi *Kalindi Prasad* and Munshi *Durga Charan Singh*, for the respondents.

GRIFFIN and CHAMIER, JJ.:—Udit Narain Chaube died several years ago leaving a widow, Musammat Rukmina, and two sons, Lalji Chaube and Gopal Chaube, respondents to this appeal. Both sons were minors when their father died. Mutation of names seems to have been effected in favour of the widow as well as the two sons. But it is common ground that the two sons only succeeded to the property with which we are now concerned, namely, five annas four pies share in a village called Koelaswa. In September, 1890, the widow was appointed by the court to be the guardian of her two sons, and in the following year she obtained from the District Judge permission to sell half the share in the village, No action seems to have been taken on that permission. On the 10th February, 1906, the widow and the elder son, Gopal, who had attained majority, sold a two anna, 3 pie, 13½ chitaks share to the appellants for a stated consideration of Rs. 5,774. The younger son, Lalji, who alleges that he came of age less than three years before this suit was brought, has sued for a declaration that the sale deed of the 10th of February, 1906, and a mortgage, dated the 1st December, 1902, are not binding on him and he prays that they may be cancelled and that he may be put in possession of the share which was sold. The court below has decreed the claim so far as it relates to the plaintiff's own share, that is, as to half of the property covered by the deed of sale. The purchasers have appealed. The first point taken in appeal is that the suit is barred by limitation for two reasons, namely, that the plaintiff attained majority when he completed his eighteenth year, and, secondly, that, even if the plaintiff attained his majority when he completed his twenty-first year, the present suit was not instituted within three years of the date on which he attained his majority. In support of the first argument we are referred to the [152] decision of the Privy Council in *Gharib-ullah* v. *Khalak Singh* (1). In that case, one Chet Singh died leaving three sons, two of whom were minors, and his widow was appointed by the Court to be the guardian of the persons and property of the two minors. Their Lordships held that the interest of a member of a joint family was not individual property at all and that therefore the widow of Chet Singh, though appointed guardian of the minors by the court, had nothing to do with the family property and had no right to join with the eldest son in making a transfer of it. Their Lordships expressly refrained from deciding the question whether the appointment of the widow as guardian of the two minors would have the effect of prolonging their minority. In the present

(1) (1903) I. L. R. 25 All. 407.

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case when Musammat Rukmina was appointed guardian of her sons, both of them were minors. The appointment was therefore not open to the objection considered by their Lordships of the Privy Council, and we must hold that under section 3 of the Indian Majority Act the sons did not attain majority until they completed their twenty-first year. The result is that the plaintiff Lalji must be held to have attained his majority when he completed his twenty-first year. On the evidence the court below has held that the present suit was instituted within three years of the date on which the plaintiff completed his twenty-first year. We have not been asked to review that evidence. The Subordinate Judge seems to have given good reason for the conclusion at which he has arrived, and we, therefore, agree with him in holding that the suit is not barred by limitation.

The second point taken by the appellants is that the sale to them was made with the sanction of the District Judge. The so called sanction was obtained in September, 1891. The sale deed in question was executed in February, 1906, about fourteen and a half years afterwards. The sanction is referred to in the sale deed as if it authorized the transfer of the property. But it is quite clear that the District Judge in 1891 did not intend to sanction the transfer of the minor's property fifteen years later when the circumstances of the family must have altered considerably. In our opinion the transfer cannot be supported by the sanction given in [153] 1891. We would observe also that this point was not definitely taken in the memorandum of appeal before us.

There remains the question whether the transfer is supported by legal necessity. We were referred to some cases in which the question was considered whether transfers made by a father were binding on his sons. Those cases have no bearing on the present case. If the transfer is to be held valid it must be on the ground that it was made for legal necessity and it was not enough for the appellants to show that part of the consideration was devoted to the discharge of pre-existing debts. Of the stated consideration of Rs. 5,774, a sum of Rs. 3,319-8-0 was left in the hands of appellants for the discharge of a mortgage held by one Doman Bhagat. The plaintiff concedes that that mortgage is binding on him. But it is not suggested that it was necessary to sell the property merely to discharge that mortgage. As a matter of fact the appellants have not yet discharged that mortgage. The remainder of the consideration is made up of several items, each of which was considered separately by the court below. We have not been taken through the evidence regarding these items. But it appears from the judgment of the Subordinate Judge that all that was attempted to be proved was that the majority of the various items were previously existing debts. There is no evidence that these debts were incurred for necessity or for the benefit of the family, and there is no evidence that the appellants made any inquiry regarding them or that they were induced to believe and did believe that the debts were incurred for legal necessity. One of the appellants was examined as a witness, and he does not even suggest that he made any inquiry. The result is that the appellants have failed to prove that there was any necessity for the sale of the property. There being no cross appeal by the plaintiff in this case, we are relieved from the necessity of considering whether the sale should have been set aside in its entirety. The decree, so far as it goes, appears to be correct. The appeal fails, and is dismissed with costs.

Appeal dismissed.

35 A. 154 (=11 A. L. J. 111=14 Cr. L. J. 119=18 I. C. 679).

[154] APPELLATE CRIMINAL

Before Mr. Justice Tudball.

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APPELLATE CRIMINAL.

35 A. 154=11 A. L. J. 111 =14 Cr. L. J. 119=18 I. C. 679.

EMPEROR v. TULSI RAM AND OTHERS.*

[8th January, 1913.]

Criminal Procedure Code, sections 35 *and* 408—*Appeal*—"*Aggregate sentences*"—*Concurrent sentences not aggregate.*

Held that the term "aggregate sentences" as used in sub section (3) of section 35 of the Code of Criminal Procedure applies only to consecutive and not to concurrent sentences. Where therefore an Assistant Sessions Judge passes concurrent sentences and the whole term to be served by the convict does not exceed four years, the appeal under section 408 of the Code does not lie to the High Court but to the Sessions Judge. *Sher Muhammad* v. *Emperor of India* (1), *Emperor* v. *Tulshidas Lakshman* (2) and *Ragina* v. *Gulam Abas* (3) approved and followed. *Abdul Khalek* v. *King-Emperor* (4) dissented from.

[Fol. 3 Pat. L. J. 188=43 I. C. 250; Ref. 63 I. C. 65=25 C. W. N. 613=23 Cr. L. J. 225.]

THE facts of this case were as follows :—

Tulsi Ram, Chotey Lal and others were convicted by the Assistant Sessions Judge of Aligarh, some of them of offences under sections 304 and 147 and others of offences under sections 325 and 147 of the Indian Penal Code. The persons named above were each sentenced to four years' rigorous imprisonment under section 304, and one year's rigorous imprisonment under section 147, the two sentences to run concurrently. They filed appeals in the High Court, and at the hearing a preliminary objection was raised that, having regard to sections 35 and 408 of the Code of Criminal Procedure the appeals lay to the Sessions Judge and not to the High Court.

Mr. *C. Dillon*, and Babu *Satya Chandra Mukerji*, for the appellants.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

TUDBALL, J:—The appellants in this case were convicted by the Assistant Sessions Judge of Aligarh, some of them of offences under sections 304 and 147 and some of them under sections 325 and 147 of the Indian Penal Code. Of these, two persons, Tulsi Ram and Chotey Lal, were each sentenced to four years' rigorous imprisonment under section 304 and one year's rigorous imprisonment under section 147, the two sentences to run concurrently. **[155]** These two have filed their appeals here, and the question arises whether these appeals have been rightly filed in this Court or whether they lay to the court of the Sessions Judge. Section 408 says that when in any case an Assistant Sessions Judge passes any sentence of imprisonment for a term exceeding four years, the appeal shall lie to the High Court. This is in clause (*b*) of the proviso; otherwise under the opening clause of the section an appeal would lie to the Court of Session. It has been urged that under section 35 (3) and section 408 the total of the two sentences passed being five years the appeal lies to this Court. Clause (3) of section 35 lays down that for the purpose of appeal, aggregate sentences passed under the section in case of convictions for several offences at one trial shall be

* Criminal Appeal No. 846 of 1912 from an order of Kunwar Sen, Assistant Sessions Judge of Aligarh, dated the 25th of October, 1912

(1) Punj. Rec. 1901, Cr. J. 83.
(2) (1909) 11 Bom. L. Rep. 544.
(3) (1875) 12 Bom. H. C. Rep. 147.
(4) (1912) 17 C. W. N. 72.

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deemed to be a single sentence. It is quite clear to my mind that the words, 'aggregate sentences' and in fact the whole of clause (3), relate to the case of consecutive sentences mentioned in clause (2). The word 'aggregate' implies an adding together of separate items, and where sentences are concurrent there is no such aggregation. As a matter of actual fact the sentences which these two appellants would have to undergo on the decision of the Assistant Sessions Judge are sentences of four years' rigorous imprisonment each, and no more.

My attention has been called to the decision of the Calcutta High Court in *Abdul Khalek* v. *King-Emperor* (1). The ruling, no doubt, is in the appellant's favour, but the judgment gives no reasons. On the other hand the point was considered in the case of *Sher Muhammad* v. *Emperor of India* (2) and it was therein held that where two sentences had to run concurrently there could be no aggregation of sentences, and as there was no sentence of imprisonment for a term exceeding four years the appeal lay to the Sessions Court. That was in the case of a decision by an Additional District Magistrate. The same point was considered in *Emperor* v. *Tulshidas Lakshman* (3). The ruling of the Punjab Chief Court and also an old ruling of the Bombay High Court itself, *Regina* v. *Gulam Abas* (4), were followed. In my opinion these decisions are perfectly correct and as these two appellants have not been sentenced to imprisonment for terms exceeding four years by the Assistant Sessions Judge, their appeals will [156] lie to the court of the Sessions Judge. I therefore direct that the memorandum of appeal be returned to the appellants to be filed in the proper court. The Sessions Judge will not doubt under the circumstances of the case admit the appeal although they may be out of time when presented to him.

Memorandum of appeal returned.

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35 A. 156 (=18 I. C. 282=11 A. L. J. 133.)

REVISIONAL CIVIL.

Before Mr. Justice Tudball.

ABDUL HAMID KHAN (*Plaintiff*) *v.* BABU LAL AND OTHERS (*Defendants*).*

[9th January, 1913.]

Act No. X of 1897 (*General Clauses Act*), *section* 3 (25)—*Act No. IX of* 1887 (*Provincial Small Cause Courts Act*), *schedule II, article* 13—*Court of Small Causes—Jurisdiction—Ferry—"Immovable property"—Suit to recover tolls alleged to be due to plaintiff as lessee of a ferry.*

Held that the right to a ferry is a benefit which arises out of land and comes within the definition of immovable property under section 3 (25) of the General Clauses Act, 1897, and a suit by a lessee of a ferry to levy a toll alleged to be recoverable by him as such lessee falls under article 13 of the second schedule to the Provincial Small Cause Courts Act and is therefore not cognizable by that Court *Gokal Chand* v. *Lal Chand* (5) and *Desa Singh* v. *Narain Das* (6) approved.

THE plaintiff in the case out of which the present application arose was the lessee of a certain ferry from the cantonment authorities of

* Civil Revision No. 113 of 1912.

(1) (1912) 17 C. W. N. 72.
(2) Punj. Rec. 1901, Cr. J. 83.
(3) (1909) 11 Bom. L. Rep. 544.
(4) (1875) 12 Bom. H. C. Rep. 147.
(5) Punj. Rec. 1897, C. J. 215.
(6) Punj. Rec. 1898, C. J. 278.

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Allahabad. He filed a suit in the Court of Small Causes to recover from certain fishermen sums of money to which he alleged himself to be entitled as lessee of the ferry by way of a toll on their boats. The Court of Small Causes returned the plaint, holding that, by reason of section 3 (25) of the General Clauses Act, 1897, and article 13 of the second schedule to the Provincial Small Cause Courts Act, 1887, the suit was not cognizable by that Court. The plaintiff thereupon applied in revision to the High Court.

Maulvi *Ghulam Mujtaba*, for the applicant.

Babu *Sital Prasad Ghosh*, for the opposite parties.

TUDBALL, J. :—This is an application in revision against the order of the Judges of the Small Cause Court at Allahabad. The plaintiff, who is the applicant here, is a lessee of a ferry from the Cantonment Committee of Allahabad. The defendants are **[157]** fishermen, who according to the plaintiff, are landing their fish on the river bank where his ferry is situate. He claims that as lessee of the ferry he is entitled to a fixed toll of Rs. 8 per boat. The suit was instituted in the Court of Small Causes at Allahabad, and the Judge of that court has held that he had no jurisdiction, as the suit is one which falls under article 13 of the second schedule to the Provincial Small Cause Courts Act. The plaintiff comes here in revision and urges that the suit is cognizable by the court below. Article 13 contemplates a suit to enforce payment of dues when such dues are payable to a person by reason of his interest in immovable property and the question is whether the plaintiff by reason of his lease of the ferry has an interest in immovable property. The point was considered in two cases, namely, *Gokal Chand* v. *Lal Chand* (1) and *Desa Singh* v. *Narain Das* (2). The right to a ferry no doubt is a benefit which arises out of land and comes within the definition of immovable property under section 3 (25) of the General Clauses Act. I fully agree with the two above mentioned rulings. In my opinion the order of the court below is perfectly right. I dismiss the application. The costs of this application will abide the result and will be costs in the cause.

Application dismissed.

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35 A. 157 (=18 I. C. 244=11 A. L. J. 118).

REVISIONAL CIVIL.

Before Mr. Justice Tudball.

KALYAN MAL (*Plaintiff*) *v.* SAMAND AND OTHERS (*Defendants*).*

[9th January, 1913.]

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 58 *and* 200—*Appeal—Question of proprietary title—Defendants setting up a title as mortgagees of the proprietary rights.*

In a suit for ejectment under section 58 of the Agra Tenancy Act, 1901, the defendants pleaded that they were not tenants but mortgagees of the proprietary rights of which the plaintiff was alleged to be the purchaser of the equity of redemption. *Held* that this amounted to a distinct claiming of a proprietary title or at least of a portion of the bundle of rights which go to make up a proprietary title and the appeal would lie to the District Judge.

[Ref: 36 All. 183; **Fol:** 73 I. C. 584; 74 I. C. 944.]

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*Civil Revision No. 111 of 1912.

(1) Punj. Rec., 1897, C. J. 215. (2) Punj. Rec., 1898, C. J. 278.

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118.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *M. L. Agarwala*, for the applicant.

Maulvi *Muhammad Ishaq*, for the opposite parties.

[158] TUDBALL, J.—This application for revision arises out of the following circumstances:—One Abdul Rahman was a zamindar of plot No. 1381, which is involved in the present suit, He cultivated it as his *sir* land. On the 11th of May, 1892, he gave a usufructuary mortgage to the predecessors in title of the present defendants. In 1897 Abdul Rahman's proprietary rights were sold in execution of a decree and purchased by Kalyan Mal. Subsequently to this the heirs of Abdul Rahman were recorded in the patwari's papers as exproprietary tenants of that plot. The mortgagees under the deed of the 11th of May, 1892, were recorded as mortgagees of the exproprietary tenure. Kalyan Mal brought a suit against the heirs of Abdul Rahman for the rent of this plot and obtained a decree, and the formality of ejectment was gone through, on the 27th of December, 1910. As a matter of fact the mortgagees remained in possession and were no parties whatever to the proceedings in the Revenue Court taken by Kalyan Mal. The present suit, out of which this application has arisen, was brought against the mortgagees, the predecessors in title of the opposite party, ostensibly under section 58 of the Tenancy Act. The defence of the mortgagees to the suit was that the relation of landlord and tenant did not exist between the parties and that they were the mortgagees of the proprietary rights. In other words they clearly set up their mortgage, and said that Kalyan Mal was a mortgagor, having acquired the equity of redemption and that they were the mortgagees. The first court dismissed the suit, holding that the relationship of landlord and tenant did not exist between the parties. Kalyan Mal appealed to the Commissioner, who held that a question of proprietary title was involved in the case and that an appeal lay to the District Judge. On the 24th of February, 1912, he returned the appeal for presentation to the proper court. The appeal was presented on the 26th of February, 1912, to the District Judge. An affidavit was filed. The appeal was admitted and then on the 19th of June, the District Judge made the following order:—" Heard pleader. A mortgagee of a right to occupy ex *sir* land has been ejected, as the exproprietor relinquished, though without redeeming the mortgagee. There is no question of proprietary title, nor was any question of jurisdiction decided in the lower court. No appeal lies here. Returned."

[159] It is perfectly clear that the defendants distinctly claimed a proprietary title, or at least a portion of the bundle of rights which go to make up proprietary title. An appeal did lie to the District Judge. I, therefore, admit the application, set aside the order of the District Judge and direct the Judge to readmit the appeal on its original number and proceed to hear and decide it according to law. I make no order as to costs.

Application allowed.

35 A. 159 (=11 A. L. J 120=18 I. C. 701).

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APPELLATE CIVIL.

35 A. 159= 11 A. L. J. 120=18 I. C. 701.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

BHARAT INDU AND OTHERS (*Plaintiffs*) *v.* YAKUB HASAN AND ANOTHER (*Defendants*).*

[10th January, 1913.]

Civil Procedure Code (1908), *order XX, rule* 18—*Partition—Appeal—Preliminary decree—Subsequent interlocutory order giving directions for preparation of final decree.*

In a suit for partition a preliminary decree was passed and confirmed on appeal. When the case went back to the court of first instance for the passing of a final decree that court passed an order directing that actual partition should be made in accordance with certain directions then given by it. *Held* that no appeal would lie against such an order, but its propriety could be questioned in appeal from the final decree. The Code of Civil Procedure contemplated the preparation of only one preliminary decree, and the order in question could not be regarded as more than an interlocutory order containing directions as to the preparation of the final decree.

[Ref. 20 C. L. J. 476=27 I. C. 317 ; 42 Mad. 296=65 I. C. 983=14 L. W. 631=42 M. L. J. 71=30 M. L. T. 83 ;74 I. C. 373=38 C. L. J. 255.]

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case are set forth in the judgment under appeal, which was as follows :—

"This was a suit for partition of certain houses. A preliminary decree was passed dismissing a portion of the claim, but declaring the plaintiff's right to possession by partition of certain specified shares in each of the two houses. This declaration was, however, subject to a condition, *viz* that a smaller fractional share in each house, that is to say, a portion of the share declared to belong to the plaintiffs, was subject to a charge of Rs. 877-0-0 in favour of the defendant Yakub Husain and directing that the plaintiffs should pay the same before they could obtain possession. That decree was contested up to Letters Patent appeal before the Court, and was substantially affirmed. The plaintiffs then presented to the court of first instance an application to the effect that they had no desire to redeem the fractional shares subject to the charge of Rs. 877, but could be content with actual partition of a smaller share in each house arrived [160] at by deducting the share subject to the charge from the share decreed in their favour in the preliminary decree. The learned Subordinate Judge, on receiving this application, proceeded to frame certain issues. He came to the conclusion that the plaintiffs were in effect abandoning a portion of their claim, and that they had a right to do this at any stage of the suit, even after the passing of the preliminary decree. Dealing with the question on this basis, he arrived at the conclusion that the plaintiffs were entitled without making any payment at all, to a share of 73/108 in one house, and of one-third in the other. He ordered separation by actual partition by metes and bounds of the shares thus ascertained from the rest, of each of the houses in question, and a formal order was drawn up which undoubtedly reads like a preliminary decree in a partition suit and fulfils all conditions of such a decree, embodying the declaration and the direction above stated. An appeal against this having been lodged in the court of the District Judge, the learned District Judge has held that the order complained of is not a decree and that no appeal lies against the same. This order is supported before me on behalf of the respondents on the ground that there can not be more than one preliminary decree in a suit for partition, and that the defendant should be content to wait for the passing of a final decree in the suit, when he would be entitled in appeal from such a decree to challenge the correctness of the order now in question. After examining the record it seems to me that this much is certainly clear, *viz* , that the learned Subordinate Judge concerned himself to the passing a second or supplementary preliminary decree in the suit, as if on an amended plaint. It is a little difficult to discuss the abstract question whether an appeal lies or not, without allowing it to be complicated by the further question whether the order complained of is a good order in law, or one which the learned Subordinate Judge was entitled to pass. I take the defendant's contention to be

*Appeal No. 79 of 1912 under section 10 of the Letters Patent.

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that the learned Subordinate Judge had no right to do anything beyond correctly interpreting and carrying out the terms of the preliminary decree before him. If the learned Subordinate Judge had dealt with the matter from this point of view, that is to say, that the only question before him was whether the preliminary decree as passed would or would not bear a certain interpretation, an order passed by him on this basis would be a mere interlocutory order only to be challenged by way of appeal from the final decree. The order before me, however, is not of this nature. It seems to me that the learned Subordinate Judge dealt with the matter upon a new set of facts which had come into existence since the passing of the preliminary decree which had been appealed to this Court. He considered that the plaintiffs were abandoning a portion of their claim and had a right to take such a step, with or without any formal amendment of the plaint, even after a preliminary decree had been passed. If this view is correct, it necessarily involves the passing of a second preliminary decree on a new set of facts. There is no force in the analogy which was pressed upon me in argument between the present case and that of a plaintiff in a partition suit, who acquires, by inheritance or otherwise, a further share in the property in suit after the preliminary decree has been passed. If, however, the learned Subordinate Judge was mistaken in the point of view from which he regarded the plaintiff's application, and if as a matter of fact nothing could happen which would justify the passing of a second [161] or supplementary decree, then his whole proceedings are open to question because he did not confine himself to merely interpreting the preliminary decree as originally passed, but undoubtedly thought it to be susceptible of modification in view of facts which had subsequently occurred, namely, the abandonment by the plaintiffs of a portion of their claim. To sum up, therefore, my opinion regarding this appeal,' I hold that it is not in itself an impossibility that there should be a second preliminary decree passed in a suit for partition if such second decree is based upon facts or circumstances alleged to have come into existence after the passing of the first preliminary decree I hold that the question whether in the present case any circumstance had or had not occurred since the passing of the first preliminary decree sufficient to justify the passing of a second preliminary decree, is a question which has to do with the merits of the decision now called in appeal and not with the question whether an appeal lies. I hold that the order appealed against is in fact a second preliminary decree in this partition suit and was intended to be a second preliminary decree, and was open to appeal to the District Judge. I therefore set aside the order of the lower appellate court and remand this case to that court under the provisions of order XLI, rule 23, of the Code of Civil Procedure, directing it to be re-admitted to the file of pending appeals and dispose it of accordingly. Costs will abide the event."

Babu *Sarat Chandra Chaudhri* (for Dr. *Satish Chandra Banerji*), for the appellants :—

The respondents should have waited till a final decree was passed. The law only contemplated one preliminary decree. See Code of Civil Procedure, order XX, rule 18. The court could have passed a preliminary decree with directions for further inquiry. Matters could be inquired into with a view to facilitate the preparation of the final decree. The Judge did not make a second preliminary decree. He laid down the lines on which the final decree was to be passed. Any objection could be taken in appeal against the final decree. At this stage no appeal lay. The order passed was not a decree.

Babu *Piari Lal Banerji*, for the respondents :—

Any directions for preparation of the final decree were in the nature of interlocutory orders ; but the court could not pass an amended decree in substitution of the first preliminary decree. No appeal lay against an interlocutory order ; but this order went beyond that ; for example, if after the preliminary decree one of the defendants dies and the plaintiff claims that his share has been augmented and the court makes an adjudication, could not then he appeal from that order ? It was submitted that he could. If a court reviews its judgment after appeal the order is not a nullity [162] and an appeal lies. A decree was any order declaring the rights of parties and the second order here did so, inconsistently with the first decree.

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35 A. 159=11 A. L. J. 120=18 I. C. 701.

RICHARDS, C. J. and BANERJI, J.:—The facts out of which this appeal arises are very shortly as follows:—There was a suit for partition. A preliminary decree was made. Appeals right up to a Letters Patent appeal were taken against that preliminary decree, but without success, and the decree of the court which made the preliminary decree for partition was confirmed. On the case going back to the court of first instance for the passing of a final decree an application was made by the plaintiff in which he asked to be allowed to abandon certain shares to which he had been declared entitled subject to a charge. His case apparently was that he would not press for these shares because they were not worth the charge. He also stated that, having regard to certain events which had happened whilst the appeals were pending, the shares of certain other persons had been acquired by him, and he asked that his share on partition might be augmented accordingly. The court of first instance went into these matters and granted the plaintiff's application and directed that actual partition should be made in accordance with his decision. There was an appeal against this decision to the lower appellate Court. It held that no appeal lay inasmuch as no final decree had as yet been made. An appeal was then preferred to this Court, and a learned Judge of this Court set aside the decree of the lower appellate Court holding that the decision of the court of first instance appealed against was really a second preliminary decree. We think that the decision of the learned Judge of this Court was not correct. The Code of Civil Procedure contemplates one preliminary decree and no more. We do not for a moment suggest that any hardship has been done to the respondent by the decision of the court of first instance. We, however, think that we should state in our judgment, that it must be clearly understood that it will be open to the respondent to challenge the propriety of the decision of the court of first instance, dated the 19th of August, 1911, after a final decree has been made in the matter. That order in our opinion is only to be regarded as an interlocutory order preparatory to the making of a final decree. We accordingly allow the appeal, set aside the order of the learned Judge of this [163] Court and restore that of the lower appellate court. We direct that the costs of all these proceedings shall be costs in the cause.

Appeal allowed.

35 A. 163 (=18 I. C. 711=11 A. L. J. 135).

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

GULAB CHAND (*Defendant*) *v.* SHANKAR LAL, (*Plaintiff*) AND OTHERS (*Defendants*).*

[21st January, 1913.]

Civil Procedure Code (1908), *order V, rules* 1 *and* 2 ; *order IX, rule* 13—Ex parte *decree—Appearance of defendant in answer to a preliminary application not equivalent to appearance in answer to the plaint.*

Held that the fact that before the admission of a suit one of the proposed defendants had appeared by pleader on a miscellaneous application for his appointment as guardian *ad litem* to a minor defendant, did not absolve the court from the necessity of serving such defendant when the suit was admitted, with a copy of the plaint and notice of the date fixed for hearing.

* First Appeal No. 66 of 1912 from an order of Baijnath Das, Subordinate Judge of Agra, dated the 30th of March, 1912.

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APPELLATE CIVIL.

35 A. 163=18 I. C. 711=11 A. L. J. 135.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Lalit Mohan Banerji*, for the appellant.

Mr. *B. E. O'Conor* and Pandit *Mohan Lal Sandal*, for the respondent.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—The appellant in this case was the defendant in a suit, in the court below, which was decreed *ex parte* against him. He applied under order IX, rule 13, of the Code of Civil Procedure to have the *ex parte* decree set aside on the ground that summons had not been served on him and therefore he was unable to appear and defend the suit. The suit was against the appellant and his minor brother Har Bilas as owners of the firm Gulab Chand Har Bilas. Har Bilas was a minor, and when the plaint was filed there was an application by the plaintiff asking the court to appoint Gulab Chand as guardian of the minor. Notice of this application was issued to Gulab Chand. On the 27th of July, 1911, he filed a vakalatnama and objected to his appointment as guardian of the minor. His objection was allowed, and finally on the 1st of September, one Musammat Champo was appointed guardian. On the same day the suit was registered and summons was ordered to issue. Summons was issued to Gulab Chand, but it was returned unserved. Therefore the court passed an order that as there was a vakalatnama on the **[164]** record it was unnecessary to take any further step. The suit was decided *ex parte* against Gulab Chand. His application was rejected by the court below on the ground that a vakalatnama, dated the 27th of July, 1911, had been filed and showed that a vakil was appointed to defend the action filed and therefore service of summons was unnecessary after that. It is quite clear that on the 27th of July, 1911, the only matter pending was the miscellaneous matter relating to the appointment of a guardian. The suit was not registered and the pleader was appointed for that miscellaneous matter. It was the duty of the court to serve the summons after the suit had been registered. It is true that Gulab Chand knew that a suit had been instituted, but he was entitled to receive a copy of the plaint and be informed of the date fixed in order that he might be able to protect his rights. Therefore the order of the court below is wrong. We allow the appeal; set aside the *ex parte* decree as against the present appellant and direct the court below to restore the suit to its original number and proceed to hear and determine it according to law. The costs of this appeal will abide the event.

Appeal allowed and cause remanded.

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35 A. 164 (=11 A. L. J. 141=18 I. C. 311.)

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Banerji, and Mr. Justice Tudball.

COLLECTOR OF MIRZAPUR (*Plaintiff*) *v.* BHAGWAN PRASAD AND OTHERS (*Defendants*).*

[21st January, 1913.]

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 59, 100—*Mortgage—Charge—Attestation—Document attested by one witness only.*

* First Appeal No. 52 of 1911 from a decree of Keshab Deb, Subordinate Judge of Jaunpur, dated the 26th of September, 1910.

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Held that a document which purported to be a mortgage, but which was attested by only one witness could not operate either as a mortgage or as creating a charge on immovable property within the meaning of section 100 of the Transfer of Property Act, 1882. *Shamu Patter* v. *Abdul Kadir Ravuthan* (1) referred to.

[Dist: 13 A. L. J. 553=29 I. C. 363; Ref: 84 I. C. 1023=2 Rang. 313.]

35 A. 164=11 A. L. J. 141 =18 I. C. 311.

THE plaintiff in this case brought a suit for sale of immovable property on the basis of a document, alleged to be a mortgage, dated the 11th of July, 1900. The document purported to have [165] been executed by a number of persons who were stated to be the adult members of a joint Hindu family. It was in the form of a mortgage but was attested by only one witness, instead of the two witnesses required by section 59 of the Transfer of Property Act, 1882. It was argued that nevertheless the document might be construed as creating a charge within the meaning of section 100 of the Act. The court of first instance held against the plaintiff on both these points and dismissed the suit. The plaintiff thereupon appealed to the High Court.

Mr. *A. E. Ryves*, for the appellant.

The Hon'ble Dr. *Sunder Lal* and Munshi *Haribans Sahai*, for the respondents.

RICHARDS, C. J., and BANERJI and TUDBALL, JJ.:—This appeal arises out of a suit for sale on foot of an alleged mortgage. The document is dated the 11th of July, 1900. It purports to have been executed by a number of persons who are stated to have been the adult members of a joint Hindu family. The present suit is brought against all the members of the family. The court below dismissed the plaintiff's suit. Hence the present appeal.

The appellant has to admit that owing to the fact that the document was attested by one witness only, the deed cannot operate as a mortgage, having regard to the provisions of section 59 of the Transfer of Property Act, which requires that a mortgage must be attested by at least two witnesses. It is, however, contended that the document, assuming it to have been executed by the persons who purported to do so, amounts to a charge under section 100 of the Transfer of Property Act and ought to be given effect to as such. It was further contended that in any event the plaintiff ought to have a personal decree against such persons as in fact executed the document.

The question as to how a mortgage must be attested was recently before their Lordships of the Privy Council in the case of *Shamu Patter* v. *Abdul Kadir Ravuthan* (1). In that case there were several witnesses to the document, but it appears that these witnesses had signed their names as such merely upon the admission of the executants and had not actually witnessed the signatures of the executants. It was held by the High Court of Madras that [166] such "attestation" did not fulfil the requirements of section 59. On appeal their Lordships of the Privy Council took the same view and confirmed the decision of the Madras High Court. It is contended that their Lordships did not decide the question raised in the present appeal, namely that the document might be good as a charge although it fell short of fulfilling the necessary conditions of a mortgage. We cannot accept this view. The suit in that case was a suit for sale on an alleged mortgage, just as the present; and the present argument could not well have escaped the attention of their Lordships or of the Madras High Court. As a matter of fact we find from the report, at page 610,

(1) (1912) I. L. R. 35 Mad. 607.

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35 A. 164=11 A. L. J. 141=18 I. C. 311.

that it was contended before their Lordships of the Privy Council that the document must operate as a charge. We must take it that their Lordships considered and repelled the contention that a charge was created. We deem ourselves bound by the ruling of their Lordships in the case to which we have referred.

As to the other point we must point out in the first instance that the suit was not a suit for a personal decree. It was a suit to enforce payment of moneys alleged to be secured by mortgage by sale of the mortgaged property. Furthermore we find in the document itself the following clauses :—" In case of breach of the condition laid down in this document the said Babu Sahib shall have power to realize the entire amount mentioned in this document together with interest at the said rate from the hypothecated properties. The said Babu Sahib shall have no power to realize it from the persons and pay, et cetera, of us, the executants."

It is true that in the earlier part of the deed there are provisions that upon failure to pay certain instalments the mortgagee shall have power to realize the entire amount from the property hypothecated and also from " *other moveable and immoveable properties.*" These are ordinary clauses which find their way into a great number of mortgages in these provinces. But, reading the document as a whole, we think that it was the intention of the parties that the mortgagee should rely upon his remedy against the mortgaged property and not against the person of the mortgagors. There is certainly no provision that a personal decree should be obtained. Under these [167] circumstances we consider that the decision of the court below was correct and ought to be confirmed.

We accordingly dismiss the appeal with one set of costs.

Appeal dismissed.

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35 A. 167 (=18 I. C. 517=11 A. L. J. 167).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

JAI SINGH PRASAD (*Plaintiff*) *v.* SURJA SINGH AND OTHERS (*Defendants*).*

[22nd January, 1913.]

Act No. IX of 1908 (*Indian Limitation Act*), *section* 31—*Limitation—Mortgage—Suit on mortgage barred under Limitation Act of* 1871—*Mortgagee's rights not revived by present Act.*

Held that section 31 of the Indian Limitation Act, 1908, cannot be construed as reviving rights already time-barred under the Limitation Act of 1871.

THIS was a suit for sale on a mortgage, dated the 19th of July, 1863. The money secured by the mortgage became payable on the 19th of June, 1864, and the suit was instituted on the 6th of August, 1910. The court of first instance dismissed the suit as being time-barred under the Indian Limitation Act of 1871. The plaintiff appealed to the High Court, relying on section 31 of the Limitation Act of 1908.

Munshi *Jang Bahadur Lal*, for the appellant.

Mr. *A. H. C. Hamilton*, for the respondents.

RICHARDS, C. J. and BANERJI, J. :—This appeal arises out of a suit on a mortgage, dated the 19th of July, 1863. The money secured by it

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* First Appeal No. 422 of 1911 from a decree of Rama Das, Additional Subordinate Judge of Azamgarh, dated the 3rd of July, 1911.

became payable on the 19th of June, 1864. The present suit was instituted on the 6th of August, 1910. The court below has dismissed the suit as being barred by time. In our opinion this view was correct. Under the Limitation Act of 1871, which governed the present mortgage, a suit could only be brought within twelve years of the time the money became due, that is to say, within twelve years from the 19th of June, 1864. That Act contained no provision similar to article 147 of Act XV of 1877. It is, therefore, quite clear that before the passing of the last mentioned Act the claim under the bond in suit was barred by limitation. It is manifest from the provisions of section 2 of the [168] Act of 1877 that no right which had become barred under the Act of 1871, was thereby revived. No doubt for some time, this High Court considered that a suit might be instituted in respect of mortgages, which were governed by the Act of 1877, at any time within sixty years, but their Lordships of the Privy Council have considered this view erroneous—see *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1). This last mentioned decision, and the hardship which was supposed to follow in consequence, led to the introduction of section 31 of the present Act, which provides that, notwithstanding anything contained in it, or in the Limitation Act of 1877, a suit for sale may be instituted within two years from the date of its passing or within sixty years from the date when the money secured by the mortgage becomes due, whichever period expires first. The appellant relies upon this section, and contends that it is clear from the mention of sixty years that it was intended to apply to cases like the present, even though they were already barred by the provisions of the Act of 1871. We cannot agree with this contention. It is impossible to hold that by the introduction of this section the Legislature intended to revive rights which had already become long since barred under the Act of 1871. The section expressly refers only to the provisions of Act XV of 1877 and not to any earlier Act. It is quite clear that if the plaintiff had instituted the suit whilst Act XV of 1877 was still in force it would have been time-barred. The enactment of section 31 certainly can give him no higher title. We dismiss the appeal with costs.

Appeal dismissed.

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35 A. 168 (=18 I. C. 521=11 A. L. J. 184.)

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

DURGA KUNWAR AND OTHERS (*Defendants*) *v.* KALI CHARAN (*Plaintiff*).*

[23rd January, 1913.]

Sale—Covenant for title—Claim made against purchaser compromised before suit brought—Right of purchaser to claim indemnity from covenantor.

The purchaser of immovable property concerning which the seller has covenanted to indemnify the purchaser in the event of the title proving defective is not bound to wait until a suit is brought and he is deprived of the property by reason of a decree passed therein, but, if a claim which the purchaser has

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* First Appeal No. 346 of 1911 from a decree of Baijnath Das, Officiating Subordinate Judge of Bareilly, dated the 19th of August, 1911.

(1) (1907) I. L. R. 30 Mad. 426.

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[169] substantial reason to believe to be valid is brought against him, he may, after notice to the covenantor, compromise such claim and sue the covenantor on his covenant to recover the amount paid by him to effect the compromise. *Smith* v. *Compton* (1) referred to.

THE facts of this case are fully stated in the judgment of the Court,

Babu *Jogindro Nath Chaudhri* and Babu *Sital Prasad Ghosh*, for the appellants.

The Hon'ble Dr. *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the respondent.

RICHARDS, C. J. and BANERJI, J:—This appeal arises out of a suit in which the plaintiff claims damages for breach of covenants for title contained in a sale deed, dated the 12th of October, 1889. The court below has given the plaintiff a decree for Rs. 2,900, being considerably less than the amount claimed. At the time of the alleged sale the property mentioned in the plaint, together with other property was in the hands of the Court of Wards, and the sale deed was executed by the Court of Wards. It has not been contended, and in our opinion could not be contended, that the persons entitled to the property sold were not liable upon foot of the covenants given by the Court of Wards, assuming that there was a breach. The sale deed contained the ordinary covenants for title, including a covenant that the vendors took upon themselves "the responsibility that the property should be free from all debts, claims and liabilities".

In the present suit we are concerned with a village called Mirpur Harriapur, which was one of the items of property comprised in the deed already mentioned. The title to this village briefly is as follows:—One Jaswant Singh and others were the owners of it. Jaswant Singh mortgaged it to Brij Kishore, who brought a suit for sale and obtained a decree. Brij Kishore then died and his widow Durga Dei continued the proceedings, had the property sold, and purchased it herself. On the 9th of December, 1879, Durga Dei sold it to Durga Kunwar. Durga Kunwar was the widow of Lakhan Singh, who had a brother, Har Singh, and it is admitted that the two brothers were joint. Some time after the sale by the Court of Wards claims were made to the property, the subject-matter of the sale. The claimants [170] alleged that they were the reversioners to the estate of Brij Kishore; that Durga Dei as his widow, in the absence of legal necessity, had no power or authority to sell property to Durga Kunwar, and that upon Durga Dei's death, which took place on the 8th of June, 1905, they became entitled to the property.

It is an admitted fact that a considerable amount of litigation took place with respect to the claim so made, with the result that in respect of one of the villages sold by Durga Dei, the claim of one Kishan Chand, one of the claimants, was decreed. We mention this to show that there was a serious claim made against the vendees under the sale deed of the Court of Wards. In due course a claim was made against Kali Charan, the purchaser from the Court of Wards, in respect of the village Mirpur Harriapur. The plaintiff at once sent notice to Durga Kunwar, setting forth clearly and distinctly the nature of the claim that had been made, called attention to the success of Kishan Chand in the other litigation, and required Durga Kunwar to give such information as would enable Kali Charan to defend the suit which he anticipated would be brought against him. No attention of any kind was paid to this notice. Subsequently Kali Charan compromised with the claimants and paid to Kishan Chand a sum of Rs. 4,750.

(1) (1832) 3 B and A 407.

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35 A. 168=18 I. C. 521=11 A. L. J 184.

He gave notice of this compromise to Durga Kunwar, but again no notice was taken and then the present suit was instituted.

We are quite satisfied that the compromise was a genuine compromise. We are also quite satisfied that the two notices, although addressed to Durga Kunwar alone, reached all the defendants, who constituted a joint Hindu family. In the written statement, which was put in by Gajraj Singh, Mahtab Singh and Musammat Dharam Kunwar, it is not disputed that the notice was sent.

Two main points have been argued in the present appeal. It was first contended that, inasmuch as Kali Charan was never actually dispossessed, the plaintiff cannot recover, and that he had no right to enter into the compromise, and that he ought in any event to have waited until a suit was actually instituted. The second point was that the property really belonged to Durga Kunwar and did not belong to the other defendants, and that accordingly the suit should be dismissed, at least, as against them.

[171] We shall deal with the second point first. The property was purchased in the name of Durga Kunwar, but it was during the life-time of her husband, who, admittedly, was joint with his brother, the father of the other defendants. The sale deed in favour of Kali Charan purports to be made on behalf of the other defendants as well as Durga Kunwar. In the written statement filed on behalf of the defendants other than Durga Kunwar, it is admitted that the property was sold by them, but it is alleged that they were only selling such title as had been got from Durga Dei. They also admitted in paragraph 4 that they were the purchasers from Durga Dei, and it was never expressly alleged in the written statement that Mirpur Harriapur belonged exclusively to Durga Kunwar. We therefore can pay no attention whatever to the statement of the pleader in the *rubkar* of the 6th of June, 1911, that the property was exlusively hers. In any event we think that, inasmuch as the property was sold as belonging to the joint family, the joint family are liable at the suit of the purchaser assuming that there was a breach of the covenant.

We now deal with the question as to whether or not Kali Charan was bound to wait until a suit was brought or whether he was entitled, after giving due notice, to enter into such compromise as he thought fit and was reasonable. A very similar question arose in the case of *Smith* v. *Compton* (1). In that case a suit was brought against the vendee, who compromised the suit before judgment, paying £. 550. He then brought a suit against the covenantors for breach of their covenant for title. It was contended that the plaintiff could not recover the money which he had paid by way of compromise, because he had not given notice to the defendants, and consequently that he was not entitled to recover the costs which he paid to his own attorney for defending the action up to the time of the compromise. Lord TENTERDEN, C. J., says:

"I am of opinion that there should be no rule. The only effect of want of notice in such a case as this, is to let in the party who is called upon for an indemnity to show that the plaintiff has no claim in respect of the alleged loss or not to the amount alleged, that he made an improvident bargain, and that the defendant might have obtained better terms, if the opportunity had been given [172] him. That was not proved here, and we cannot assume it. As to the costs, the plaintiff here had a right to claim an indemnity, and he is not indemnified unless he receives the amount of the costs paid by him to his own attorney."

It will thus appear that the learned Chief Justice considered that the plaintiff was entitled to compromise the action and to claim the amount

(1) (1832) 3 B. and A. 407.

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35 A. 168=18 I. C. 521=11 A. L. J. 184.

for which he compromised, together with the costs of defending the suit PARKE, J., says:—

"I am of the same opinion. The effect of notice to an indemnifying party is stated by BULLER, J., in *Duffield* v. *Scott*, 3 T. R., 374:—'The purpose of giving notice is not in order to give a ground of action, but if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment and estops the other party from saying that the defendant in the first action was not bound to pay the money.'"

The only distinction that can be drawn between the case cited and the present, is that the plaintiff in the present case settled what he considered to be a claim which he could not resist without waiting until a suit was actually brought. We can see no reason or principle why if a person entitled to an indemnity is competent to compromise a suit which is brought, he is not equally competent to settle the dispute before suit. If he has given due notice to the indemnifying party, the indemnifying party, on the authority of the case to which we have referred, is not entitled to come forward and say that the compromise was not a fair and reasonable one.

In any event the court below has in our judgment given very good reasons for holding that the compromise in the present case was a reasonable and fit one. Furthermore, it was never alleged by the defendants that they were in a position to show that Durga Dei had authority to sell the property in question absolutely, or that there was any other claimant who could come forward, and it has been admitted by the learned advocate for the plaintiff that he has no further claim against the defendants upon foot of the covenants contained in the sale deed from the Court of Wards, so far as the village of Mirpur Harriapur is concerned.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

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35 A. 173 (=18 I C. 665=11 A. L. J. 196=14 Cr. L. J. 105.)

[173] REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* DINA NATH AND ANOTHER.*

[31st January, 1913.]

Act No VI of 1882 (*Indian Companies Act*), *section* 74—*Penalty*—*Criminal Procedure Code, section* 260—*Summary jurisdiction*—*Power to try summarily offences under the Indian Companies Act.*

Held that there is nothing in law to prevent a Magistrate from trying summarily offences under the Indian Companies Act, 1882.

Held also, that the penalty provided by section 74 of the Indian Companies Act, 1882, is a fixed and not a maximum penalty. *Queen Empress* v. *Moore* (1) referred to.

DINA Nath, Kashi Ram, Hazari Lal and Devi Dat were directors of a Company known as the Union Indian Sugar Mills Company, Limited, Cawnpore. On the complaint of the Registrar of Joint Stock Companies these four persons were placed on their trial on a charge under section 74 of the Indian Companies Act, 1882, no balance sheet having been filed with the Registrar within the time fixed or within the extension allowed by

* Criminal Revision No. 1011 of 1912 from an order of Austin Kendall, Sessions Judge of Cawnpore, dated the 25th of November, 1912.

(1) (1893) I. L. R. 20 Cal. 676.

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33 A. 173=18 I. C. 665=11 A. L. J. 196 =14 Cr. L. J. 105.

him ; the offence being that of knowingly and wilfully authorizing or permitting the default. The case was tried summarily by a Magistrate of the first class, who acquitted Devi Dat and imposed a penalty of Rs. 50 on each of the other directors. The three directors who had been convicted applied in revision to the High Court.

Mr. *W. Wallach* and Babu *Vikaramajit Singh*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

TUDBALL, J. :—This matter and Revisions Nos. 1012 and 1013 of 1912, arise out of the following circumstances :—

The three applicants Lala Dina Nath, L. Kashi Ram and L. Hazari Lal, and one Lala Devi Dat are the directors of the Union Indian Sugar Mills Company, Ld., Cawnpore. They were placed upon their trial on the complaint of the Registrar of Joint Stock Companies on a charge under section 74 of the Companies Act, VI of 1882, no balance sheet having been filed with the Registrar within the time fixed or within the extension allowed by him ; the **[174]** offence being that of knowingly and wilfully authorizing or permitting the default mentioned above. The case was tried summarily by a Magistrate of the first class, who acquitted Lala Devi Dat and imposed a penalty of Rs. 50 on each of the other directors. The three latter have come here in revision. A great deal has been said about the merits of the case, but in view of the order which I am going to pass I abstain from making any remarks thereon.

It is urged that the Magistrate had no power to try the case summarily. With this I cannot agree. Under section 260 of the Code of Criminal Procedure a Magistrate has power to try summarily all offences not punishable with death, transportation or imprisonment for a term exceeding six months. The word 'offence' is defined in the Code as "any act or omission made punishable by any law for the time being in force." Section 5 of the Code lays down that "All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions laid down in the Code of Criminal Procedure." Clause (2) of the section lays down that "All offences under any other law shall be similarly dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or the place of investigating, inquiring into, trying or otherwise dealing with such offences." There is nothing in the Companies Act which lays down that a Magistrate having summary powers shall not try an offence under that Act in a summary manner. It is true that under section 252 all offences under the Act may be tried by any Magistrate of the first class unless the period of imprisonment to which the offender is liable exceeds that which such officer is competent to award under the law for the time being in force in the place where he is employed. When the period of imprisonment provided by the Act exceeds the period that may be awarded by such officer, the offender shall be committed for trial to the Court of Session. There is nothing in this portion of the section which takes away the Magistrate's power to try summarily cases within his jurisdiction, nor does the second clause of the section take away any such power. As a matter of fact a Presidency Magistrate has power to try all cases under the Act in a summary way irrespective of the sentence he may impose.

[175] Section 262 of the Code of Criminal Procedure lays down the limit to the sentences of imprisonment which may be awarded at a summary trial. There is nothing in chapter XXII which limits the amount

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of fine which may be imposed in a summary trial; the sections which deal with appeals in the Code, however, show that a sentence of fine exceeding Rs. 50 is an appealable sentence. But though it cannot be said that the Magistrate has been guilty of any illegality in trying the case summarily, there are very good grounds why he should not have done so. In the first place the penalty which may be imposed under section 74 is one of Rs. 1,000 *neither more nor less*. An examination of the Act would show that everywhere (with two exceptions) where the Act lays down a penalty for an offence in the shape of fine it clearly lays down a maximum, which is not to be exceeded, and sections 25, 55, 57 and 66 are all instances of this. In section 66 (1) any Limited Company which does not paint or affix its name in the manner directed by the Act, is held liable to a penalty not exceeding Rs. 50. But in the last clause of the same section it is distinctly laid down that the Director, Manager or Officer of the Company, who is guilty of the act mentioned in this clause, shall be liable to a penalty of Rs. 1,000. Similarly in section 74 it is laid down that a Director or Manager of a Company shall be liable to a penalty of Rs. 1,000. If the Legislature had intended that in these two cases there should be a maximum penalty and not a fixed penalty, it would have used the same languages as it has used in other sections of the Act, just in the same way as in the Indian Penal Code it has been laid down that sentence shall not be more or less than a fixed amount, clearly showing that the court should exercise its discretion as to the sentence to be imposed. The only decision which is on all fours with the present case is the case of *Queen Empress* v. *Moore* (1). That was under section 35 of the Companies Act, which has since been repealed. That section ran as follows: —"If a share-warrant is issued without being duly stamped, the company issuing the same, and also every person who at the time when it is issued is the managing Director or Secretary or other principal officer of the Company, shall forfeit the sum of Rs. 500." It was in that case held that the forfeiture was a penalty and that a forfeiture of Rs. 500 was **[176]** the fixed penalty laid down by the Statute. It seems to me clear that the penalty laid down in section 74 is also a penalty fixed by Statute and the Magistrate was not competent to inflict any lesser penalty. If the Magistrate had inflicted this penalty, it is clear that the person convicted would have had a right of appeal. The case is one in which a great deal of correspondence has been put forward and is by no means of that simple character to which a summary trial is intended to be restricted. In deciding whether or not he will try a case summarily it is for the Magistrate to exercise a wise discretion and ordinarily he ought to restrict such trials to simple cases. In my opinion the present case was one in which, even if it had been tried summarily and a proper penalty imposed, an appeal would have been of very little use to the persons convicted, as a great mass of important evidence is not on this record. It seems to me essentially one of those cases which the Magistrate should have tried in an ordinary way, duly recording the evidence. The case has not been properly tried and ought to be tried *de novo*.

It is urged on behalf of Lala Devi Dat, who was acquitted by the Magistrate that the order of acquittal should not be set aside, as the Magistrate has found that Devi Dat had done his best to bring about the filing of the balance sheet. This is really a point on the merits

(1) (1893) I. L. R. 20 Cal. 676.

of the case. Without full evidence before me it is impossible to say whether Devi Dat is innocent or guilty, nor would it be right for me to express any opinion, especially as I am ordering a new trial. The case in my opinion has not been satisfactorily tried and ought to be tried *de novo*. I therefore set aside the convictions and sentences on Lala Dina Nath, Lala Kashi Ram and Lala Hazari Lal. I set aside the acquittal of Lala Devi Dat and order the case to be tried *de novo* by some Magistrate, other than the Magistrate who has decided the case, to whom the District Magistrate may think it fit to send it.

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Order set aside.

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35 A. 177 (=19 I. C. 53=11 A. L. J. 200).

[177] APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

G. J. BOWER (*Judgment-debtor*) *v.* IMPERIAL BANK LIMITED (*Decree-holder*).*

[3rd February, 1913.]

Act No. VI of 1882 (*Indian Companies Act*), *section* 169—*Company—Winding up—Appeal—Notice.*

Held, that the provisions of section 169 of the Indian Companies Act, 1882, as to service of notice of appeal are imperative, and if the requisite notice has not been served within three weeks from the date of the order complained of and the time for service has not been extended by the appellate court, the appeal cannot be heard.

THIS was an appeal from an order passed in the matter of the winding up of a company in the following circumstances. The respondent Bank was being wound up. The appellant was one of the contributories. The winding up was in the court of the Additional District Judge of Aligarh, where, it appears, the appellant took an objection on the ground that the decree passed against him in favour of the Bank was time-barred. The objection was disallowed. The decree holders applied to enforce the order of the court under section 167 of the Companies Act and the matter went to the court of the Second Additional Judge of Meerut. There the appellant raised further objections as well as the objection as to limitation; but they were disallowed.

The contributory thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Babu *Durga Charan Banerji* and Pandit *Rama Kant Malaviya*, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—This is an appeal from an order of the court below passed under the following circumstances. The respondent Bank is being wound up. The appellant is one of the contributories. The winding up is in the court of the Additional District Judge of Aligarh, where, it appears, the appellant took an objection on the ground that the decree passed against him in favour of the Bank was time-barred. The objection was disallowed. The decree-holders applied to enforce the order of the court under section 167 of the Companies Act and the matter went to the court of the Second Additional Judge of Meerut. There the [178] appellant raised further objections as well as

* First Appeal No. 122 of 1912 from an order of Mubarak Husain, Second Additional Judge of Meerut, dated the 28th of June, 1912.

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the objection as to limitation; but they were disallowed. The appellant has come upon appeal to this Court.

A preliminary objection is taken that notice under section 169 of the Act has not been given and that therefore the appeal cannot be heard. It is argued on behalf of the appellant that the order which he seeks to have upset on appeal is not an order which was made in the matter of the winding up of the Company. With this we cannot agree. It is clearly and distinctly an order which was given in the matter of the winding up of the Company. If it is not, we do not know under what law he comes to this Court on appeal. Under the last clause of section 169 it was obligatory on him to give notice within three weeks, which he has failed to do. Therefore we cannot hear the appeal. On behalf of the appellant Mr. *Chaudhri* asked for an extension of time. The order of the court below was passed on the 28th of June, 1912, and this appeal was filed on the 7th of August, 1912. No good cause is shown why we should extend the time, and we see no reason to accede to the request. The preliminary objection prevails and this appeal is dismissed with costs.

Appeal dismissed.

35 A. 178 (=18 I. C. 731=11 A. L. J. 224).

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

BADRI NARAIN (*Defendant*) *v.* KUNJ BIHARI LAL (*Plaintiff*).*

[4th February, 1913.]

Execution of decree—Limitation—Suit for sale on a mortgage—Decree payable by instalments—Civil Procedure Code (1882), *section* 258—*Civil Procedure Code* (1908), *order XXI. rule* 2; *order XXXIV, rule* 5—*Act No. IX of* 1908 (*Indian Limitation Act*), *schedule* 1, *article* 181.

On a compromise in a suit for sale on a mortgage a decree followed providing that the sum found due on the mortgage (Rs. 1,374), with interest at a certain rate, should be paid by instalments of Rs. 100 a year, along with the interest then due. Payments were to be made by the end of Jeth in each year, beginning with Jeth 1957 Fasli (June 1900) and it was provided that if default were made for three years in succession in the payments and interest, the decree-holder would be at liberty to recover at once the whole amount payable under the decree, that is, to apply for an order absolute for sale and execute the same. No payment was made in 1900 or 1901, but in June 1902, just before the end of Jeth 1959 Fasli, the judgment-debtor paid up all that was [179] due on account of the first three years. He made no payment in 1903, but in June 1904 he paid up all that was due up to the end of Jeth 1960 Fasli (June 1903). No payment was made in 1905, but in June 1906 he paid the instalment and interest which he ought to have paid in Jeth 1961 Fasli (June 1904). This payment was covered by the proviso to section 20 (1) of the Limitation Act. The only other payment made was a small sum on account of interest in July 1909. The decree-holder applied for an order absolute for sale on the 3rd of August, 1909.

Held that the first three consecutive defaults were in 1905, 1906 and 1907, and that the decree-holder's application was in time applying article 181 of the first schedule to the Indian Limitation Act, 1908.

The following cases were referred to :—*Oudh Behari Lal* v. *Nageshar Lal* (1), *Kishan Singh* v. *Aman Singh* (2), *Roshan Singh* v. *Mata Din* (3), *Chunni Lal*

* Second Appeal No. 634 of 1911 from a decree of H. Dupernex, District Judge of Mainpuri, dated the 22nd of February, 1911, confirming a decree of Banke Behari Lal, Subordinate Judge of Mainpuri, dated the 10th of September, 1910.

(1) (1890) I. L. R. 13 All. 278.
(2) (1894) I. L. R. 17 All. 42.
(3) (1903) I. L. R. 26 All. 36.

v. *Harnam Das* (1), *Shankar Prasad* v. *Jalpa Prasad* (2), *Ajudhia* v. *Kunjal* (3), *Mon Mohun Roy* v. *Durga Churn Gooee* (4) and *Kashiram* v. *Pandu* (5).

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THE facts of this case were as follows :—

A decree on a compromise was passed on the 11th of September, 1899, to the following effect :—" Rs. 1,374 with interest at As. 10 per cent. per mensem shall be paid by instalments of Rs. 100 a year. *Agar mutawattir tin sal tak ada na ho ya kuch baqi rahe to digridar ko ikhtiar hai* etc., etc." The first instalment was due in June, 1900. In June, 1902, Rs. 605 were paid on account of the instalments, principal and interest, due for 1900, 1901, and 1902. No payment was made in 1903. In June, 1904, Rs. 181 were paid, which were credited by the decree-holder towards principal and interest of the instalment for 1903. The decree-holder alleged a further payment of Rs. 173-1-0 in June, 1906, which the decree-holder credited towards the instalment due for 1904. This payment was not admitted by the opposite party, who was a representative of the judgment-debtor. The present application for the preparation of a final decree was made on the 3rd of August, 1909, and the opposite party objected that the application was barred by limitation. The court below held that the alleged payment of June, 1906, was proved to have been made by the opposite party but that it had not been certified to the court. Both the courts below disallowed the objection as to limitation. The judgment-debtor's representative appealed.

[180] Babu *Piari Lal Banerji*, for the appellant :—

The payment of 1906 should not be recognized at all as it was not certified to the court executing the decree. Under order XXI, rule 2, of the Code of Civil Procedure the alleged payment could not be inquired into even for the purpose of seeing whether the present application was barred by limitation. Under the old Code an uncertified payment could be recognized for the purpose of such inquiry ; *Roshan Singh* v. *Mata Din* (6). The change in the law has been noticed and given effect to in the case of *Kutab-ullah Sarkar* v. *Durga Charan Rudra* (7). The fact that the alleged payment was made while the old Act was in force will not make the old Act applicable. The court has now to decide the question with reference to the procedure now applicable. It cannot be said that by the alleged payment any substantive right was acquired. The decree-holder could not say that by the payment he acquired any right which was not affected by the repeal of the old Act. It is true that this Court has held that the new Code of Civil Procedure would not affect any right acquired under the old Code ; *Kaunsilla* v. *Ishri Singh* (8). But that was a very different case. Under the law as it stood in the old Code a decree-holder who had obtained a decree on foot of a mortgage was not fettered by the twelve years' rule of limitation and he therefore did acquire this substantive right : to quote the words of KNOX, J. :—" the decree-holder had the remedy to enforce his right so to speak till the end of time " and it was held therefore that section 48 of the new Code would not affect mortgage decrees passed before the new Code came into force. No such consideration arose in the present case, as the question was merely one of procedure, in which no one had a vested right. If

(1) (1898) I. L. R. 20 All. 302.
(2) (1894) I. L. R. 16 All. 371.
(3) (1908) I. L. R. 30 All. 123.
(4) (1888) I. L R. 15 Cal. 502.
(5) (1902) I. L. R. 27 Bom. 1.
(6) (1904) I. L. R. 26 All. 36.
(7) (1912) 16 C. W. N. 396.
(8) (1910) I. L. R. 32 All. 499.

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the payment of 1906 was not recognized, the application was obviously time-barred, because there were three consecutive defaults in 1904, 1905 and 1906 and therefore the right to apply accrued in June, 1906, and the application should have been made in June, 1909. Even if the payment of June, 1906, were recognized, still the application was time-barred, because the payment made in June, 1906, had not the effect of paying in full the instalment due for June, 1906, and did not prevent the year 1906 from being a [181] year of default, and therefore there were three consecutive defaults in 1904, 1905 and 1906. No payment made in 1906 could wipe away the default of 1904 and 1905 which had already occurred, but if the payment had been made in full for the instalment due in 1906 it might have prevented a third consecutive default and thus have prevented the accrual of the right to apply.

Dr. *Satish Chandra Banerji*, for the respondent :—

The first point to be considered is whether the application made for a final decree for sale under order XXXIV, rule 5, of the Code of Civil Procedure is an application for execution or an application in the suit itself. If it is an application in the suit itself then the provisions of order XXI, rule 2, will not apply. Under the new Code an application under order XXXIV, rule 2, is not an application in the suit itself; *Sita Ram* v. *Sheo Raj Singh* (1). Even if the matter is treated as a matter in execution order XXI, rule 2, of the new Code would not apply, as the payments were made while the old Code was in force and uncertified payments could under that Code be recognized for the purpose of saving limitation; *Kaunsilla* v. *Ishri Singh* (2). Whether, therefore, the old Code applies or the new, order XXI, rule 2, has no application. As regards the proper construction of the decree as the payment was made in 1906 and was accepted by the decree-holder, the right to apply was waived. It was for the decree-holder to insist or not on punctual payments and if he chose to show favour to the judgment-debtor and accepted an overdue instalment, the judgment-debtor could not complain. The three consecutive defaults were made in 1905, 1906 and 1907. The application was made within time in 1909. He cited *Shankar Prasad* v. *Jalpa Prasad* (3), *Bhagwan Das* v. *Janki* (4), *Ajudhia* v. *Kunjal* (5), *Maharaja of Benares* v. *Nand Ram* (6).

Babu *Piari Lal Banerji*, in reply :—

The present matter is one in execution, as after the decree *nisi* had been passed under the old Code, the suit came to an end and therefore it could not be said, that by the new Code a suit which [182] had terminated was revived. He discussed *Ganga Singh* v. *Banwari Lal* (7) and *Amlook Chand Parrack* v. *Sarat Chunder Mukerjee* (8).

GRIFFIN and CHAMIER, JJ. :—The only question in this appeal is whether the respondent's application for a decree absolute for the sale of mortgaged property was made within time. The decree *nisi*, which was passed in 1899 upon a compromise between the parties, provided that Rs. 1,374-0-0 with interest at a certain rate should be paid by instalments of Rs. 100 a year along with the interest then due. Payments were to be made by the end of Jeth in each year beginning with Jeth 1957 Fasli (June 1900), and it was provided that if default were made for three years in succession in the payments and interest, the decree-holder would be at liberty to recover at once the whole amount payable under the decree, *i.e.*,

(1) (1910) 7 A. L. J. (Note) 65.
(2) (1910) I. L. R. 32 All. 499.
(3) (1894) I. L. R. 16 All. 371.
(4) (1905) I. L. R. 28 All. 249.
(5) (1903) I. L. R. 30 All. 123.
(6) (1907) I. L. R. 29 All. 431.
(7) (1911) 8 A. L. J. 1229.
(8) (1911) I. L. R. 33 Cal. 913.

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to apply for an order absolute for sale of the property and execute the same.

No payment was made in 1900 or in 1901, but in June 1902, just before the end of Jeth 1959 Fasli, the appellant paid up all that was due on account of the first three years. He made no payment in 1903, but in June 1904 he paid up all that was due up to the end of Jeth 1960 Fasli (June 1903). No payment was made in 1905, but in June 1906 he paid the instalment and interest which he ought to have paid in Jeth 1961 Fasli (June 1904). It has been found that this payment is covered by the proviso to section 20 (1) of the Limitation Act. The only other payment made was a small sum on account of interest in July 1909 which has no bearing upon the question which we have to decide.

The appellant contends that the payment made in June 1906 not having been certified cannot be recognized by the court in view of the provisions of order XXI, rule 2. To this the respondent replies that that rule is not applicable, inasmuch as the application for a decree absolute is not an application for execution and the court is not being asked to execute a decree but only to continue the suit. The payment in question was made before the passing of the new Code of Civil Procedure. Under the old Code it was, no doubt, held by this Court that an application for an order absolute was a proceeding in execution of a decree—see *Oudh* [183] *Behari Lal* v. *Nageshar Lal* (1)—but it was held also in several cases that although an uncertified payment could not be recognized as a payment or adjustment of a decree by a court executing a decree, it was available to a decree-holder for the purpose of meeting a plea of limitation—see for example *Kishan Singh* v. *Aman Singh* (2) and *Roshan Singh* v. *Mata Din* (3). These rulings are binding upon us. The right which the respondent had before the passing of the new Code of Civil Procedure, to use the payment made in 1906 for this purpose, cannot have been taken away from him by the passing of the Code. We are therefore bound to recognize the payment when dealing with the question of limitation.

We have to ascertain what article of the Limitation Act is applicable and when time began to run against the respondent. In *Chunni Lal* v. *Harnam Das* (4) article 179, schedule II, to the Limitation Act of 1877 (article 182 of schedule I to the present Act) was held to govern an application for an order absolute for sale of mortgaged property. But the decree *nisi* in that case was in the common form, whereas in the present case we have an instalment decree containing a provision that the whole amount of the decree may be demanded on the occurrence of three consecutive defaults, and it is difficult to see how any of the provisions of the third column of article 182 of the present Act can be applied to such a case. It would appear that the article applicable is No. 181. This article corresponds with article 178 of the Act of 1877, which has been held in many cases to govern applications in execution proceedings to which for one reason or another article 179 of that Act could not be applied. If, as we think, article 181 of the present Act is applicable, the right to apply for an order absolute accrued to the appellant on the occurrence of the third consecutive default.

(1) (1890) I. L. R. 13 All. 278.
(2) (1894) I. L. R. 17 All. 42.
(3) (1903) I. L. R. 26 All. 36.
(4) (1898) I. L. R. 20 All. 302.

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The respondent relies upon the decisions in *Shankar Prasad* v. *Jalpa Prasad* (1), *Ajudhia* v. *Kunjal* (2) and other like cases as authority for the proposition that the respondent was not bound to take out execution, i.e., apply for an order absolute, on the happening of the third consecutive default, though he was at [184] liberty to do so if he pleased, and therefore time did not necessarily begin to run against him from the date of the third consecutive default. We need not discuss these cases, two of which were governed by article 75, for it cannot be denied that if article 181 is applicable the right to apply for an order absolute accrued to the appellant on the happening of the third consecutive default. The question is when did that occur? The defaults in 1900 and 1901 were wiped out by the payment made in June 1902. There was a default in 1903, another in 1904 and a third in 1905. The respondent contends that those defaults were wiped out by the payments made and accepted in 1904 and 1906. There is a consensus of opinion among the High Courts that the subsequent payment and acceptance of overdue instalments must be taken into consideration for the purpose of applying the rules of limitation to an instalment decree, although the articles applicable contain no such provision as that to be found in article 75. The Calcutta High Court seem to treat it as a case of waiver and as an exception to the rule that limitation runs from the date of default—*Mon Mohun Roy* v. *Durga Churn Gooee* (3)—and the same view seems to have been accepted by this Court and by the Madras High Court. The Bombay High Court treat it as a kind of estoppel—*Kashiram* v. *Pandu* (4). Whatever may be the true reason for the rule, it seems to be well settled that after defaults have occurred, which according to the decree set time running against the decree-holder, the payment and acceptance of the overdue instalments may have the effect of preventing him from saying that the payments were not made regularly and in satisfaction of the decree, and remitting the parties to the rights which they would have had if no default had occurred. In the present case there can be no doubt that the respondent accepted the payment made in June, 1904, in satisfaction of the instalments and interest payable in June, 1903. Similarly he accepted the payment made in June, 1906, in satisfaction of the instalments and interest payable in June, 1904, and if he had applied for an order absolute or sale at any time before July, 1907, it would certainly have been held by this Court that his action was premature.

On the authorities we feel bound to hold that the first three consecutive defaults of which the respondent can take advantage [185] are those which occurred in 1905, 1906 and 1907. Consequently his application for a decree absolute made in August 1909, must be held to have been made within time. We dismiss this appeal with costs.

Appeal dismissed.

(1) (1894) I. L. R. 16 All. 371.
(2) (1908) I. L. R. 30 All. 123.
(3) (1888) I. L. R. 15 Cal. 502.
(4) (1902) I. L. R. 27 Bom. 1.

35 A. 185 11(=A. L. J. 206=19 I. C. 63.)

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35 A. 185=11
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19 I. C. 63.

SHIDA ALI (*Plaintiff*) *v.* PHULLO AND ANOTHER (*Defendants*). *
[7th February, 1913.]

Act No. IX of 1903 (*Indian Limitation Act*), *schedule I, article* 132—*Limitation*—Malikana—*Suit for* malikana—*Decree asked for against property charged.*

Where a plaintiff sued for the recovery of *malikana* for 11 years and claimed a decree against the property on which the *malikana* was charged, it was *held* that the suit was within time having regard to article 132 of the first schedule to the Indian Limitation Act, 1903. *Kallar Roy* v. *Ganga Pershad Singh* (1) distinguished.

[Ref. 17 A. L J. 177=49 I. C. 737.]

THE facts of this case were as follows.—

The plaintiff sued on the allegations that in mauza Razzakpur the owners of *muafi* rights were bound to pay to the owners of zamindari rights Rs. 12-8-0 per cent. of cash rental, $2\frac{3}{4}$ seer per maund of the grain rental, and Rs. 17-3-0 a year as *bhent* (present); that these dues were a charge on the *muafi* rights; that in mahal *safed* of that mauza there was a *patti* of 5 biswas; that the defendant was a *muafidar* of the whole of that and a zamindar of 3 biswa, 2 biswannsis, 10 kachwansis of it; that the plaintiff was a zamindar of one biswa 17 biswansis 10 kachwansis and entitled to recover the aforesaid dues in respect of that; that the defendant had not paid him any thing for the years 1305 *fasli* to 1316 *fasli*; hence this suit for Rs. 625-6-4 as principal, and Rs. 498-9-0 as interest, to be realized from the defendant's 85 biswas. The defendants pleaded that the suit was not cognizable by the Civil Court; that the amount of *bhent* was not Rs. 17-8-0 per annum; that the dues payable were not a charge on the land; that the dues in question were payable by the holder of the whole 20 biswa zamindari rights jointly to the holders of the whole 20 biswa *muafi* rights, therefore the suit against the defendants alone was not maintainable and was bad for non-joinder of parties; that the plaintiff himself owned *muafi* right over five biswas till the [186] 21st of December, 1908, on which date $4\frac{1}{2}$ biswas were auctioned off and half a biswa was still held by him; that a large part of the claim is barred by limitation; that the amounts of rental and quantities of zamindari rights as mentioned by the plaintiff were wrong, and that the claim about interest was wrong. The court below dismissed the suit. The plaintiff appealed.

Mr. *S. A. Haidar*, for the appellant, relied on *Hurmuzi Begum* v. *Hirdaynarain* (2) *Churaman* v. *Balli* (3), *Lallubhai* v. *Naran* (4) and *Jagarnath Pershad Singh* v. *Kharach Lal* (5) and submitted that the *malikana* being a charge on property the whole amount was recoverable. Article 132 of the Limitation Act was applicable.

Tha Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents, contended that the claim, except that for three years, was barred by limitation. He relied on *Kallar Roy* v. *Ganga Pershad Singh* (1).

Mr. *S. A. Haidar* was not heard in reply.

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* First Appeal No. 248 of 1911 from a decree of Pitamber Joshi, Second Additional Judge of Moradabad, dated the 18th of March, 1911.

(1) (1905) I. L. R. 33 Cal. 998.
(2) (1880) I. L. R. 5 All 921.
(3) (1887) I. L. R. 9 All. 591.
(4) (1882) I. L. R. 6 Bom. 719.
(5) (1905) 10 C. W. N. 151.

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35 A. 185=11 A. L. J. 206 =19 I. C. 63.

GRIFFIN and CHAMIER, JJ.:—This is a plaintiff's appeal arising out of a suit to recover eleven years' arrears of *malikana*. The plaintiff asked for a decree against the property, on which, he says, the *malikana* allowance was chargeable. The court below has given him a decree for Rs. 57-3-4 only. In appeal to this Court it is pointed out, on behalf of the appellant, that the court below, in making its calculation, has made an obvious mistake and that the sum due to the plaintiff appellant on the basis adopted by the court below should be Rs. 262-12-5, to which should be added Rs. 18-0-0 on account of *bhent*. The defendants respondents have filed objections, and it is contended on their behalf that the suit is barred by time. Reliance is placed on *Kallar Roy* v. *Ganga Pershad Singh* (1). In that case the learned Judges refused to apply the provisions of article 132 of the Limitation Act, the reason being that in the particular case before them the plaintiff had not asked for a decree against the property chargeable with *malikana*. In the present case the plaintiff asked for a decree against the property, although the court below has not granted it. The explanation to article 132 leaves no doubt as to the period [187] of limitation applicable to suits of this nature. We allowed the appeal so far that in lieu of the decree for Rs. 57-3-4 passed by the court below we substitute a decree for Rs. 280-12-5. Parties will pay and receive costs in proportion to failure and success in both courts. The cross objections are dismissed with costs.

Appeal allowed.

35 A. 187 (=19 I. C. 76=11 A. L. J. 214).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

ANANT DAS (*Defendant*) *v.* UDAI BHAN PARGAS (*Plaintiff*).*

[7th February, 1913.]

Civil Procedure Code (1908), *section* 11—Res judicata—*Two suits, one judgment and two decrees—Two appeals of which one abates before the other is heard.*

A plaintiff instituted, on the same day and in the same court, two suits, in each of which the claim was for a declaration that he was the *mahant* of a certain *math*. The one was against defendant *A* only, the other against defendants *A* and *S*. Both suits were decided by a single judgment, but a separate decree was framed in each. In the former suit *A* appealed. In the latter *S* appealed, but *A* did not. Pending *A*'s appeal *S* died and his appeal abated and the judgment in the case became final. *Held* that the hearing of *A*'s appeal was barred. *Zaharia* v. *Debia* (2) followed.

[Ref. 84 I. C. 894=2 Rang. 633; over. 74 I. C. 411=21 A. L. J. 465=45 All. 503 (F.B.) Ref; 74 I. C. 583; 74 I. C. 591=37 C. L. J. 184; 75 I. C. 479.]

In this case two suits were instituted in the court of the Subordinate Judge of Gorakhpur apparently on the same day. The plaintiff in both suits was *mahant* Udai Bhan Pargas *alias* Angan Das. In one suit the defendant was Anant Das; and in the other Anant Das and Sundar Das. In both suits the plaintiff claimed a declaration that he was *mahant* of a certain *math*. In the latter suit the claim was as follows:—"The plaintiff's title and the defendants' want of title

* First Appeal No. 131 of 1911, from a decree of Harbandhan Lal, Additional Subordinate Judge of Gorakpur, dated the 26th of January, 1911.

(1) (1905) I. L. R. 33 Cal. 998. (2) (1910) I. L. R. 33 All. 51.

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may be established, and it may be declared that the plaintiff is entitled to receive the papers and the box aforesaid. The box and the papers detailed below may be awarded to the plaintiff." In the earlier part of the plaint the plaintiff stated "but as both the defendants deny the plaintiff's title, he brings this claim against both the defendants in respect of a box which contains papers, documents, etc., . . . and which Sundar Das the defendant has taken back after the institution of this suit without the plaintiff's knowledge." Both the suits were tried together, and amongst the issues framed were the following:—"Is the plaintiff *chela* of Karan Das, and was he appointed *mahant*? Has the plaintiff a right to sue? What is the custom relating to the *mahantship*, and was the plaintiff [188] appointed *mahant* according to that custom?" The result was that in the suit in which both Anant Das and Sundar Das were defendants there was a decree against both declaring the plaintiff's title. From that decree Sundar Das appealed, but Anant Das did not. This appeal, however, abated, Sundar Das having died, and no steps having been taken within time to bring his legal representative on to the record. The decree, therefore, in this case, became final. In the other case Anant Das appealed, but when the appeal came on for hearing a preliminary objection was raised to the effect that the decree in the first case having become final operated as *res judicata* in regard to this appeal.

The Hon'ble Dr. *Sundar Lal* and Munshi *Govind Prasad*, for the appellant.

Dr. *Satish Chandra Banerji* and Munshi *Iswar Saran*, for the respondent.

RICHARDS, C. J. and BANERJI, J.—A preliminary objection has been taken to the hearing of this appeal on the ground of *res judicata*. It is necessary shortly to state the facts in order that it may be understood how the question arises. Two suits were instituted in the court of the Subordinate Judge of Gorakhpur apparently on the same day. The plaintiff in both the suits was *mahant* Udai Bhan Pargas *alias* Angan Das. In the present suit Anant Das was the only defendant. In the other suit the defendants were (1) Sundar Das and (2) Anant Das, the appellant in this appeal. In both suits the plaintiff claimed a declaration that he was the *mahant* of a certain *math*. In the suit in which both Sundar Das and Anant Das were defendants the claim was as follows:—

"The plaintiff's title and the defendants' want of title may be established and it may be declared that the plaintiff is entitled to receive the papers and the box aforesaid. The box and the papers detailed below may be awarded to the plaintiff."

In the earlier part of the plaint the plaintiff stated "but as both the defendants deny the plaintiff's title, he brings this claim against both the defendants in respect of a box which contains papers, documents, etc., ... and which Sundar Das, the defendant, has taken back after the institution of this suit without the plaintiff's knowledge."

[189] Both the suits were tried together in the court below and amongst the issues framed were the following:—"Is the plaintiff *chela* of Karan Das and was he appointed *mahant*? Has the plaintiff a right to sue? What is the custom relating to the *mahantship*, and was the plaintiff appointed *mahant* according to that custom?" These issues were decided in favour of the plaintiff. The result was that in the suit in which both Sundar Das and Anant Das were defendants, there was a decree against both the defendants, declaring the plaintiff's title, after the issues to

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we have referred had been decided. From the decree in that suit Sundar Das alone appealed, but Anant Das did not prefer an appeal. The appeal of Sundar Das abated by reason of the fact that after his death no steps were taken to bring his representatives on the record within the time allowed by law. Anant Das, however, did appeal in the suit out of which the present appeal arises, which, as we have already mentioned, was decided at the same time as the other suit, and by one and the same judgment. We must here mention that, although both suits were disposed of by the same judgment, separate decrees were drawn up in each case.

The respondent now by way of a preliminary objection contends that the appeal of Sundar Das having abated and Anant Das not having appealled from the decree in that suit, there is now a binding decree against him unappealed from. The appellant Anant Das, on the other hand, contends that section 11 of the Code of Civil Procedure, which deals with *res judicata*, does not apply to the present case, because, the two suits were tried together and disposed of by one judgment on the same day, and secondly, because in any event, in the suit in which both Sundar Das and Anant Das were defendants, the real question was the title to the particular property mentioned in the plaint in that suit, and that therefore the decree which was given in that suit cannot be said to operate as *res judicata* on the question of the title to the property in dispute in the suit out of which the present appeal arises.

Section 11 of the Code is as follows: —"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent [190] to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

In explanation (1) " former suit " is defined as denoting a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto. It cannot for one moment be contended that the decree in the suit in which both Sundar Das and Anant Das were defendants has not now become final as against Anant Das. Beyond all question the issue as to whether the plaintiff was or was not the *mahant* was decided in that suit and we are now called upon to decide the same issue in the present appeal. The result might be that if we were now to hear the appeal, there would be one binding decree declaring that Udai Bhan was the *mahant*, and another equally binding decree declaring that he was not, both decrees being in suits to which Anant Das was a party. It seems to us that it was to prevent anomalies of this description (amongst other reasons) that section 11 was enacted. No doubt it is somewhat unfortunate in the present case that the appellant is unable to have the question decided by this Court by reason merely of the fact that he did not appeal against the dec[illegible] in the other suit. This view of the rule of *res judicata* was taken in th[illegible] Bench case of *Zaharia* v. *Debia* (1), a decision which is of course bi[illegible]us.

We accordingly disr[illegible]nding on[illegible]ith costs.

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Appeal dismissed.

(1) 7910 I. L. R. 33 All. 51.

35 A. 190 (=19 I. C. 79=11 A. L. J. 217).

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35 A. 190 = 19 I. C. 79 = 11 A. L. J. 217.

Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Rafiq.

KUNWAR SEN AND OTHERS (*Defendants*) *v.* JWALA PRASAD AND OTHERS (*Plaintiffs*).*

[7th February, 1913.]

Act No. XIX of 1873 (*North-Western Provinces and Oudh Land Revenue Act*), *sections* 146, 148 *and* 167—"*Proprietor*"—*Mortgage by* muafidar—*Sale of mahal for default in payment of Government revenue—Rights of purchaser and mortgagees of the* muafi.

Where certain *muafidars*, whose rights as such accrued before the year 1870, and were not shown to have been created by the zamindars of the *mahal* in which the *muafi* land in question was situate, executed a usufructuary mortgage of such land, and thereafter the *mahal* was sold for default in [191] payment of Government revenue, it was *held* that the rights of the mortgagees were not extinguished in favour of the purchaser.

THE facts of this case were as follows:—

The plaintiffs brought a suit for the recovery of money or for possession on two mortgages in respect of land belonging to defendants 1 to 3. The *mahal* in which the land in question was situate was sold for arrears of revenue on the 24th of December, 1892, and purchased by one Jagan Bihari Lal, who again sold all his rights in the property to one Tara Chand, who was represented by defendants 4 to 6. These defendants contested the suit of the plaintiffs on the ground that they were the exclusive owners of the property having derived their title from Jagan Bihari Lal, to whom the whole *mahal* was sold at auction in default of arrears of revenue, and that even if defendants 1 to 3 (mortgagors) and the plaintiffs had any right as co-sharers, their right was extinguished after the sale of the property in view of the provisions of section 167 of Act XIX of 1873. The first court, relying upon sections 146 and 148 of Act XIX of 1873, held that the plaintiffs were entitled to a decree for recovery of possession of the land in dispute. The lower appellate Court, however, found that the land in dispute was really *nankar* land and that no exproprietary tenancy had been created so far as the occupiers of the *nankar* land were concerned and held that the plaintiffs' rights in the land were in no way affected by the sale of the *mahal* and gave the plaintiffs a decree for sale of the mortgaged property. The defendants appealed.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Munshi *Gulzari Lal*), for the appellants:—

As the entire proprietary rights in the village were sold the mortgage in suit was extinguished and could not be enforced. The land in dispute is described in the wajib-ul-arz as being *sir bila lagan bataur malikana wa bila mundarja khewat*. The word 'proprietor' used in section 146 of Act XIX of 1873 was not used in any restrictive sense, and under the provisions of that section all proprietors and the entire *mahal* were liable for the revenue for the time being assessed on the *mahal*. And the entire *mahal* having been sold in default of arrears of revenue the rights of the mortgagees came to an end and the first court was right in dismissing the plaintiffs' claim in view of the provisions of section 167 of Act XIX of 1873.

*Second Appeal No. 152 of 1912 from a decree of H. Dupernex, District Judge of Farrukhabad, dated the 14th of December, 1911, reversing a decree of Gauri Shankar, Subordinate Judge of Fatehgarh, dated the 16th of May, 1911.

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[192] Dr. *Satish Chandra Banerji*, for the respondents, was not called upon.

KNOX and MUHAMMAD RAFIQ, JJ.:—The plaintiffs to the suit out of which this second appeal has arisen describe themselves as mortgagees from certain persons whom they have arrayed as defendants 1 to 3. It appears that the *mahal* in which the land in dispute is situate was sold for arrears of revenue which were due from the *mahal*. On the 24th of December, 1892, the *mahal* was sold at a revenue sale and purchased by one Jagan Bihari Lal. Jagan Bihari Lal in turn sold all the rights he had purchased to one Tara Chand and defendants 4 to 6 are the representatives in interest of Tara Chand. The mortgagees are now seeking to enforce their rights and ask that the mortgage money may be awarded to them by sale of the mortgaged property. The suit was defended only by defendants 4 to 6. The contention is that as the whole of the *mahal*, including the area in dispute, was sold to Jagan Bihari Lal, even if defendants 1 to 3 and the plaintiffs had any right as co-sharers, that right became extinct under section 167 of Act XIX of 1873. The land in dispute, they say, though known as grove land, is not actually a grove, but has been actually under cultivation from a long time prior to the execution of the mortgage set up by the plaintiffs. The Subordinate Judge of Farrukhabad, before whom the suit came in the first instance, relying upon sections 146 and 148 of Act No. XIX of 1873, held that the plaintiffs might be granted a decree for recovery of possession of the land in dispute. In appeal the learned Judge found that the land in dispute was really *nankar* land and no exproprietary tenancy had been created so far as the occupiers of the *nankar* land were concerned. He further held that their rights in the land were in no way affected by the sale of the zamindari. He therefore decreed the suit, against the first three defendants, for recovery of possession of the land in suit by the plaintiffs as usufructuary mortgagees of these defendants' interest as exproprietary tenants of the land in suit, for Rs. 800-0-0. But he dismissed the rest of the suit. Defendants 4 to 6 have appealed to this Court and they again contend that as the entire proprietary rights in the village Neknampur were sold, the mortgage in suit was extinguished and could not be enforced.

[193] Apparently the confusion into which the Subordinate Judge fell arose from the words in which the land in dispute is described in the wajib-ul-arz at the settlement of 1870. There the land is set out as being *sir, bila lagani bataur malikana wa bila mundarja khewat*, and it has been strongly argued before us that the terms used in sections 146 and 148 of Act XIX of 1873 justify the contention. It is true that in section 146 it is said that in the case of every *mahal* the entire *mahal* and all the proprietors jointly and severally shall be responsible to Government for the revenue for the time being assessed on the *mahal*, and that section 148 provides that any sum not so paid becomes thereupon an arrear of revenue and the persons responsible for it become defaulters. We are also referred to section 53 of the same Act. The learned counsel was asked whether he could produce any precedent in support of his contention that persons in a *mahal* who are generally known by the term *muafidars* and are, as in this case, persons who are not entered as payers of revenue to the Government for the time being, are, in the event of the *mahal* falling into arrears of payment of revenue, responsible for payment under section 146 and their rights, if the *mahal* is brought to sale, extinguished in favour of the seller. The rights of the mortgagors in the

present case were rights which came into existence before the settlement of 1870. It is not shown, and it is in the highest degree improbable, that they were rights created by the zamindars who were responsible for the arrears under which the *mahal* in which the property in dispute was situate was brought to sale. In our opinion the word 'proprietor' used in sections 146 and 148 refers only to those who in the wajib-ul-arz are set out as being the persons on whom the revenue has been at the time of settlement assessed jointly or severally. The wajib-ul-arz of 1870 shows no such payment of revenue by the mortgagors in the present case. The contention raised in this appeal is in our opinion without force, and the view taken by the learned Judge is the correct view. It is not for us in the present case to say what precise position the mortgagee held in the *mahal*. All that we have to decide is what rights were sold in default of arrears of revenue. The appeal fails and is dismissed with costs.

Appeal dismissed.

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35 A. 190=19 I. C. 79=11 A. L. J. 217.

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35 A. 194 (=11 A. L. J. 221=18 I. C. 744).

[194] APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

BIHARI LAL AND OTHERS (*Defendants*) *v.* MAKHDUM BAKHSH AND OTHERS (*Plaintiffs*) AND ALIM-ULLAH KHAN AND OTHERS (*Defendants*) *

[12th February, 1913.]

Evidence—Mortgage—Recital of receipt of consideration—Recital admissible as against representatives of original mortgagor.

Held that the admission of the receipt of consideration contained in a mortgage deed is admissible in evidence against the representatives in interest of the original mortgagors. *Brajeshware Peshakar* v. *Budhanuddi* (1), *Nawal Kunwar* v *Bakhtawar Singh* (2) and *Abdul Majid* v. *Habbub Ali* (3) followed. *Manohar Singh* v. *Sumirta Kuar* (4) not followed. *Bisheswar Dayal* v. *Harbans Sahay* (5), *Ghurpheku* v. *Purmeshwar Dayal Dubey* (6) and *Rahim Jan Bibi* v. *Imam Jan* (7) doubted.

[Rel. 21 I. C. 841; 12 A. L. J. 941=26 I. C. 68; Fol. 35 All. 353.]

THE facts of this case were as follows:—

This was a suit upon a mortgage made by one Najaf Khan in favour of an ancestor of the plaintiff in May, 1868. The first set of defendants are the heirs of Najaf Khan. The second set are purchasers after the mortgage of various portions of the mortgaged property. The mortgage purported to have been made in consideration of a sum of Rs. 22 due on a prior mortgage of 1887 and two sums said to have been paid just before and just after the execution of the deed. The courts below held that the payment of these two sums had not been proved, but that the mortgage was good for the sum of Rs. 92 and interest thereon. The evidence that the last mentioned sum was due upon a prior mortgage consisted of a recital in the deed in suit and the production by heirs of the mortgagor of the earlier deed, which does not bear endorsement showing that it had been paid off.

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* Second Appeal No. 24 of 1912 from a decree of B. J. Dalal, District Judge of Jaunpur, dated the 30th of November, 1912, confirming a decree of Debi Prasad Chaturvedi, Second Additional Munsif of Jaunpur, dated the 5th of September, 1911.

(1) (1880) I. L. R. 6 Cal. 268.
(2) (1912) 10 A. L. J. 390.
(3) F. A. No. 129 of 1911.
(4) (1895) I. L. R. 17 All 428.
(5) (1907) 6 C. L. J. 659.
(6) (1907) 5 C. L. J. 653.
(7) (1911) 17 C. L. J. 178.

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APPELLATE CIVIL.

35 A. 194=11 A. L. J. 221 =18 I. C. 744.

The court of first instance decreed the claim to the extent mentioned, and this decree was affirmed in appeal by the District Judge. The defendants appealed, contending that the recital in the mortgage deed of receipt of consideration was not admissible as regards them.

The Hon'ble Munshi *Gokul Prasad* (with him Munshi *Haribans Sahai*), for the appellants, submitted that such a recital was no [195] evidence against a purchaser of property and should be proved against him. He relied on *Manohar Singh* v. *Sumirta Kuar* (1), *Brajesheware Peshakar* v. *Budhanuddi* (2), *Ghurphekne* v. *Purmeshwar Dayal Dubey* (3), *Bisheswar Dayal* v. *Harbans Sahay* (4) and *Rahim Jan Bibi* v. *Imam Jan* (5).

Mr. *S. A. Haidar*, for the respondents, cited *Lalak Singh* v. *Ajudhia Prasad* (6).

The Hon'ble Munshi *Gokul Prasad*, replied.

GRIFFIN and CHAMIER, JJ.:—This was a suit upon a mortgage made by one Najaf Khan in favour of an ancestor of the plaintiff in May, 1868. The first set of defendants are the heirs of Najaf Khan. The second set are purchasers after the mortgage of various portions of the mortgaged property. The mortgage purports to have been made in consideration of a sum of Rs. 22 due on a prior mortgage of 1867 and two sums said to have been paid just before and just after the execution of the deed. The courts below have held that the payment of these two sums has not been proved, but that the mortgage holds good for the sum of Rs. 92 and interest thereon.

The evidence that the last mentioned sum was due upon a prior mortgage consists of a recital in the deed in suit and the production by the heirs of the mortgagor of the earlier deed which does not bear any endorsement showing that it had been paid off.

In second appeal it is contended that the recital in the deed is not admissible in evidence against the defendants. The defendants appellants rely upon the decisions of this Court in *Manohar Singh* v. *Sumirta Kuar* (1) and the decisions of the Calcutta High Court in *Brajeshware Peshakar* v. *Budhanudai* (2). *Ghurphekni* v. *Purmeshwar Dayal Dubey* (3) *Bisheswar Dayal* v. *Harbans Sahay* (4) and *Rahim Jan Bibi* v. *Imam Jan* (5).

The first of the Calcutta cases is no authority for the proposition that a recital of the receipt of consideration contained in a mortgage is not admissible in evidence against a subsequent transferee of the property. On the contrary, the Chief Justice, the only [196] one of the three Judges who discusses the question at all, shows at page 278 of the report how the mortgagor's admission of the receipt of consideration was admissible against a subsequent purchaser of the property. The statement at the foot of page 277 of the report, that a recital in a deed is not evidence against third persons must be read in conjunction with what follows. This seems to have been overlooked by the learned Judges who decided the case of *Manohar Singh* v. *Sumirta Kuar* (1). In the last mentioned case and in the case of *Bisheswar Dayal* v. *Harbans Sahay* (4) the question was whether the admission by a mortgagor of the receipt of the consideration contained in a deed was admissible in evidence against subsequent auction purchasers of the property. That question does not arise in the present case. There

(1) (1895) I. L. R. 17 All. 428.
(2) (1880) I. L. R. 6 Cal. 268.
(3) (1907) 5 C. L. J. 653.
(4) (1907) 6 C. L. J. 659.
(5) (1911) 17 C. L. J. 178.
(6) (1912) 10 A. L. J. 108.

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35 A. 194=11 A. L. J. 221 =18 I. C. 744.

may be, we do not say that there is, some ground for distinguishing between the case of an auction purchaser and the case of mortgagee or a purchaser by private treaty. In the case of *Ghurpheknı* v. *Purmeshwar Dayal Dubey* (1) all that was held was that an admission of the receipt of consideration made by a mortgagor was not admissible against her step-daughters who, however, did not claim title under her. That decision has no bearing upon the present case. In the case of *Rahim Jan Bibi* v. *Imam Jan* (2) it was held that the recital of the receipt of consideration contained in a *hibabiłewaz* was not admissible against his daughter after his death. If, as seems to have been the case, the daughter was one of his heirs, we think that the correctness of the decision is open to doubt, for under section 21 of the Evidence Act an admission is relevant and may be proved as against the person who makes it or his representative in interest.

In *Nawal Kunwar* v. *Bakhtawar Singh* (3) it was held that a recital in a mortgage deed that a certain sum was due to the mortgagee was admissible in evidence against a subsequent purchaser, by private treaty, of the property mortgaged, and in *Abdul Majid* v. *Mahbub Ali* (4) it was held that a recital of the receipt of consideration contained in a deed of mortgage was as much binding upon his heirs as upon the mortgagor himself.

[197] It seems to us that the decisions in the two last mentioned cases are in reality supported by the decision in *Brajeshware Peshakar* v. *Budhanuddi*, and we must hold that the admission of the receipt of consideration contained in the mortgage deed now in suit is admissible against the defendants appellants, who are representatives in interest of the original mortgagor.

It is not for us in second appeal to consider the value of the admission, but we may say that it receives in our opinion strong support from the production of the deed of 1867 which bears no signs of having been paid off.

For the above reasons we dismiss the appeal with costs.

Appeal dismissed.

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35 A. 197 (=11 A. L. J. 233=18 I. C. 797.)

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

RAM CHANDRA AND OTHERS (*Defendants*) *v.* ALI MUHAMMAD AND OTHERS (*Plaintiffs*) AND KAMARUDDIN BEG (*Pro forma Defendant*).*

[13th February, 1913.]

Muhammadan Law—Waqf—Right of Muhammadans to worship in mosques—Suit by individual Muhammadans whose right is infringed—Civil Procedure Code (1908), *order I, rule* 8.

Every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance and is competent to maintain a suit against anyone who interferes with its exercise, but if he brings his suit in his personal capacity and not on behalf of the whole Muhammadan community, the decision will be binding only as between the plaintiff and the

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* Second Appeal No. 405 of 1912 from a decree of H. W. Lyle, District Judge of Agra, dated the 6th of January, 1912, confirming a decree of Muhammad Amanul Haq, Additional Munsif of Agra, dated the 25th of February, 1911.

(1) (1907) 5 C. L. J. 653.
(2) (1911) 17 C. L. J. 173.
(3) (1912) 10 A. L. J. 390.
(4) F. A. No. 129 of 1911.

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APPELLATE CIVIL.

35 A. 197=
11 A. L. J.
233=18 I. C.
797.

defendant and cannot be taken advantage of by, or be binding on, the Muhammadan community in general. *Jawahra* v. *Akbar Husain* (1) and *Dasondhay* v. *Muhammad Abu Nasar* (2) followed.

[Ref: 66 I. C. 90;]

THE facts of this case are fully set forth in the judgment of the Court.

Pandit *Shiam Krishna Dar*, for the appellants.

Maulvi *Ghulam Mujtaba* and Munshi *Muhammad Ishaq*, for the respondents.

GRIFFIN and CHAMIER, JJ. :—The plaintiffs in this case, who are Muhammadans, allege that in the time of the Muhammadan kings a mosque and some houses were built in the town of Agra; that from that time the Muhammadans have always worshipped in the mosque and the property has all along been waqf; that some time [198] before 1875 the *Mutawalli* of the property mortgaged it to some Hindus, but in a suit brought in the court of the Subordinate Judge in 1875 it was declared that the property was waqf and the Muhammadans continued to worship in the mosque as before; that the plaintiffs had received information that the fifth defendant, when in charge of the mosque, transferred it to an ancestor of the defendants 1—4 who are Hindus; that this mortgage was invalid and notwithstanding the mortgage the Muhammadans continued to use the mosque as before, that defendants 1—4 instituted a suit against six Muhammadans in 1907 and obtained a decree, in execution of which they attempted to take possession of the property on the 20th of March, 1910, but the plaintiffs refused to deliver possession alleging themselves to be in possession of the property like other Muhammadans. The plaintiffs say that the cause of action accrued to them on the 20th of March, 1910, and they pray for a declaration that the property is waqf; that it was intended to be used as a place of worship by all Muhammadans; that it was not transferable, and that defendants 1—4 had acquired no title to the property. The defendants denied that the property was a mosque or that it had been used by the Muhammadans as such. They pleaded that the suit was barred by section 11 of the Code of Civil Procedure, and also limitation. They pleaded further that the right of the Muhammadans, if any, was barred by the long continued adverse possession on the part of the defendants and their predecessors. Both the courts below have come to the conclusion that the property now in suit is part of the property which was in suit in 1875 and that the defendants have failed to prove adverse possession for more than twelve years. The District Judge says that the defendants may have been in possession of the property off and on, but they have not held possession continuously for the requisite period. We must accept these findings. There is nothing to show that the Muhammadans who were made defendants to the suit brought by the present defendants in 1907, were sued as representatives of the Muhammadan community or that the present plaintiffs in any way claim under them or are bound by the decision pronounced in that suit.

The only question which admits of any doubt is whether the present suit is maintainable. We have been referred to a large [199] number of decisions of this and other High Courts, and it is contended that such a suit as this cannot be maintained unless it is instituted under order 1, rule 8, of the Code of Civil Procedure, and that individual

(1) (1884) I. L. R. 7 All. 178. (2) (1911) I. L. R. 33 All. 660.

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35 A. 197=11 A. L. J. 233 =18 I. C. 797.

Muhammadans are not entitled to reliefs such as are claimed in the present suit. There can, we think, be no doubt that a suit of this nature might be brought on behalf of the Muhammadan community, and we think that if the defendants had raised the question in the court of first instance, the Munsif might well have said that in the exercise of his discretion he would not give a declaratory relief unless the plaint was amended and the suit was brought on behalf of the whole Muhammadan community. There has been a great deal of litigation about this property and it would have been well if the suit had been so constituted as to put an end to all disputes once for all. It is difficult to see how the decision arrived at in the present case could be taken advantage of by, or be held binding on, the Muhammadan community in general. But it seems to us that on the authorities we are bound to hold that the plaintiffs are entitled to maintain the suit. In the case of *Jawahra* v. *Akbar Husain* (1) it was held by a Full Bench of five Judges that every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance and is competent to maintain a suit against anyone who inteferes with its exercise, irrespective of the provisions of sections 30 and 539 of the Code of Civil Procedure, 1882. In the present case the defendants interfered with the rights of the plaintiff and attempted to turn them out of the mosque. We are bound to follow the decision of the Full Bench, which has been followed in other cases, and we must, therefore, hold that the plaintiffs are entitled to maintain this suit. There are other cases in this Court in which the Full Bench decision was followed, the latest case being that of *Dasondhay* v. *Muhammad Abu Nasar* (2). The relief claimed by the plaintiffs is perhaps a little wider than it should have been. But the defendants did not object to the form of relief claimed in the court of first instance, nor in the grounds of appeal to the lower appellate court did they contend that the suit should have been instituted under order 1, rule 8. The decision in this case will, as the District Judge has observed, be binding only as between the [200] plaintiffs and the defendants. In these circumstances we do not think it necessary to interfere with the decree. The appeal is dismissed with costs.

Appeal dismissed.

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35 A. 200 (=11 A. L. J. 236=19 I. C. 416.)

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

HADI HASANKHAN (*Plaintiff*) *v.* PATI RAM (*Defendant.*)*

[14th February, 1913.]

Act (Local) No. II of 1901 (Agra Tenancy Act), section 4, chapter X—"Land"—Resumption of rent-free grants—Grove-land—Suit for resumption of grove-land not maintainable in Revenue Court.

Held that grove-land not being "land held for agricultural purposes" within the meaning of section 4 (2) of the Agra Tenancy Act, 1901, nor "land" within the meaning of Chapter X of the Act, no suit will lie in a Revenue Court for

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* Second Appeal No. 413 of 1913 from a decree of F. E Taylor, District Judge of Bareilly, dated the 27th of February, 1912, reversing a decree of Abdul Hadi Khan, Assistant Collector, First Class, of Bareilly, dated the 4th of September, 1911.

(1) (1884) I. L. R. 7 All. 178. (2) (1911) I. L. R. 33 All. 660.

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APPELLATE CIVIL.

35 A. 200=11 A. L. J. 236 =19 I. C. 416.

resumption of a rent-free grant of grove-land. *Sheo Mangal* v. *Sardar Singh* (1) and *Megh Singh* v. *Nazar Fatma* (2) referred to.

[Fol. 24 I. C. 98=12 A. L. J. 449 ; 12 A L. J. 1080=25 I. C. 169 ; Ref. 24 I. C. 81.]

THIS was a suit under sections 150 and 154 of the Agra Tenancy Act, 1901, for resumption of a rent-free grant. The plaintiff alleged that the grant was made for the performance of a specific service in connection with the *Holi*, which he no longer required. The court of first instance (an Assistant Collector of the first class) decreed the claim. On appeal, however, this decision was reversed by the District Judge, on the ground that the land, being grove-land, was not 'land held for agricultural purposes' within the meaning of section 4 (2) of the Tenancy Act, and was not 'land' within the meaning of the word as used in Chapter X of the Act. The suit was accordingly dismissed. The plaintiff appealed.

The Hon'ble Dr. *Tej Bahadur Sapru* and Maulvi *Mohammad Rahmatullah*, for the appellant.

Munshi *Govind Prasad*, for the respondent.

GRIFFIN and CHAMIER, JJ. :—This was a suit under sections 150 and 154 of the Tenancy Act for resumption of a rent-free grant. The plaintiff alleged that the grant was made for the performance of a specific service in connection with the *Holi*, which he no longer required. The Assistant Collector decreed the claim, but on appeal his decision was reversed on the ground that the land, being groveland, was not 'land held for agricultural purposes' within the [201] meaning of section 4 (2) of the Tenancy Act, and was not 'land' within the meaning of the word as used in Chapter X of the Act.

In the papers prepared at the settlement of 1836 and 1872 the land was recorded as held under a service grant, and during the current settlement it is recorded as a rent-free grant, and the wajib-ul-arz says that the land shall be held subject to the service to be rendered at the *Holi*.

The District Judge has not recorded a definite finding that the land is held rent-free on account of the service, but on the evidence no other conclusion is possible.

The plot however is a grove, apparently a mango grove, and has been recorded as such at all the three settlements. 'Land' is defined in the Tenancy Act as land let or held for agricultural purposes. The latest reported opinion of the Board of Revenue is that a grove is not 'land' as defined in the Act—see *Megh Singh* v. *Nazar Fatma* (2), where a previous decision of the Board regarding a guava grove was considered and distinguished. In *Sheo Mangal* v. *Sardar Singh* (1) two Judges of this Court doubted whether a grove was land within the meaning of the definition contained in the Act but the question was not definitely decided and, as far as we are aware, never has been decided by this Court.

It is impossible to say whether the plot was a grove when the grant now in question was made ; but, assuming that it was not then a grove, it has been a grove since 1836, and it must be presumed that if the trees were not standing on the land at the time of the grant they were subsequently planted with the consent of the proprietor.

In our opinion land held as a grove, whether on payment of rent or not, is not land held for agricultural purposes, and we can discover no reason for holding that the word 'land' is used in Chapter X of the Act otherwise than in the sense indicated by the definition.

(1) (1909) 6 A. L. J. 749.

(2) Select Decisions of 1911, No. 4.

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35 A. 200=11 A. L. J. 236 =19 I. C 416

In this view it must be held that the suit was not maintainable under Chapter X of the Act, nor would it avail the plaintiff if we were to treat the suit as one for ejectment of a tenant, for a rent-free grantee is not a tenant as defined in the Act.

[202] It appears to us that if the plaintiff has any remedy it is by way of a suit in a civil court. The appeal is dismissed with costs.

Appeal dismissed.

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35 A. 202 (=19 I. C. 449=11 A. L. J. 253).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

GOBARDHAN SAHI AND ANOTHER (*Defendants*) v. JADUNATH RAI AND ANOTHER (*Plaintiffs*) AND NANHU SAHI AND OTHERS (*Defendants*).*

[17th February 1913.]

Act No. III of 1877 (*Indian Registration Act*), *section* 17 (*n*)—*Mortgage—Agreement to relinquish portion of principal and all interest—Acknowledgement—Registration.*

Held that an agreement executed by a mortgagee after the date of the mortgage whereby he relinquished a certain part of the principal and all interest, past and future, on the mortgage in lieu of certain services rendered by the mortgagor to the mortgagee was a document which required registration to make it admissible in evidence, and it could not be said to be an acknowledgement of payment within the meaning of the exception contained in section 17, clause (*n*), of the Indian Registration Act, 1877.

[Fol. 44 I. C. 132=34 M. L. J. 79=7 L. W. 229=1913 M. W. N. 262.]

THIS was a suit for sale upon a mortgage, dated the 21st of March 1900. In answer to the suit *pro tanto* the defendants pleaded that after the mortgage had been executed the mortgagors rendered certain services to the mortgagee and that in consideration of those services a certain part of the principal and all interest up to date and all future interest were relinquished by the mortgagee. To prove this agreement a certain document was tendered in evidence. The document was unstamped and unregistered. The difficulty as to the stamp was got over by payment of the duty and penalty, but the lower appellate Court rejected the document as inadmissible for want of registration and decreed the claim in full. The defendants appealed to the High Court.

The Hon'ble Pandit *Moti Lal Nehru*, for the appellants.

The Hon'ble Dr. *Sunder Lal* and the Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

RICHARDS, C. J. and BANERJI, J.—This appeal arises out of a suit brought to realize the amount of a mortgage, dated the 21st of March, 1900, by the sale of the mortgaged property. The defendants pleaded that after the mortgage had been executed the mortgagors rendered certain services to the mortgagee, and that [203] in consideration of those services a certain part of the principal and all interest up to date and all future interest were relinquished by the mortgagee. To prove this agreement a certain document was tendered in evidence. The document was unstamped and unregistered. The difficulty of stamp has been got over by the payment of duty and penalty, but the question of registration remains.

The court below held that the document required registration and therefore was inadmissible in evidence. Section 17 of Act No. III of

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*Second Appeal No. 480 of 1912 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 16th of January, 1912, confirming a decree of Jagat Narain, Subordinate Judge of Gorakhpur, dated the 13th of November, 1911.

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35 A. 202=19 I. C. 449=11 A. L. J. 253.

1877 (which was the Registration Act in force at the time of the execution of the document in question), provides that certain documents must be registered. A later section provides that documents which require to be registered cannot be admitted in evidence unless they are registered. Amongst the documents requiring registration are all documents of a non-testamentary nature which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest of a certain value to or in immoveable property. There can be no doubt that prior to the execution of the document in question the mortgagee had a right to realize from the property mortgaged, all principal, together with all interest then accrued or that might thereafter accrue due on foot of the mortgage.

It is argued that the document in question comes within the exception mentioned in clause (*n*) to section 17. That clause exempts from the necessity of registration any endorsement on a mortgage deed acknowledging payment of the whole or any part of the mortgage money and also any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage. In our opinion the document in question cannot be said to come within the exceptions mentioned in clause (*n*). The document is clearly an agreement to forego in part the plaintiffs' rights as against the mortgaged property in consideration of services rendered. It cannot in any sense be said to be a receipt for the payment of money not extinguishing the mortgage in whole or in part. It clearly does extinguish the mortgage to the extent of a considerable portion of the principal and the whole of the interest.

[204] Under these circumstances we think that the decision of the court below was correct. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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35 A. 204 (= 11 A. L. J. 249=19 I. C. 304).

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

RAM CHANDRA NAIK KALIA (*Decree-holder*) *v.* ABDUL HAKIM AND OTHERS (*Judgment-debtors*).*

[17th February, 1913.]

Civil Procedure Code (1908), *order XXI, rule* 16—*Execution of decree—Decree for money and costs of suit—Transfer of the decree as to costs merely.*

Held that a decree for payment of a sum of money and for costs of the suit is one and indivisible and the decree-holder cannot tansfer the decree so far merely as it may be a decree for costs, retaining the right to execute the decree for the main sum awarded.

[Ref. 63 I. C. 811; Rel: 2 Lah. L. J 1.]

THE facts of this case were as follows:—

One Musammat Najm-un-nissa obtained a decree for dower and for costs against the heirs of her late husband Maulvi Farzand Ali. The heirs of Farzand Ali appealed to the High Court and the decree of the first court was affirmed. The appellants were made liable to pay the costs of Musammat Najm-un-nissa incurred in the High Court. Najm-un-nissa transferred the decree for costs of both the courts to the present appellant

*First Appeal No. 239 of 1912 from a decree of W. R. G. Moir, District Judge of Mirzapur, dated the 16th of April, 1912.

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Ram Chandra Naik Kalia. The latter put in an application for execution of the portion of the decree transferred to him. The lower court held that the transfer in favour of Ram Chandra Naik Kalia was valid, but that he was not entitled to put the decree into execution, because, under order XXI, rule 16, the transferee became a joint decree-holder with Musammat Najm-un-nissa and as such he could not take out execution in respect of his share of the decree. The application was accordingly dismissed. The decree-holder appealed to the High Court.

Babu *Sital Prasad Ghosh* (with him Babu *Jogindro Nath Chaudhri*), for the appellant, contended that the court below was wrong in law in holding that the appellant was a joint decree-holder with Musammat Najm-un-nissa. The decree was not an indivisible decree but the two portions could be separated. Najm-un-nissa could have taken out execution of the decree for costs only and there was no bar to her transferee doing the same. The decree for costs had been passed personally against the heirs of Farzand Ali and Najm-un-nissa could have asked for the execution of that decree by arrest of [205] those persons while in respect of her decree for dower the assets of Farzand Ali in the hands of his heirs were liable. If, therefore, Najm-un-nissa could have taken out execution separately for the two portions of the decree in her favour, her transferee, who obtained no interest in the portion of the decree relating to dower could, without any legal bar, have certainly done so.

Mr. *Nihal Chand*, for the respondents, submitted that order XXI, rule 16, contemplated that the whole decree or the whole of the interest of the joint decree-holder could be transferred. But if it was held that a portion of a decree or a portion of the interest of a joint decree-holder could be legally transferred, even then, when execution was taken out, it could be so done in respect of the whole decree only and not of a portion. In the present case the decree was for a sum of money and it could not be split up in such a way that a portion could be executed at one time and another portion at a different time.

Babu *Sital Prasad Ghosh*, in reply, argued that a "decree" in order XXI, rule 16, meant the decree that was transferred, which might be the whole or a part of it. By virtue of the transfer Ram Chandra Naik Kalia did not become a joint decree-holder. For a joint decree-holder meant the holder of a decree who had an interest in every bit of that decree. In the present case the appellant had no interest at all in the decree for dower. The decree in which he had an interest he had executed in full, so that there was no question of the decree being executed piecemeal. The principle upon which one joint decree-holder was not allowed to execute his share only of the decree was that the court had to safeguard the interest of the other decree-holders. In this case the interest of no one had to be safe-guarded. What the transferee could execute he did and the matter ended there.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—This appeal arises out of the following circumstances:—Musammat Najm-un-nissa, the widow of one Maulvi Farzand Ali, brought a suit against the other heirs of her deceased husband to recover a sum of Rs. 97,500 due to her as dower. She also asked for the costs of her suit. The District Judge decreed the claim in her favour. The judgment ends as follows:—"I, therefore, decree the claim in full with costs and future interest [206] at 6 per cent. per annum. The decree will be executed against the assets of Maulvi Farzand Ali, and not against the personal property of the defendants". This was also entered in

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the decree. The defendants appealed to this court. But the appeal was dismissed with costs. There was no order in the decree of this Court as to the realization of the costs of this Court from the assets of the deceased. Musammat Najm-un-nissa has transferred to the present appellant her right to recover costs as against her judgment-debtors. The present appellant applied to the District Judge for execution of so much of the decree as related to costs. Objection was taken, first of all as to the right of the appellant as transferee of a part of the decree to put a portion of the decree into execution, and next it was also objected that the costs could only be recovered from the assets of the deceased Farzand Ali. The lower court has held on a construction of the decrees that the costs incurred by the plaintiff in the High Court are recoverable from the persons and other property of the defendants; that the costs incurred in the court of first instance are only recoverable from the assets of the deceased, and thirdly, that the appellant was not in law entitled to apply as a transferee of a part of the decree for execution of that portion only. The transferee has come here on appeal, and it is urged that the District Judge has misconstrued the decree and that he has erred in law in holding that the appellant as a transferee of a part of the decree could not put that portion of the decree into execution. In so far as the construction of the decree is concerned, in our opinion the District Judge is perfectly correct. As regards the second point, assuming that there is nothing in law to prevent the transfer of a portion of the decree, and assuming that the transferee can apply for the execution of the whole decree, in the present case the transferee is not entitled to apply for execution of a part of the decree, as the original decree-holder herself could not have done so. The decree appears to us to be one and indivisible, for recovery of the dower plus the costs incurred in the suit. We do not think that the bare fact of a portion of the sum decreed being recoverable only from the assets of the deceased makes the decree one which could be divided into two separate decrees with regard to which the decree-holder will be entitled to execute separately. Rule 16 of order XXI lays down distinctly that in cases of [207] transfer the decree can be executed in the same manner and subject to the same condition as if the application were made by such decree-holder. In our opinion the application was properly disallowed and we dismiss the appeal with costs.

Appeal dismissed.

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35 A. 207 (=18 I. C. 726=11 A. L. J 244).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

DALIP SINGH AND OTHERS (*Defendants*) *v.* KUNDAN LAL AND OTHERS (*Plaintiffs*) AND BAKHTAWAR SINGH AND OTHERS (*Defendants*).*

[18th February, 1913.]

Hindu Law—Joint Hindu family—Power of father to bind the family property—Father no power to revive a time-barred debt.

Held that the father and manager of a joint Hindu family cannot legally revive a time-barred debt and bind the family property to secure its repayment

* First Appeal No. 416 of 1911 from a decree of Kanhaiya Lal, Second Additional Judge of Meerut, dated the 3rd of July, 1911.

Chandra Deo Singh v. *Mata Prasad* (1) and *Indar Singh* v. *Sarju Singh* (2) followed.

[Ref. 79 I. C. 1002 : over. 80 I. C. 684=22 A. L. J. 601 (F. B.)]

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18 I. C. 726=
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THIS was a suit for sale on a mortgage bond, dated the 9th of February, 1891, executed by Dorab Singh, father of the defendants appellants. The mortgagee was one Sham Lal, the predecessor in title of the plaintiffs respondents. The mortgage was made for Rs. 33,500. The consideration for the bond was Rs. 5,000, alleged to have been due on account at the date of the mortgage, plus Rs. 6,500 calculated as interest in advance, and a balance of Rs. 22,000 paid in cash. This principal amount was made payable by instalments extending over 16 years; no further interest was to be charged except in case of default in payment of instalments. The Rs. 5,000 due on account had been advanced more than 20 years before the date of mortgage. The court of first instance gave a decree for the full amount. The defendants appealed, in regard to the item of Rs. 5,000, the claim for which was alleged to have been long time-barred.

Dr. *Satish Chandra Banerji* (The Hon'ble Dr. *Tej Bahadur Sapru* with him), for the appellants :—

The question is whether a Hindu father could revive a time-barred debt. He could not mortgage ancestral property for such debts : *Indar Singh* v. *Sarju Singh* (2). A time-barred debt could not be acknowledged under the Statute of Limitations. A Hindu father could only alienate property for legal necessity : ordinarily speaking, [208] he could not borrow to add to family property. The mortgagee had to prove that the debt incurred was for family necessity and if the debt was time-barred, it could not be enforced against the family. Revival of a debt was not a family necessity and it was not permissible for a father or manager to revive such debts. There was a difference between reviving a debt and acknowledging a debt ; *Gopal Narain Mozoomdar* v. *Muddomutty Guptee* (3), *Chinnaya Nayudu* v. *Gurunatham Chetti* (4) and *Dinkar* v. *Appaji* (5). The lower court had relied on *Narayanasami Chetti* v. *Samidas Mudali* (6), but an obligation to pay the debt did not help the plaintiff ; he had to show that the debt was one which could be enforced.

The Hon'ble Dr. *Sundar Lal*, (Pandit *Rama Kant Malaviya* with him), for the respondents :—

The question is was the transaction to the advantage of the family. Money was advanced at an exceptionally low rate of interest. He could not get such easy terms if he had not revived the time-barred debt. The revival of the debt was therefore a family necessity. The debt was one which was enforceable against the father. It was an antecedent debt and as such the question of legal necessity does not arise. A son's liability to pay his father's debt is a pious obligation and is independent of the rule of limitation. The principle on which he has been made liable is entirely different—the idea being that he would suffer for the debts elsewhere if he did not discharge them in this world.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of a suit brought on foot of a mortgage, dated the 9th of February, 1891. The mortgage was admittedly made by the father of a joint Hindu family. The consideration for the mortgage was a sum of Rs. 5,000 alleged to be due on account at the date of the mortgage, a sum of Rs. 6,500 representing

(1) (1909) I. L. R. 31 All. 176.
(2) (1911) 8 A. L. J. 1099.
(3) (1874) 14 B. L. R. 21.
(4) (1882) I. L. R. 5 Mad. 169.
(5) (1894) I. L. R. 20 Bom. 155.
(6) (1883) I. L. R. 6 Mad. 293.

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18 I. C. 726=
11 A. L. J. 244.

interest calculated in advance, and Rs. 22,000 cash advanced to enable the mortgagor to purchase certain immovable property. The principal amount was made repayable by instalments extending over sixteen years. The court below has given a decree for Rs. 27,926-1-0.

[209] The question which has been urged before us in the present appeal is that the sum of Rs. 5,000, assuming it ever to have been a debt at all, was at the time of the execution of the mortgage time-barred, and that, therefore, it was not permissible for the mortgagor, as the father and manager of the joint Hindu family, to revive a time-barred debt and to create a mortgage for such time-barred debt on the family property. A ground was no doubt taken in the memorandum of appeal that on the evidence the Court should not have held that there was any debt at all. In our opinion we ought to have no hesitation in accepting the finding of the court below that the debt was an honest debt, but that it was time-barred at the time of the execution of the mortgage.

The case resolves itself then into a question of law, namely, whether or not the father of a joint Hindu family can legally revive a time-barred debt and bind the family property to secure its repayment. Having regard to the decision of the majority of the Full Bench in the case of *Chandra Deo Singh* v. *Mata Prasad* (1) it seems to us that we must find the existence of family necessity before we can hold the family property bound. It is very difficult to say that there would ever be any necessity for the father or manager of the family to revive a time-barred debt. *Prima facie* and looked at from a worldly point of view it is very much against the interest of the family to revive such a debt. The very question was decided by a Bench of this Court in the case of *Indar Singh* v. *Sarju Singh* (2). It has been contended before us that we ought to hold, under the circumstances of the present case, that it was in the interest of the family that the time-barred debt should be revived. It is urged that the money was advanced upon very easy terms, and that, therefore we should hold that the money could not have been obtained except on the condition of reviving the debt. In our opinion there is no sufficient evidence on the record to show that it was for the benefit of the family that the time-barred debt of Rs. 5,000 should be revived.

It has also been contended that the father, even if he could not bind his sons, could bind himself, and that, therefore the payments which he made should be considered as payments made in respect of his interest in the property. We do not consider that this [210] argument is sound. In our opinion the payments which were made must be attributed to payments made upon foot of the mortgage to the extent for which it was a good and valid mortgage, that is to say, to the extent of the family necesstiy proved. There is nothing to show that the payments were made by the father out of separate funds.

Under these circumstances we would have been quite prepared to have excluded the sum of Rs. 5,000 from the mortgage and dealt with the mortgage as if it had been made for an advance of Rs. 22,000 and no more. If we did this, however, we certainly should give the mortgagee interest upon Rs. 22,000, or so much thereof as for the time being remained unpaid, at a reasonable rate. We think under the circumstances that nine per cent. per annum would not be an excessive rate of interest. In the mortgage deed itself it was agreed that interest at that rate should be paid on

(1) (1909) I. L. R. 31 All. 176.

(2) (1911) 8 A. L. J. 1099.

overdue instalments. We find, however, that if we were to treat the mortgage as a mortgage for Rs. 22,000 only and calculated interest at the rate of nine per cent. (allowing the mortgagors credit for any sums where the instalments which were paid were more than sufficient to keep down interest) the amount due on such calculation would admittedly exceed the amount of the decree of the court below. Under these circumstances we see no reason whatever for interfering with the decree of the court below, and we accordingly dismiss the appeal with costs. The decree will carry future interest at the rate of six per cent. per annum from the date of the decree of the court below. To this extent we allow the respondent's objection. We extend the time for payment for six months from this date.

Appeal dismissed.

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[211] PRIVY COUNCIL.

SKINNER (*Plaintiff*) *v.* NAUNIHAL SINGH AND ANOTHER (*Defendants*) AND 10 OTHER APPEALS, 11 APPEALS CONSOLIDATED.*

[*On appeal from the High Court of Judicature at Allahabad.*]

[4th and 5th February and 4th March, 1913.]

Will—Construction of will—Rule of justice, equity and good conscience—Devise to eldest son and his lawful male children according to law of inheritance—Mortgages made by testator as full owner and mortgages made by son with an estate for life only—Rights of mortgagees—Alternative case set up on appeal—Costs.

T. S., a domiciled resident of the North-Western Provinces of India, died on the 9th of November, 1864, leaving a will, dated the 22nd of October, 1864, [and therefore before the Indian Succession Act (X of 1865) came into force] whereby he made provision that certain villages, houses and other property should "at my demise descend to my eldest son T. B. S. and to his lawful male children according to the law of inheritance, and in the event of my eldest son T. B. S. dying without lawful male children, to my female children, or in the event of their death to the female children born in wedlock of my sons in succession." The testator had in 1863 mortgaged his property to the extent of Rs 50,000 with interest, and his son T B S, after he succeeded to the property, further mortgaged it in 1867, 1869 and 1872, and in execution of decrees obtained against him on those mortgages the property was sold and his interest therein was acquired by the various auction purchasers. T. B. S. died in 1900 without lawful male children and was succeeded by the second son of the testator, the present appellant, who in 1905 and 1906 brought the present suits for ejectment against the auction puchasers, in which he prayed for decrees for "full proprietary possession" and the suits were dealt with on that footing in the Courts in India, the High Court, however, only dismissing the suits because there was no specific claim for redemption. On his appeal part of the appellant's case was that the High Court, instead of dismissing the suits, should have made decrees for possession conditional upon payment of the debts binding on the etate of the testator; and during the hearing it was conceded by counsel that on the construction of the will the appellant was only a life-tenant of the property.

Held that the regulation of the succession under the will was to be determined by the rule of "justice, equity and good conscience;" that the bequest was to be read in its entirety and together, and that so read there was in it no intention that his son T. B S. should have an absolute ownership: the testator intended to regulate the succession after the death of T. B. S and settle the mode of the subsequent enjoyment of the property, and such detailed regulations were only natural, necessary and entirely in place if T. B. S. was intended to be merely a tenant for life.

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* *Present* :—Lord SHAW, LORD MOULTON, SIR JOHN EDGE and Mr. AMEER ALI.

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Held, therefore, that the rights under mortgages granted by T. B. S. ceased at his death, and that the appellant, as the next male heir, was entitled to the enjoyment of the estate for life free from any rights so acquired. The case, however, was very different with regard to the rights acquired under mortgages [212] granted by the testator himself. Even if T. B. S. renewed such mortgages, the right of the mortgagees would not be prejudiced thereby, the renewal of a mortgage by a person with a limited interest in the estate not operating as a discharge of debts effectually secured upon the radical right. The appellant accordingly was not entitled to possession until full satisfaction had been made of the rights of all mortgagees and their successors under mortgages granted by the testator. The appeals were allowed and the suits remitted to the High Court on that footing.

The alternative case set up by the appellant on appeal was only permitted by their Lordships to be the ground of judgment, because it seemed possible in that way to construct the material for a just decision of the true rights of the parties concerned, which would be best for the interests of all, and prevent further litigation.

[Fol: 26 I. C. 876; Ref. 3 Pat. L. J. 199=45 I. C 749;—Construction of will, Ref. 68 I. C. 703=15 L. W. 72=1922 M. W N. 42=42 M. L. J. 43=30 M. L. T. 201; Rel. 74 I. C. 793=32 C. L. J. 356=50 Cal. 292; Fol. 80 I. C. 1041=45 All. 59—Alternative case set up in appeal.]

ELEVEN consolidated appeals 95 and 97 to 106 of 1911 from judgments and decrees (2nd March 1909) of the High Court of Judicature at Allahabad, which reversed judgments and decrees (26th March 1907) of the Subordinate Judge of Meerut.

The suits which gave rise to these appeals were brought to recover possession with mesne profits of certain villages in the district of Bulandshahr in the United Provinces, most of which were granted by the Government of India as a reward for good service to one Thomas Skinner, and all of which formed part of his estate on his death.

He died in November, 1864, leaving a will, dated the 22nd October, 1864, by which, together with other property, all the above-mentioned villages were bequeathed " to my eldest son Thomas Brown Skinner and to his lawful male children according to the law of inheritance, " and " in the event of my eldest son Thomas Brown Skinner dying without lawful male children the above-mentioned property shall descend to my next male heir. "

The material clauses of the will are set out in full in the judgment of their Lordships of the Judicial Committee.

Thomas Brown Skinner died on the 3rd of July, 1900, without lawful male children, and was succeeded by the appellant Richard Ross Skinner, the second son of the testator.

Thomas Skinner (the testator) had on the 1st of September, 1863, mortgaged the villages in dispute to the firm of Seth Lakhmi Chand and Seth Govind Das as security for a loan of Rs. 50,000, with interest at the rate of one rupee per cent. per mensem. The mortgagor undertook to pay off the amount of the loan with [213] interest at the end of December 1863, and stipulated that if he failed to do so, he would put the mortgagees in possession in order that they might be able to realize the amount due on the mortgage themselves. He died, however, without having redeemed the mortgage.

On the death of Thomas Skinner the Court of Wards took possession of his estate, and in 1867 made over possession of it to Thomas Brown Skinner, who was entered in the revenue registers as the proprietor of the villages. Thomas Brown Skinner put the Seths in possession of the mortgaged property under the deed of 1863, on which, on the 10th of November, 1867, there was due the sum of Rs. 43,294, and under a mortgage of

that date he borrowed a further sum from them on the security of the same villages. Subsequently he took other loans on the same security from the same mortgagees under deeds of the 9th of October, 1869, and the 7th February, 1872. Part of the latter sums borrowed were to discharge debts of his father.

The property in dispute was sold in execution of decrees obtained against Thomas Brown Skinner, his equity of redemption being sold on the 20th of December, 1872, in the following villages under a decree obtained by Durga Prasad and Sri Ram, dated the 28th of August, 1871: Hirdeypur, purchased by Durga Prasad; Neknampur, Saonli, Raja Rampur Dolai Rajpur, and Kishanpur, purchased by Seth Lachman Das and under the same decree his equity of redemption was, on the 20th of February, 1873, sold in Gangapur, Mathrapur, and Mandpa, and purchased by Lal Singh and Kishan Singh.

Under a decree obtained by Gorakh Ram and Gauri Dat, dated the 19th of September, 1871, the equity of redemption of Thomas Brown Skinner was sold in Gangola on the 20th of September, 1872, and in Salehpur on the 20th of December, 1872, both purchased by Seth Lachman Das.

In execution of a decree of Jauhari Mal and Ram Prasad, and of the decree of Gorakh Ram and Gauri Dat his equity of redemption was on the 20th of December, 1872, sold in the villages of Sunperha, purchased by Seth Lachman Das, and Ainchar (two lots of 15 biswas and 5 biswas) purchased by the decree-holders: and in execution of a decree of Waris Ali and Pitambar, the decree of [214] Gorakh Ram and Gauri Dat, and the decree of Jaudhari Mal and Ram Prasad his equity of redemption in the village of Ghori Bachera was sold on the 20th of December, 1872, and purchased by Seth Lachman Das.

The auction-purchasers abovementioned were the defendants in the eleven suits brought on various dates between the 25th of August, 1905, and the 2nd of July, 1906, by the appellant Richard Ross Skinner, in which he alleged his title under the will of Thomas Skinner, and claimed decrees for proprietary possession of the villages comprised in the various suits with mesne profits on the ground that Thomas Brown Skinner only had under the will a life-interest in the villages, and consequently the auction-purchasers had by the sales acquired only the right, title and interest of the judgment-debtor, namely an estate for his life.

The several defendants in the suits set out their respective titles claiming to be absolutely entitled to the lands respectively under the mortgages and sales abovementioned. They asserted that Thomas Brown Skinner, if he took under the alleged will, which they did not admit, took an absolute estate, and not an estate for life only; and that the plaintiff could not recover on the footing of the will until probate of it had been duly obtained. It was further pleaded that the possession of Thomas Brown Skinner and of those claiming under him was adverse to the plaintiff; and that the plaintiff was estopped by his conduct from denying that Thomas Brown Skinner was the absolute owner of the villages; and that in any case the plaintiff was not entitled to the relief he sought.

Issues were raised, on which the Subordinate Judge, so far as is material in these appeals, held that Thomas Skinner did make the will, dated the 22nd of October, 1864; that, following a previous decision of the High Court in 1904 in the case of *Skinner* v. *Durga Parsad* (1), Thomas Brown Skinner took only a life estate and not an absolute estate in the property;

(1) (1904) I. L. R. 31 All. 239.

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that the taking out of probate was not necessary; that Thomas Skinner had encumbered the property by the mortgage of 1863; that Thomas Brown Skinner created the fresh encumbrances mentioned; but that they did not operate as a discharge of the mortgage bond executed by Thomas Skinner [215] in 1863; that all the defendants were in possession as the representatives of the original auction purchasers, who had acquired merely the equity of redemption of Thomas Brown Skinner, and were not entitled to be reimbursed; and that no question of adverse possession arose. In the result he gave decrees for possession to the plaintiff with mesne profits.

Appeals by the defendants were preferred and the High Court (*Sir John Stanley, C. J.* and *Banerji, J.*) reversed the decisions of the Subordinate Judge and dismissed the suits.

In appeal 95 the High Court took the findings of the Subordinate Judge on the questions involved in the will and as to the nature of the estate taken by Thomas Brown Skinner to be correct, but allowed the appeal on the ground that the mortgage of 1863 entitled the mortgagees to retain possession of the property as security for the amount due upon it, and therefore, without redeeming it, the plaintiff was not entitled to dispossess the mortgagees or their representatives. As no specific claim for redemption had been advanced, the High Court refused to direct an account of the rents and profits and dismissed the suits.

The material portion of the judgment was as follows :—

"It was contended on behalf of the defendants in the Court below that the plaintiff is not entitled to recover possession of the property in suit unless he first redeem the mortgage made in favour of the Seths on the 1st of September, 1863. This contention was overruled by the learned Subordinate Judge on the ground that the aforesaid mortgage was only a simple hypothecation and did not give to the mortgagees the right to obtain possession, 'or prevent the rightful owner from getting possession of the property as owner without immediately discharging that mortgage debt.' In this view the learned Subordinate Judge was in our opinion in error. As we have pointed out above, the mortgage of 1863 provided that in default of payment of principal and interest according to the stipulation contained in the mortgage-deed, the mortgagor would put the mortgagees into possession of the mortgaged property. Although the mortgagees did not take possession at the time, there can be no doubt that when the subsequent mortgage of the 10th of November, 1867, was executed possession was surrendered to the mortgagees in accordance with the stipulation contained in the earlier document. The mortgagees or their representatives are admittedly in possession of the mortgaged property, and their possession must be treated, we think, as referable to the stipulation contained in the mortgage of 1863, which gave them a right to possession. The mortgage of 1867 did not supersede and extinguish *in toto* the mortgage of 1863. On the contrary, that mortgage must be regarded, we think, as a subsisting mortgage and as such entitling the mortgagees to retain possession as against any person claiming title through [216] the original mortgagor as security for the amount due upon that mortgage. In this view, until the mortgage of 1863 has been redeemed, the plaintiff is in no event, whatever be his title, entitled to dispossess the mortgagees or their representatives. Whether Kunwar Naunihal Singh is the person solely entitled to remain in possession, or whether the Seths are also so entitled, there can be no doubt that one of them has the right to remain in possession so long as the mortgage of 1863 is subsisting.

"Therefore until the plaintiff redeems the said mortgage, he is not entitled to obtain possession of the property in question. In this suit there is no claim for redemption Had such a claim been put forward, it would have been necessary to take an account of the rents and profits for the purpose of determining whether any and what amount is due upon the said mortgage. But, as we have said above, no such claim was advanced, and we do not think the plaintiff is entitled in this suit to ask that an account be taken from the defendants and a decree be made for redemption. (See *Murugaser Marimuttu* v. *De Soysa* (1)."

(1) (1891) L.-R., A. C. 69.

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Appeal 95 of 1911 related to the villages of Neknampur, Salehpur, Sunperha, Gangola and Ghori Bachera purchased by Seth Lachman Das.

Appeals 98 (relating to the village of Hirdeypur, purchased by Durga Prasad and Sri Ram in execution of their own decree), 99 (relating to the village of Kishanpur purchased by Seth Lachman Das in execution of Durga Prasad's decree and sold by him to the present respondents), 100 (relating to the village of Saonli), 101 (relating to the village of Dolai Rajpur), 102 (relating to the village of Raja Rampur), 103 (relating to the village of Mandpa), 105 (relating to the village of Mathrapur), and 106 (relating to the village of Gangapur) were held to be governed by the same considerations as appeal 95, and they were also allowed and the plaintiff's suits dismissed.

In appeals 97 (relating to a 15 biswa share in the village of Ainchar), and 104 (relating to a 5 biswa share in the village of Ainchar) the defendants were held by the High Court entitled to retain possession until the mortgage redeemed by them had been discharged, notwithstanding their right to possession was referable to the purchase at auction sale of the right, title and interest of Thomas Brown Skinner, the tenant for life. In those also, therefore, the plaintiff's suits were dismissed.

On these appeals —

De Gruyther, K. C. and *G. C. O'Gorman*, for the appellants, relied on the judgment of the Subordinate Judge on all matters [217] connected with the will of Thomas Skinner, and it was contended that Thomas Brown Skinner had only a life-interest in the property ; and that consequently the auction purchasers of property sold under mortgages made by him acquired merely his right, title and interest, which ceased at his death. The mortgages executed by Thomas Brown Skinner in favour of the predecessors in title of the respondents bound only his own interests, and, it was submitted, operated as a discharge of any previous mortgage executed by Thomas Skinner. Seth Lachman Das, therefore, was not entitled to possession as against the appellant ; but even if he were so entitled, purchasers from him, and persons who subsequently redeemed specific villages from him, had no such right to possession. As to Durga Prasad, all questions relating to him were *res judicata*. It was contended accordingly that the appellant was entitled to an absolute estate in the properties in suit and that the High Court had been wrong in not affirming the decrees for proprietary possession given to the appellant by the Subordinate Judge. In any event the High Court should not have dismissed the suits, but should have passed decrees for possession conditional upon payment of the debts binding on the estate of Thomas Skinner. If their Lordships were against the claim of the appellant to proprietary possession, that might be done now.

Sir *Earle Richards K. C.* and *Kenworthy Brown*, for the respondents in appeals 95, 99, 100 and 102, contended that under clause 4 of the will Thomas Brown Skinner took an absolute estate. The words of the will "to him and to his lawful male children according to the law of inheritance," would have given him under section 84 of the Succession Act (X of 1865) an estate in fee, that is, the whole estate of the testator, in the property. That section introduced the English law, see illustration (*a*) to that section. The Succession Act, however, did not apply because the will was made, and the testator died, in 1864 ; see section 331 of the Act. But the law as it existed in India before the Succession Act would on the true construction of those words have given him an absolute estate. The

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case should be decided by the rule of justice, equity and good conscience. Reference was made to *Barlow* v. *Orde* (1). **[218]** If the construction of the will in the case of *Skinner* v. *Durga Prasad* (2) followed by the Subordinate Judge is held to be the correct one, namely, that Thomas Brown Skinner took only an estate for life, then on the same construction the appellant has only a life estate also. The High Court, it was submitted, had put a reasonable construction on the will. There was no offer made in the pleadings or in the lower courts to pay off the amounts due on the mortgages. The mortgage of 1863 did not become discharged or extinguished on the execution of the mortgages subsequently made by Thomas Brown Skinner: the intention was not to do that: *Gokal Das Gopal Das* v. *Puranmal Prem Sukh Das* (3) was referred to. The appellant had no right or title to any of the lands in dispute in these appeals, as on the right construction of the will—that Thomas Brown Skinner had an absolute estate—the appellant had no interest under it. Thomas Brown Skinner was always treated by the appellant, and by every one as being in possession as absolute owner. At any rate, if the appellant is held entitled to succeed in these suits, it should be subject to his paying off the mortgages due on the property in suit. Reference was made to *Murugaser Marimuttu* v. *De Soysa* (4), a somewhat similar case to the present. If the cases are sent back the Nawab of Rampur should be joined as a party.

W. A. Raikes for the respndents in appeal 101 contended that the appellant had not proved his title under the will, so as to enable him to maintain the suit. After the sale of the 20th of December, 1872, Seth Lachman Das and after him the respondent became absolute owners of the property. On the proper construction of the will Thomas Brown Skinner became absolute owner of the property, and could in any case bind it as against the reversioners. The suit, moreover, was barred by limitation. This respondent was a mortgagee of Thomas Skinner, and under a usufructuary mortgage he had been in possession for more than 60 years, and his possession had been adverse from 1832. He purchased the equity of redemption of the village of Dolai Rajpur, the subject of this appeal. Reference was made to *Mataḍin Kasodhan* v. *Kazim Husain* (5). The clauses of the will should **[219]** be read subject to any claim of adverse possession. In any case the appellant could not succeed during the existence of the mortgage of 1863.

B. Dube for the respondents in appeals 97, 103, 104 and 106 contended with respect to 97 and 104 that the appellant had not proved his title; that he had never offered to redeem the property; and that in any case he was liable to discharge the incumbrances created by Thomas Skinner and Thomas Brown Skinner before recovering the villages in suit; and, as to all the appeals, that the High Court was right,

J. M. Parikh and *J. R. Roy* for the respondents in appeals 98 and 105 contended that on the proper construction of the will Thomas Brown Skinner took an absolute estate in the property in suit; and that the appellant was not in any event entitled to recover possession of the property until he redeemed the mortgage of 1863.

De Gruyther, K. C., in reply distinguished the case of *Murugaser Marimuttu* v. *De Soysa* (4) cited by Sir *Earle Richards, K. C.* If their

(1) (1870) 5 B. L. R. 1 (9): 13 Moo. I. A. 277 (307): L. R. 3 P. C. 164 (187).
(2) (1904) I. L. R. 31 All 239.
(3) (1884) I. L. R. 10 Cal. 1085: L. R. 11 I A. 126.
(4) (1891) L. R. A. C. 69 (76).
(5) (1891) I. L. R. 13 All. 432.

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Lordships were of opinion on the construction of the will that Thomas Brown Skinner took only a life estate under it, he would concede that the appellant took under the will no greater interest than that, and would ask to be allowed to redeem the incumbrances created by Thomas Skinner the testator : reference was made to the Civil Procedure Code, 1882 (Ameer Ali and Woodroffe), page 683, where all the cases are collected relating to granting relief.

1913, *March 4th* :—The judgment of their Lordships was delivered by Lord SHAW : —

These are consolidated appeals from eleven judgments and decrees of the High Court of Judicature for the North-Western Provinces, Allahabad. The suits were for ejectment and were brought by the present appellant Richard Ross Skinner. The Subordinate Judge of Meerut passed ejectment decrees and the appellant was granted absolute proprietary possession, with mense profits, of certain villages situated in the district of Bulandshahr in the United Provinces. These judgments and decrees of the Subordinate Judge were reversed by the High Court.

[220] In the proceedings before the Subordinate Judge many issues were taken and questions investigated and discussed.

With the exception of those to be hereafter referred to, it is unnecessary to enter upon these questions. For, as the result of the discussion before the Board, the appellant made a concession, which was (whatever may have been the nature of the other discussions before the Courts below) no part of his original pleadings or case. In the plaint he prayed " that a decree for full proprietary possession of the entire villages . . . be granted to the plaintiff. He further prayed for mesne profits and for costs of the suit, with interest upon these mesne profits up to the date of realization. It is true that the plaint also concluded " that any further relief which may be considered desirable and necessary be granted to the plaintiff," but, in their Lordships' opinion, this conclusion was treated by the plaintiff himself throughout the proceedings as merely ancillary to or consequential upon the radical demand he made for " full proprietary possession." The case in the Courts of India was throughout conducted upon the footing that he was entitled to this proprietary possession in a full and unconditional sense, that is to say, that any mortgages or duly constituted burdens granted even by Thomas Skinner over the properties were to be treated as wholly unavailing against him. Under the decree obtained no such rights were recognized. His position, in short, was that the whole of these burdens and mortgages might be ignored.

When, however, the case for the appellant to this Board was drawn, an alternative view was submitted, which is contained in the seventh reason. That reason was in this form :—" In any event the High Court of Judicature, Allahabad, should not have dismissed the suits, but should have passed decrees for possession conditional upon the payment of the debts binding on the estate of Thomas Skinner."

Their Lordships are of opinion that this case was never either openly or fully set up by the appellant before the Indian Courts, and that great embarrassment to the learned Judges therein, and great delay and loss, have ensued to the respondents by reason of the appellant's action in this regard. The Board has experienced considerable difficulty in permitting the alternative to be the ground **[221]** of judgment now; and it is only because, in their view, it may be possible, out of a large wreckage of procedure, to construct the material for a just decision of the true rights of the parties,

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and because upon the whole this may be in the parties' own best interests, that their Lordships refrain from *simpliciter* sustaining the appeals and dismissing the suits.

The villages were the property of one Thomas Skinner, a member of a family not unknown in the history of the North-Western Provinces. In 1863 Thomas Skinner mortgaged, *inter alia*, these villages for a sum of Rs. 50,000, with interest.

It is unnecessary to refer to other mortgages than that of the year 1863, which has just been mentioned, for the principles of the judgment which is to follow are meant to apply comprehensively to the mortgages granted by Thomas Skinner. Detailed reference need not, therefore, be made, for instance, to the mortgage of 1861 granted by him over the village of Ainchar to secure a sum of Rs. 4,000. On the 7th of September of that year this village was mortgaged to the Collector of Bulandshahr. The plaintiff's claim to this village, as to the other villages, has been dismissed. But although this procedure is to be corrected as the result of the judgment of this Board, their Lordships are entirely of the opinion expressed in the judgment of the High Court of date the 2nd March, 1909, to the effect that "the plaintiff is not entitled to oust the appellant without payment of the amount which the predecessors in title of the appellant paid in discharge of the mortgage in favour of the Collector."

The mortgage deed of 1863 above mentioned provided that the mortgagees should be put in possession if principal and interest were not paid in accordance with the terms. On the 22nd of October, 1864, Thomas Skinner executed a will. In the next month, namely, November, 1864, he died. Under his will an important question to be immediately referred to arises as to what was the nature of the right conferred in the villages upon his son.

That son, Thomas Brown Skinner, had possession delivered to him in the year 1867 by the Court of Wards. At that time the Board were informed that there was due, on the mortgage for Rs. 50,000, granted by his father, Thomas Skinner, a sum of Rs. 43,000. The mortgagees were placed in possession by him, [222] and he also himself borrowed further sums in that year, in 1869 and in 1872, and granted mortgages over the properties therefor. In 1872 Lachman Das purchased at a sale, in execution of decrees obtained against Thomas Brown Skinner, the right under the mortgages both of the father, Thomas Skinner, in 1863, and of the son, Thomas Brown Skinner, in 1869 and 1872. Other transactions and some transmissions took place with regard to the villages, but these need not be entered upon. From this main sketch it is to be observed generally that Thomas Brown Skinner had in point of fact acted, as all parties to the transactions appear to have acted, on the footing that he was the owner of the father Thomas Skinner's estate in the villages, and was the absolute owner. If this was the true view, all questions in the case are at an end, and the suit for possession must entirely fail. How does this question stand?

This depends upon the construction to be given to two clauses of destination occurring in Thomas Skinner's will of 1864. They are in these terms:—

> "(4) That my private zamindari presented to me by Government as a reward for services rendered during the rebellion of 1857, as well as all villages, houses and other property added by me from time to time to the original grant may, at

my demise, descend to my eldest son, Thomas Brown Skinner, and to his lawful male children according to the law of inheritance.

" (5) In the event of my eldest son, Thomas Brown Skinner, dying without lawful male children, the abovementioned private zamindari, &c., shall descend to my next male heir, and should all my sons die without lawful male children, the zamindari, &c., shall descend to my female children, or, in the event of their death, to the female children born in wedlock of my sons in succession."

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It is strenuously contended that under this destination Thomas Brown Skinner (who, it may be mentioned, was an illegitimate child, and who was, at the date of his father's death, about fourteen years of age) took an absolute estate as contradistinguished from an estate [223] for his life. Reference is made to the Succession Act, section 84, which provides that "where property is bequeathed to a person, and words are added which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will;" and one of the illustrations in the section is specially founded upon, namely, "to A. and the heirs male of his body." The Act was passed in the year 1865. By section 331 of the Act it is enacted that "the provisions of this Act shall not apply . . . to any will made or any intestacy occurring before the first day of January, 1866." But, as stated, Thomas Skinner the testator died in 1864. It is contended, however, that although this may be so, yet, according to the law of India, prior to the enactment of that Act, a destination to "Thomas Brown Skinner and to his lawful male children according to the law of inheritance" was, in point of fact, an effective form of conveyance of no less than absolute ownership.

In determining this question it is the opinion of their Lordships that the destination must be read in its entirety and together. Following the words quoted there occur these :—"In the event of my eldest son, Thomas Brown Skinner, dying without lawful male children, the abovementioned private zamindari, &c.. shall descend to my next male heir." The argument of Richard Ross Skinner, who, in point of fact, was the next male heir, is that his brother, Thomas Brown Skinner, had only the interest of a tenant for life. On reading still further on in the destination it is found that the appellant is not entitled himself, if his own argument be sound, to the position of absolute owner, for the destination continues: "And should all my sons die without lawful male children, the zamindari, &c., shall descend to my female children, or in the event of their death, to the female children born in wedlock of my sons in succession." His learned counsel accordingly conceded that the appellant is, as was his brother before him, only a tenant for life. The event has not yet been ascertained whether the appellant shall or shall not die without lawful male children. If there should be such children, no doubt they would be the absolute owners of the properties, but if he should die childless, then the destination over to female children will, it is argued, take place.

[224] The question is full of embarrassment and difficulty. It is no doubt a temptation to be rid of the troublesome issues, with consequent accountings, by holding that the absolute ownership was in Thomas Brown Skinner; but—for this temptation must be put aside—the only

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question that their Lordships have to consider is whether it was the testamentary intention of Thomas Skinner, under the form of language adopted, to create by his will an absolute ownership in Thomas Brown Skinner. From the case of *Barlow* v. *Orde* (1) (in which, it may be observed, the history of the Skinner family is referred to in a judgment of Lord Westbury) it is plain that English rules of interpretation—in so far at least as these are artificial rules of construction which have arisen in the administration of English Courts of Equity—must not be allowed to govern the interpretation of Thomas Skinner's will. Questions affecting the construction of such a settlement as the present, or the regulation of a succession under it, must be determined by the principles of natural justice, or, to use the familiar language, according to "justice, equity and good conscience."

So, looking at this settlement, their Lordships do not find themselves able to affirm that Thomas Skinner meant his son Thomas Brown Skinner to have an absolute ownership of these villages. So to conclude, would be to affirm that the former a month before his death set forth an elaborate scheme of destinations over, while all the time he was really meaning that the boy of fourteen was to take the absolute ownership if he survived him. If the son was to be a tenant for life merely, then the detailed regulations for successive enjoyment and descent were entirely in place; they were natural and necessary. There are considerations either way; but it seems to their Lordships a more likely and more reasonable conclusion to come to, that Thomas Skinner did mean to regulate the succession after the death of his son, and addressed his mind to the consideration of what should be the steps and order of that subsequent enjoyment of his property. In their Lordships opinion accordingly, the possession of Thomas Brown Skinner of these villages was the possession of a tenant for life.

It follows that the mortgages granted by Thomas Brown Skinner were ineffectual to convey or give any rights over any [225] estate exceeding the tenancy for life of which Thomas Brown Skinner was possessed. The appellant, accordingly, as the next male heir, is entitled to the enjoyment of this estate for life, as of an estate out of the corpus of which no rights could issue which proceeded from Thomas Brown Skinner, and that the respondents, in so far as they represent such rights and the succession thereto have no title to interfere with his entry into possession.

But the case, in their Lordships' view, stands in a very different position with regard to the rights of mortgagees and their successors under mortgages granted, not by the appellant's brother, but by the appellant's father, Thomas Skinner. With regard to the appellant's brother, it is decided by this judgment that the estate which he possessed was that of a tenant for life, and that mortgages proceeding in respect of debts incurred by him could not affect the estate beyond his life. Even if it be supposed that after he, Thomas Brown Skinner, came into possession he granted mortgages in renewal of those granted by his father and then outstanding, the rights of the mortgagees could not in justice or equity be prejudiced thereby. To do so would be to operate a substantial defeat of the rights of those mortgagees and to imply, what certainly never was the intention of any of the parties to the transaction, that by the renewal of a mortgage by a person with a limited interest in the estate the intention was to operate a discharge of debts effectually secured upon the radical right.

(1) (1870) L. R. 3 P. C. 164; 13 Moo. I. A. 277; 5 B. L. R. 1.

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Their Lordships, accordingly, have little difficulty in holding that such a result must be avoided, that full effect must be given to the mortgages granted by Thomas Skinner, and that the appellant can only enter upon possession of his rights qua tenant for life of these villages now after satisfying the mortgage debts of his father upon the estate. Their Lordships are glad to observe that the substance of this equity is fully recognized in the judgment appealed from. They express no surprise, looking to the state of the pleadings, and particularly to the unqualified nature of the demand made in the plaint, that these learned Judges should have dismissed the same *simpliciter*, and they view the judgment of the High Court as meant to leave open the determination of the rights of the mortgagees of Thomas Skinner and their successors in some further suit or suits.

[226] Upon the whole, however, it does not appear to their Lordships that justice will be done between these parties if the present suit be dismissed, with the prospect of further litigations to determine a matter now substantially ripe for settlement. They are further of opinion that the appellant is not entitled, even under the present suit, to enter into possession until full satisfaction is first made of the rights of all mortgagees and their successors under the mortgage deeds granted by Thomas Skinner. Should this condition be not, within what appears to the Court below to be a proper and sufficient time, satisfied, then in their Lordships' opinion a decree dismissing the suit in respect of this failure could then be pronounced.

Had the condition of a grant of possession which was conceded at their Lordships' Bar been made upon the plaint or the pleadings in the Court below, the whole of the protracted litigation would have been saved, except to the extent of a simple determination of the point of the construction of Thomas Skinner's will.

In their Lordships' opinion, accordingly, justice to the parties will be most nearly approached if the appellant make payment to the respondents of the costs of the proceedings in both Courts of India, and if, in regard to the appeal before this Board, neither party be found entitled to costs. Their Lordships will accordingly humbly advise His Majesty that the appeals should be allowed, that the causes should be remitted to the High Court to be dealt with upon the footing that the rights under mortgages granted by the late Thomas Skinner should be satisfied by payment being made to the mortgagees or their successors, that upon these payments being made and that within such reasonable time as shall be fixed in the Court below, a decree for possession shall be pronounced in favour of the appellant, and that, failing such payment within such time, the suits shall stand dismissed.

Appeals allowed.

Solicitors for the appellant :—*T. L. Wilson & Co.*

Solicitor for the respondents in appeals 95, 99, 100 and 102 :—*The Solicitor, India Office.*

Solicitors for the respondents in appeals 97, 103, 104 and 106 :—*Barrow Rogers & Nevill.*

[227] Solicitors for the respondents in appeal 101 of 1911 :—*T. O. Summerhays & Son.*

Solicitor for the respondents in appeals 98 and 105 :—*Edward Dalgado.*

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SONI RAM (*Plaintiff*) *v.* KANHAIYA LAL (*Defendant*).*

[*On Appeal from the High Court of Judicature at Allahabad.*]

[6th February and 6th March, 1913.]

Act No. XV of 1877 (*Indian Limitation Act*), *section* 19 *and schedule II, article* 148—*Acknowledgment. effect of—Acknowledgment by widow in possession of husband's estate—Suspension of limitation—Act XV of* 1877, *section* 9—*Act XIV of* 1859 *section* 1, *clause* 15—Res judicata—*Contentions raised for the first time on appeal to His Majesty in Council—Practice of Privy Council.*

In a suit brought by the appellant on the 4th of March, 1907, against the respondents for the redemption of a mortgage, dated the 2nd of January, 1842, made between the respective predecessors in title of the parties and in which no date for redemption was specified, acknowledgments of the mortgagor's right had been made by the widow and daughter of a former mortgagee, a predecessor in title of the respondents, which, the appellants contended, extended the period of limitation.

Held that the law of limitation applicable to the case was not Act XIV of 1859, the law in force at the date of the acknowledgments, but Act XV of 1877, which was in force at the time of the institution of the suit.

Under article 148 of schedule II to that Act the period of limitation prescribed for a suit to redeem a mortgage was 60 years from the time when the right to redeem accrued, and by section 19 an acknowledgment to be effective must be "signed by the party against whom such right is claimed or by some person through whom he claims title."

Held that the respondents derived title through the last male owner, and not through his widow and daughter, who were therefore not competent under section 19 to make an acknowledgment of the right of redemption so as to bind any interests except their own. To hold otherwise would be to extend the power of a Hindu female in possession of a limited interest to bind the estate to an extent which was not sanctioned by authority.

An acknowledgment of liability only extends the period of limitation within which the suit must be brought, and does not confer title, and, with reference to section 2 of Act XV of 1877, was not a "thing done" within the meaning of section 6 of the General Clauses Consolidation Act (I of 1868).

There was nothing in article 148 of Schedule II of Act XV of 1877 to justify a holding that by reason of the fusion of the interests of the mortgagor and mortgagee (which, it was alleged, took place between the years 1883 and 1898) the [228] period of limitation which began to run on the 3rd of January, 1842, was suspended; which would be deciding contrary to section 9 of the Act: this suit not being one to which the proviso to that section applied.

Barrell v. *Earl of Egremont*,(1) distinguished.

The present suit was not barred as *res judicata* by a former suit in 1901.

With regard to contentions raised on this appeal which had not been raised before at any stage of the case, and consequently had not been considered by any of the Courts below, nor were even suggested in the reasons in the case of the appellant to England, their Lordships adhered to the established practice of the Board not to allow new cases to be made for the first time on appeal to His Majesty in Council.

[**Ref.** 41 Cal. 1125; 31 I. C. 250; 39 Mad. 645; 43 I. C. 50=1917 M. W. N. 864=33 M. L. J. 753; 39 Mad. 646; 42 Mad. 319; 59 I. C. 790=45 Bom. 365; 64 I. C. 451; 21 I. C. 43; **Fol.** 18 C. L. J. 274; 29 I. C. 833; **Ref.** 83 I. C. 110=28 C. W. N. 1009; 83 I. C. 1052; 70 I. C. 370=36 C. L. J. 263; 70 I. C. 446=16 L. W. 529=44 M. L. J. 87; 72 I.C.698=36 C. L. J. 208; 79 I. C. 520=39 C. L. J. 40; **Ref.** 67 I. C. 526=3 Lah. 103.]

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* *Present* :—Lord SHAW, LORD MOULTON, SIR JOHN EDGE, and Mr. AMEER ALI.

(1) (1844) 7 Beav. 205.

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APPEAL from a judgment and decree (7th August 1909 of the High Court at Allahabad, which reversed a judgment and decree (24th March 1908) of the court of the District Judge of Aligarh, who had affirmed a decree (16th September 1907) of the Subordinate Judge of Aligarh.

The suit out of which this appeal arose was one for redemption of a mortgage, dated the 2nd of January, 1842, and the only question for determination on this appeal is whether the suit is barred by limitation. The District Judge held that it was not barred ; but on appeal the High Court (BANERJI and TUDBALL, JJ.) reversed that decision and dismissed the suit.

The case before the High Court will be found reported in I. L. R. 32 All. 33, where the facts are sufficiently stated.

The facts of the case are also fully stated in the judgment of their Lordships of the Judicial Committee.

On this appeal, which was heard *ex parte* —*G. Cave*, *K. C.* and *J. M. Parikh* for the appellant contended that the suit was not barred by limitation. The Act of Limitation applicable to the suit was Act XIV of 1859 section 1, clause 15, under which the acknowledgments of 1866 and 1867, made by Musammat Jamna, and Musammat Janki respectively were valid and binding on the respondents and therefore effective to extend the period of limitation. Those acknowledgments, having been made while Act XIV of 1859 was in operation, were, within the meaning of section 6 of the General Clauses Consolidation Act (I of 1868) " things done" before the Limitation Act, XV of 1877, came into force, and that Act being a repealing Act did not affect them. The appellant, it was therefore submitted, acquired a title under Act XIV of 1859, and Act IX of 1871, and under section 2 of Act XV [229] of 1877, nothing contained in that Act affected his title. The ladies, who claimed through the original mortgagee, were full owners of the mortgagee rights, and therefore bound the succeeding heirs in the way stated in *Katama Natchiar* v. *Raja of Shivagunga* (1). They represented the estate, and their acknowledgments were valid, so as to bind their successors in title, the respondents. *Bhagwanta* v. *Sukhi* (2), and Mayne's Hindu Law (7th ed.), page 705, paragraph 519, page 818, paragraph 605, page 840, paragraph 624, and page 852, paragraph 634, were referred to. Moreover, between the years 1883 and 1898 there was a union of the rights of the mortgagor and those of the mortgagee in the appellant and his father, the effect of which, it was submitted, was that the operation of the Limitation Act was suspended during that period, and consequently, even if Act XV of 1877 applied, the suit would not be barred by lapse of time. There must under article 148 of Act XV of 1877 be one person liable to pay interest under the mortgage and with a right to redeem and another person entitled to receive interest, and liable to a suit for redemption ; and where there is a union of those rights in one person, as there was here between 1883 and 1898, there was no operation of the Act. Reference was made to *Burrell* v. *Earl of Egremont* (3), the principle on which Lord Langdale M. R. acted in that case in construing section 40 of 3 and 4 Will. IV, C. 27, being, it was contended, applicable to the present case ; and *Seagram* v. *Knight* (4) : and sections 9 and 20 of Act XV of 1877 were also referred to. As long as the right of the mortgagee, and the right of redemption remained in one person, the equity of redemption could not be enforced. The cause of action for redemption arose again at

(1) (1863) 9 Moo. I.A., 539 (603).
(2) (1899) I. L. R. 22 All., 33.
(3) (1844) 7 Beav., 205 (284).
(4) (1867) L.R., 2 Ch., App., 632.

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earliest when, on the death of Musammat Janki in 1893, there was separation of those rights—under article 148 limitation begins to run when the right to recover posseasion accrues, and until 1898 there was no right to recover possession. It was also contended that in 1904 the respondent being full owner of the property sued only for the mortgagee's right, and did not assert his right to that of the mortgagor; his conduct led the appellant to believe that he (the appellant could redeem the [230] mortgage and operated as an estoppel against him.

The present suit was not barred by the suit brought by the respondent in 1904, the right to redeem was not in that suit decided against the appellant.

1913, *March 6th*:—The judgment of their Lordships was delivered by Sir JOHN EDGE:—

The suit in which this appeal has arisen was brought on the 4th of March, 1907, by Lala Soni Ram the appellant here for the redemption of a mortgage which had been made on the 2nd of January, 1842, by the then owners of mauza Kheria Buzurg in favour of Khushwakt Rai, who was on the making of the mortgage put in possesion by the mortgagors. The mortgage was usufructuary, the profits, except Rs. 80 per annum, were to be taken by the mortgagee in lieu of interest and the mortgagee was to pay to the mortgagors annually the Rs. 80 as malikana.

By the mortgage it was provided that the mortgagors should be entitled to redeem and to obtain possession of the mortgaged property on payment of Rs. 4,000, which was the amount advanced to them. No date for the redemption of the mortgage was specified and consequently the mortgage became liable to be redeemed immediately after it was made. The whole 20 biswas of Kheria Buzurg were included in the mortgage, but the original mortgagors, or some of them, redeemed the mortgage so far as it affected 6 biswas 17½ biswansis of Kheria Buzurg, and this suit relates to the right to redeem the mortgage so far as it affects the remaining 13 biswas 2½ biswansis of the property which was mortgaged in 1842, if that right could at the date of the suit have been enforced by suit.

In order to understand the issues which were raised and were tried in the court of first instance, or on appeal below, it is necessary briefly to refer to the title of Lala Soni Ram, the plaintiff appellant, as representing the original mortgagors and to the title of the defendants respondents as representing the original mortgagee Khushwakt Rai, and to refer to a suit which was brought on the 18th of May, 1904, by the present defendant respondent Babu Charan Behari Lal, and his brother Lala Shib Shankar Lal against the present plaintiff appellant Lala Soni Ram. Lala Shib Shankar Lal [231] was a defendant to this suit and is represented here by the respondents to this appeal.

Between the years 1880 and 1883 Mannu Lal, since deceased, who was the father of the plaintiff appellant, acquired the rights and interests of the original mortgagors in 13 biwas, 2½ biswansis of Kheria Buzurg to which this suit relates. These rights and interests, so far as they can be enforced, are now vested in the plaintiff appellant, Lala Soni Ram.

Khushwakt Rai, the original mortgagee, died shortly before 1855, leaving surviving him his widow, Musammat Janma, who died on the 10th of May, 1866, and a daughter Musammat Janki, who died on the 30th of May 1898. Babu charan Behari Lal and Lala Shib Shankar Lal, who were the plaintiff in the suit of 1904, were the sons of Musammat Janki.

On the 31st of March, 1866, Musammat Jamna, who had succeeded to a Hindu widow's estate on the death of her husband Khushwakt Rai,

executed a sale deed by which she transferred a moiety of her interest as mortgagee of Kheria Buzurg to Debi Prasad and Gulab Rai, and on the same date by deed hypothecated to them the other moiety of her interest as mortgagee. On the 29th of April, 1867, Musammat Janki executed a sale deed in favour of Debi Prasad and Gulab Rai, by which she transferred to them her interest as mortgagee in the moiety of Kheria Buzurg which had been hypothecated to them by Musammat Jamna in 1866. The mortgagee's interest in Kheria Buzurg, which by the sale deeds of 1866 and 1867, had vested for the lives of Musammat Jamna and Musammat Janki in Debi Prasad and Gulab Rai, vested by assignments in or before 1883 in Mannu Lal, and from 1883 until Mussammat Janki's death in 1898 Mannu Lal or his son, Lala Soni Ram, the plaintiff appellant, who succeeded him, enjoyed the rigts of the mortgagors and the mortgagee in the 13 biswas 2½ biswansis.

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In the deed of the 31st of March, 1866, Musammat Jamna has described herself as a mortgagee and had acknowledged the existence of the mortgage of 1842, and in the deed of the 29th of April, 1867, Musammat Janki had similarly described herself as mortgagee and acknowledged the existence of the mortgage. Neither of those deeds is before this Board, but that is the [232] inference which their Lordships draw from the proceedings and the judgments in the Courts below.

After the death of Musammat Janki her sons, Babu Charan Behari Lal and Lala Shib Shankar Lal, brought a suit on the 18th of May, 1904, against Lala Soni Ram, the present plaintiff appellant to obtain possession as mortgagees of the 13 biswas 2½ biswansis of Kheria Buzurg on the ground that the transfers which were made in the life-time of Musammat Jamna and Musammat Janki became ineffectual as against them on the death of those ladies. In that suit Babu Charan Behari Lal and Lala Shib Shankar Lal on the 12th of October, 1904, obtained a decree for possession.

So far as appears from that part of the record which is before this Board, Babu Charan Behari Lal and Lala Shib Shankar Lal did not in the suit of 1904 allege or admit that the mortgagors' interest had vested in Mannu, or was vested in Lala Soni Ram, the present plaintiff appellant; their case apparently simply was that the title to the mortgagees' interest which had been transferred by Musammat Jamna and Musammat Janki had determined, so far as Lala Soni Ram was concerned, on the death of Musammat Janki and that they became entitled as representing Khushwakt Rai, the mortgagee, on her death to possession as mortgagees. Their case was, that after the death of Musammat Janki, Lala Soni Ram was a trespasser, as in fact he was, and they claimed mesne profits. It does not appear that Babu Charan Behari Lal and Lala Shib Shankar Lal alleged, or otherwise admitted, in the suit of 1904, that a right to redeem the mortgage of 1842, which could be enforced by suit vested in anyone, nor was it material to their cause of action that a right to redeem which could be enforced by suit should be vested in anyone. Their title to possession on the death of Musammat Janki, which was the title they claim, related back to and was based on the mortgage of 1842, whether the right to enforce by suit redemption of that mortgage had or had not been extinguished before the 18th of May, 1904 by limitation. The mortgage had not been redeemed and nothing had happened between the death of Musammat Janki and the 18th of May, 1904, to disentitle Babu Charan Behari Lal and Lala Shib Shankar Lal to a decree for possession based on that original title. As a matter of fact if Lala Soni Ram had desired, on the death of

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[233] Musammat Janki, in 1898, to redeem, he could have brought his suit within sixty years from the date of the mortgage, as the sixty years did not expire until January, 1902, but apparently he hoped, by holding on to the possession of the 13 biswas 2½ biswansis to escape from having to pay the Rs. 4,000 redemption money. When the suit of 1904 was brought, the period of 60 years, computed from the 2nd of January, 1842, had expired.

In this appeal, which is *ex parte*, the plaint and other pleadings in the suit of 1904 are not before their Lordships, but they draw the inference which they have expressed from the judgment of the 12th of October, 1904, and from the judgment of the Courts below in this suit. The effect of the suit of 1904 was to give by process of law to Babu Charan Behari Lal and Lala Shib Shankar Lal the possession as mortgagees to which they had become entitled on the death of their mother Musammat Janki on the 30th of May, 1898.

Lala Soni Ram, the present plaintiff appellant, on the 4th of March, 1907, brought in the Court of the Subordinate Judge of Aligarh this suit against Lala Shib Shankar Lal and Babu Charan Behari Lal for the redemption of the mortgage of the 2nd January, 1842, so far as it affected the 13 biswas 2½ biswansis or Kheria Buzurg. Other defendants were subsequently added. In their written statement Lala Shib Shankar Lal and Babu Charan Behari Lal admitted that the mortgage of the 2nd of January, 1842, was made, and so far as is now material pleaded that the suit was not brought within 60 years of the date of the mortgage, that no admission of the right of the mortgagor was made within 60 years from the date of the mortgage, and consequently that the suit was barred by limitation. They also alleged that in the suit of 1904 Lala Soni Ram had pleaded that he had a right to redeem, but that the Court in that suit had decreed their claim for possession, and they relied upon section 13 of the Code of Civil Procedure. They further pleaded that in the suit of 1904 it had been decided that the deeds which had been executed by Musammat Jamna and Musammat Janki were not binding upon them, the answering defendants, after the deaths of those ladies.

The Subordinate Judge held, and rightly as their Lordships consider, that the suit of 1904 did not by the operation of section [234] 13 of the Code of Civil Procedure bar the present suit. The suit of 1904 was a suit by Lala Shib Shankar Lal and Babu Charan Behari Lal for possession as mortgagees. The mortgage had not been redeemed, and the plea of Lala Soni Ram that he was entitled to redeem was irrelevant to a suit by the usufructuary mortgagee for possession. Lala Soni Ram's title as mortgagor was not in question in that suit, nor could he as a defendant to that suit have converted that suit into one in which he could have obtained a decree for redemption. The Subordinate Judge, however, applying section 15 of Act XIV of 1859 to the case, held that the acknowledgments of the existence of the mortgage by Musammat Jamna and Musammat Janki in their respective deeds brought this suit within time, and he gave the plaintiff a decree for redemption.

The District Judge of Aligarh, on appeal from the decree of the Subordinate Judge, affirmed the judgment of the Subordinate Judge, and by his decree of the 24th of March, 1908 dismissed the appeal. From the decree of the District Judge the defendants appealed to the High Court at Allahabad. The High Court, rightly holding that the law of limitation applicable to a suit or proceeding, is the law in force at the

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date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary, held that Act XV of 1877, and not Act XIV of 1859, was the Limitation Act which was applicable to the suit. By section 19 of Act XV of 1877, it is, so far as is material for present purposes, enacted as follows:—

"If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he claims title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

This is a suit to redeem and the period prescribed by article 148 of the second schedule to Act XV of 1877 within which a suit against a mortgagee to redeem or to recover possession of immoveable property mortgaged is 60 years from the time when the right to redeem or to recover possession accrues.

The learned Judges of the High Court held that there could not be any doubt that the mortgage of 1842 was in terms admitted by Musammat Jamna and Musammat Janki in their respective deeds, **[235]** but they also held that the defendants derived title through their grandfather Khushwakt Rai, who was mortgagee and the last full owner of the rights of the mortgagee, and did not derive title through Musammat Jamna or Musammat Janki, who, although for certain purposes they did represent the estate, were not persons who could be deemed to have admitted for the benefit of the mortgagee's estate a right of redemption in the mortgagor, and that in making such acknowledgments they had no power to bind any interest except their own. To have held otherwise would, in their Lordships' opinion, have been to extend the power of a Hindu woman in possession for her limited interest to bind the estate to an extent which has not been sanctioned by authority.

It was also contended in the High Court on behalf of the plaintiff that there had been a fusion of the interest of the mortgagee and the mortgagor in the same person between the years 1883 and 1893; and that no mortgage was in existence during that period; and that article 120 of the second schedule of Act XV of 1877, and not article 148 applied; and that the suit was within time. The learned Judges of the High Court pointed out one obvious answer to that contention. It was that, if article 120 applied, the suit was not within time, as Musammat Janki had died more than six years before the suit was brought. They also pointed out that the mortgagee's interest which became vested in Mannu was only the limited interest of a Hindu lady, and consequently there had been no merger. The High Court, by its decree of the 7th of August, 1909, allowed the appeal on the ground that the suit was barred by limitation and dismissed the suit with costs in all Courts. From that decree the plaintiff Lala Soni Ram has brought this appeal.

In this appeal it has been contended that the Limitation Act applicable to this case is Act XIV of 1859, and consequently the acknowledgments of the existence of the mortgage of 1842 which were contained in the deeds which were executed by Musammat Jamna and Musammat Janki brought this suit within time. As to that contention it is sufficient for their Lordships to say that they agree with the High Court that Act XIV of 1859 does not apply to this suit and that the Limitation Act which does apply is Act XV of 1877, and further that the acknowledgments which were **[236]** made by Musammat Jamna and Musammat Janki were not

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acknowledgments within the meaning of section 19 of Act XV of 1877 made by a person or persons through whom the defendants derived title or liability. Their Lordships consequently consider that these acknowledgments were ineffectual to give a new period of limitation. The contention in this appeal which is based upon section 6 of the General Clauses Act and section 2 of Act XV of 1877 was pressed upon the High Court. Their Lordships agree with the High Court that an acknowledgment of liability only extends the period of limitation within which a suit must be brought and does not confer title, and is not a "thing done" within the meaning of section 6 of the General Clauses Act.

In this appeal it was also contended that the operation of Act XV of 1877 was suspended during the whole period 1883—1898 when Mannu or his son Lala Soni Ram, the plaintiff, were in the position of mortgagors and mortgagees, the contention being, that that period should be excluded from the computation of the 60 years provided by article 148 of the second schedule to Act XV of 1877, as between 1883 and 1898 no suit for redemption could have been brought by Mannu or after his death by the plaintiff Lala Soni Ram. Their Lordships are by no means certain that this particular contention was raised in the High Court. The contention there apparently was—not that the operation of article 148 was suspended during the period 1883—1898—but that by reason of the fusion of interests of mortgagor and mortgagee article 148 did not apply to this case and that the article which did apply was article 120. In support of the contention in this appeal this Board was urged to apply in this suit the principle which Lord Langdale, Master of the Rolls, applied when construing section 40 of 3 & 4 Will., IV, C. 27, in *Burrell* v. *The Earl of Egremont* (1). Their Lordships are unable to accede to that contention, as article 148 of Act XV of 1877 is essentially different in its language and intention from section 40 of 3 & 4 Will. IV, C. 27, and the facts upon which Lord Langdale acted were not in any way similar to the facts in this suit Under section 40 of 3 & 4 Will. IV, C. 27, no suit could be brought to recover money secured on a mortgage or otherwise charged upon land, but within twenty years next after a present right to [237] receive the same shall have accrued to some person capable of giving a discharge for or a release of the same, unless in one or other of the events specified in the section. The 60 years' period of limitation allowed by article 148 of Act XV of 1877 begins to run in such a case as this "when the right to redeem or to recover possession accrues." In *Burrell* v. *The Eral of Egremont* (1) there was a charge upon an estate which no assignable person was liable to pay and in respect of which no person was capable of making an acknowledgment that it was due. In this case the right to redeem the mortgage of the 2nd of January, 1842, accrued to the mortgagors the moment the mortgage was executed and the 60 years' period of limitation must be computed as having begun on the 3rd of January, 1842. There is nothing in Act XV of 1877 which would justify this Board in holding that, once that period of limitation had begun to run in this case, it could be suspended. Their Lordships consider that if they were to hold that, by reason of the fusion of interests between 1883 and 1898, the period of limitation was suspended, they would—this not being a suit to which the proviso to section 9 of Act XV of 1887 applies—be deciding contrary to the express enactment of that section

(1) (1844) 7 Beav. 205.

that "when once time has begun to run no subsequent disability or inability to sue stops it."

At the hearing of this appeal two other contentions, each of which involved the consideration of facts and of law as applied to these facts, were raised. Neither of those contentions, so far as appears from the record which is before this Board, had previously been raised by anyone at any stage of this suit either in the Court of first instance or on either of the appeals, and consequently had not been considered either by the Subordinate Judge or the District Judge or the learned Judges of the High Court. Further, neither of these contentions is even suggested by any of the grounds of appeal which were set out in Lala Soni Ram's application to the High Court for leave to appeal to His Majesty in Council, nor is either of them suggested in the reasons contained in the case for the appellant here, and it must be remembered that this appeal has been heard *ex parte*, neither the respondents nor any counsel on their behalf having appeared. Their [238] Lordships are not disposed to depart from the established practice of this Board not to allow on appeals to His Majesty in Council new cases to be made which were not made below.

The result is that their Lordships will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court should be affirmed.

Appeal dismissed.

Solicitor for the appellant :—*Edward Dalgado.*

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35 A. 227=11 A. L. J. 389=19 I. C. 291=17 C. L. J. 438=1913 M. W. N. 470=25 M. L. J. 131=40 I. A. 74=13 M. L. T. 437=17 C. W. N. 605=15 Bom. L. R. 489.

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35 A. 238 (=13 I. C. 763=11 A. L. J. 144).

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Rafiq.

BACHCHAN LAL AND OTHERS (*Plaintiffs*) *v.* BANARSI DAS (*Defendant*).*

[10th January, 1913.]

Civil Procedure Code (1908), *order VIII, rule* 6—*Set-off—Claim barred according to* lex fori, *but not according to* lex loci contractus.

In a suit filed against him in the United Provinces the defendant claimed to set off a debt, which, though it would have been barred by limitation in the United Provinces, was not barred according to the local law (that of the Punjab) applicable thereto. *Held*, that the set-off claimed was admissible.

THE facts of this case, so far as they are material to the purposes of this report, are as follows. The plaintiffs sued to recover Rs. 3,200 from the defendant, who was a resident of Umbala in the Punjab, the money being alleged to be due as the result of dealings in flour between the parties. Amongst other defences, the defendant claimed to set off the amount due on a certain rukka for Rs. 200. This set-off was disallowed by the court of first instance upon the ground that the claim on the rukka was barred by limitation. On appeal by the defendant, however, the lower appellate Court reversed the finding of the court below on this point, holding that the local law of the Punjab applied to the rukka in question, according to which the debt was not time-barred. The plaintiffs appealed in respect of this and other matters to the High Court.

The Hon'ble Dr. *Sundar Lal* and Mr. *A. P. Dube*, for the appellants.

* Second Appeal No. 1264 of 1911 from a decree of Austin Kendall, District Judge of Cawnpore, dated the 21st of August, 1911, modifying a decree of Mohan Lal Hukku, Subordinate Judge of Cawnpore, dated the 6th of July, 1910.

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APPELLATE CIVIL.

35 A. 238=
18 I. C. 763=
11 A. L. J. 144.

Babu *Satya Chandra Mukerji*, for the respondent.

KNOX and MUHAMMAD RAFIQ, JJ.:—The appellants before us in this second appeal were plaintiffs in the court of first instance. [239] They sued the respondent for a sum of money together with costs. The sum of money, they claimed, was alleged to have arisen out of certain dealings in wheat between the parties. The sum which they sued for was Rs. 3,200. The lower appellate Court went into the accounts and gave the appellants a decree for Rs. 374-0-6 with proportionate costs. Against this decree the appellants have brought the present appeal. In the memorandum of appeal they have raised several pleas. One of these pleas, namely, plea No. 6, has been abandoned, and the pleas urged before us really resolve themselves into two, the first being that the lower appellate Court was wrong in debiting the appellants with the amount of a rukka dated the 7th of December, 1903, inasmuch as the claim on that rukka was barred by limitation.

The second point was that the account books produced by the respondent before the lower appellate Court had not been proved according to law. Before dealing with this we would note that the third plea in the memorandum of appeal is a plea calculated to get behind a finding of fact based upon evidence and of this we can take no account in second appeal. The second plea, which was to the effect that the lower court ought to have passed a preliminary decree under order XX, rule 16 of the Code of Civil Procedure, is not entitled to any weight. We agree with the learned Judge of the court below that this was not a case in which a preliminary decree was required.

As regards the action of the lower court with reference to the rukka, the contention was that the court ought to have in the present case applied the provisions of the Indian Limitation Act of 1908 without any reference to the provisions of the Punjab Act No. I of 1904. Reference was made to Dicey on the Conflict of Laws, rule 118, page 711. But the learned advocate overlooked altogether in his argument the provisions contained in the Code of Civil Procedure, vide order VIII, rule 6. This order and rule apply equally as law in these provinces as in the Punjab in suits for recovery of money. The defendant can claim to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff. Without going any further into the contention raised by the learned advocate, the sum due on the rukka was a sum which the defendant, if [240] he had sued in the Punjab, could have recovered by law from the plaintiff.

As regards the plea relating to the account books, we notice that the appellants, when they filed their objections in the lower appellate Court, filed the roll of respondents in that court, and they never objected that the account books had not been proved. We understand that the respondent went into the witness box and as a matter of fact did prove the account books. This plea also fails. The appeal fails and is dismissed with costs.

Appeal dismissed.

35 A. 240 (=11 A. L. J. 352=18 I. C. 721).

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APPELLATE CIVIL.

APPELLATE CIVIL.

35 A. 240=11 A. L. J. 352=18 I. C. 721.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

BIHARI LAL (*Plaintiff*) *v.* DAUD HUSAIN AND OTHERS (*Defendants*)*.

[8th February, 1913.]

Hindu widow—Hindu law—Compromise followed by an award settling disputes as to the property of various members of the family—Effect of such award on reversionary interests.

Where the widow of one and the son of the other of two brothers, Hindus, separated in estate, entered into a compromise, which was found to be reasonable in its nature, concerning the partition of the property of the two brothers, and an award was made on the basis of such compromise, it was *held* that it was not open to the reversioner to dispute the validity of the compromise and award, especially when a considerable time had elapsed and most of the property had changed hands meanwhile. *Khunni Lal* v. *Gobind Krishna Narain* (1) and *Madan Lal* v. *Chuttan Singh* (2) followed.

[Ref: 67 I. C. 210=34 C. L. J. 323.]

THIS was a suit to set aside a deed of compromise and an award based thereon and to recover possession of certain immovable property.

The plaintiff came into court alleging that one Ganesh Rai, his maternal grandfather, was a separated Hindu and was the sole owner of the property in suit; that Musammat Gango, the widow of Ganesh Rai, on his death, took possession of the aforesaid property as a life tenant, but unlawfully transferred it, under an arbitration award, to one Bhagirath, who was Ganesh Rai's cousin, that Bhagirath sold a portion of it to Musammat Wali-un-nissa, and that the ancestor of the defendants brought a suit against the latter for pre-emption and obtained possession of the property from her. The plaintiff prayed that the arbitration award might be set aside and [241] possession delivered to him. The defendants pleaded that Ganesh Rai and Bhagirath were members of a joint Hindu family and were joint-owners of the property, and on Ganesh Rai's death, a dispute arising between Bhagirath and Musammat Gango, an arbitration award based upon a compromise between the parties was made, under which the property in suit was given to Bhagirath. He did not get it by transfer from Musammat Gango, and the plaintiff had no right to the property.

The court of first instance decreed the plaintiff's claim, but the lower appellate Court allowed the appeal and dismissed the suit. The plaintiff appealed to the High Court.

Munshi *Benode Behari* (with him Dr. *Satish Chandra Banerji*) for the appellant :—

The compromise seems to be collusive and cannot bind the reversioners. Further it was not arrived at in a contested suit and so it is of no effect. It was not even a compromise, since the arbitrators, without using their own judgment, gave the award according to the arrangement already arrived at by the parties. It would be extremely dangerous if widows were allowed to alienate property to which the reversioners would be entitled.

Mr. *Agha Haidar*, for the respondent :—

There is no allegation in the plaint that the compromise was collusive or fraudulent. Fraud is never presumed. If once it is found that the

* Second Appeal No. 839 of 1912 from a decree of D. R. Lyle, District Judge of Shahjahanpur, dated the 30th of January, 1912, reversing a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 11th of August, 1911.

(1) (1911) I. L. R. 33 All 356. (2) (1912) 10 A. L. J. 101.

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compromise was in every respect a fair and reasonable one the argument that it was not arrived at in a contested suit loses much of its force. The finding of the lower court is that the compromise is perfectly reasonable and saved the parties from a doubtful and ruinous litigation. On this finding the plaintiff has no case. Again the compromise is 21 years old. The property has, during the period, changed hands twice. It would be unfair if the plaintiff was allowed to take the property back from a *bona fide* purchaser. The plaintiff's family alone can know about the disputes which resulted in the compromise. They would not help the defendant with evidence, but would rather try to deprive him of the property. He relied on *Khunni Lal* v. *Gobind Krishna Narain* (1) and *Madan Lal* v. *Chuttan Singh* (2).

Munshi *Benode Behari* replied.

[242] GRIFFIN and CHAMIER, JJ. :—Balkishan and Mul Chand were brothers, separate in estate. Mul Chand died leaving a son Bhagirath. In execution of a decree obtained by Bhagirath a share in a village called Jaswan was put up for sale and purchased by, or at all events in the name of, Balkishan. The last named was succeeded by his son; Ganesh, who died in 1888, leaving a widow Musammat Gango. Bhagirath put forward a claim to the share in Jaswan. The dispute was referred to the arbitration of three persons, but before an award could be made the parties agreed that the share in Jaswan should go to Bhagirath and that a share in a village called Karauri, standing in the names of Ganesh and Bhagirath, should go to Musammat Gango, and at the same time other properties were allotted to one party or the other. An award was made in terms of this agreement. In 1904, Gango gave the share in Karauri to her daughter's son, the present plaintiff. She died in 1908. In 1892 Bhagirath sold the share in Jaswan to a Musammat Wali-un-nissa, from whom it was taken under a pre-emption decree by the predecessors of the defendants. Thus, there has been several dealings with the properties included in the award. In the present suit, instituted in 1910, the plaintiff seeks to recover the share in Jaswan on the ground that he is not bound by the compromise and award made thereon. The Subordinate Judge decreed the claim, but his decision was reversed by the District Judge, who upheld the compromise, on the ground that it was a reasonable settlement of the dispute between Mussammat Gango and Bhagirath. The learned Judge was disposed to think that Balkishan and Bhagirath must have been joint owners of the share in Jaswan, as both were recorded as holders of *sir* and *khudkasht*, and Bhagirath's name remained in the *khasra* after the death of Balkishan. In second appeal it is contended that Musammat Gango being the holder of a limited interest in the property had no power to surrender it to Bhagirath in such a way as to bind the reversionary heirs of her husband. In our opinion there is no force in this contention. The case appears to be covered by the decision of the Privy Council in *Khunni Lal* v. *Gobind Krishna Narain* (1) and the decision of this Court in *Madan Lal* v. *Chuttan Singh* (2). The compromise which has been found to be a reasonable [243] settlement was designed to put an end to a family dispute which would otherwise have resulted in ruinous litigation. On the authorities it is impossible to treat the compromise as an alienation, valid only if it can be shown to be justified by necessity. The appeal is dismissed with costs.

Appeal dismissed.

(1) (1911) I. L. R. 33 All. 356. (2) (1912) 10 A. L. J., 101.

35 A. 243 (=19 I. C. 622=11 A. L. J. 282).

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APPELLATE CIVIL.

APPELLATE CIVIL.

35 A. 243=19 I. C. 622=11 A. L. J. 282.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

MOHAN LAL (*Judgement-debtor*) *v.* JAGAN NATH AND ANOTHER *Decree-holders.**

[12th February, 1913.]

Civil Procedure Code (1908), *section* 47—*Execution of the decree—Partition—Objection that decree-holders had realized certain debts assigned by the decree to the judgment-debtor—Procedure.*

The decree in a partition suit, *inter alia*, allotted a sum of money to be paid by the judgment-debtor to the decree-holders and assigned certain debts on account books to the judgment-debtor. On application by the decree-holders for execution as to the sum allotted to them, the judgment-debtor took objection that the decree holders had as a matter of fact realized a large amount of the debts which had been assigned by the decree to him. *Held* that the question thus raised was not a matter falling within the purview of section 47 of the Code of Civil Procedure, and that the judgment-debtor's remedy was by a separate suit to recover from the decree-holders the amount alleged to have been illegally realized.

[Ref. 63 I. C. 975.]

THIS appeal arose out of proceedings in execution of a decree based upon a compromise in a suit for the partition of the property of the family to which both parties belonged. Amongst this property were certain debts due on bonds and other debts due on account-books. Several of the bond debts were assigned to the plaintiffs, and the rest as well as the debts on account-books to the defendant. In addition to this the sum of Rs. 3,400 was to be paid by the defendants to the plaintiffs, Rs. 400 at once and the balance within two years. The sum of Rs. 400 was paid. In 1910 and 1911 there were applications made by the decree-holders in execution of the decree whereby they sought to recover the balance of Rs. 3,000. The present application for execution was made in January, 1912. On the 8th of March, 1912, the judgment-debtor filed certain objections. The objections were that the application was in contravention of the terms of the decree, that the application was time-barred, that interest had been charged by the [244] decree-holders to which they were not entitled, and that since the date of the partition decree the plaintiffs decree-holders had realized a large sum of money out of those debts which had been allotted to the judgment-debtor under the partition decree. On the 16th of March the objections were slightly amplified by another application in which the judgment-debtor sought for time to bring into court evidence to prove that the decree-holders had realized a large sum out of those debts based on account-books which had been allotted to the defendant.

The court of first instance disallowed the objections. The defendant judgment-debtor appealed to the High Court.

Pandit *Shiam Krishna Dar* and Pandit *Uma Shankar Bajpai*, for the appellant.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—This is an appeal arising out of execution proceedings. The facts are briefly as follows:—The parties are step-brothers. A suit for partition was brought by the plaintiffs respondents for partition of the joint family property. The suit

* First Appeal No. 205 of 1912 from a decree of Mohan Lal Hukku, Subordinate Judge of Meerut, dated the 25th of May 1912.

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35 A. 243=19 I. C. 622=11 A. L. J. 282.

ended in a decree, dated the 3rd of March, 1908, based on a compromise. The compromise is dated the 14th of January, 1908, and was filed in the course of the appeal in this Court, on the 22nd of January, 1908, and was remitted to the court below for verification and report. It reached the court below on the 31st of January, 1908. According to the compromise the landed property was divided in a certain manner, likewise the house property. With these we are not concerned in this appeal. The third class of property consisted of debts on bonds and on accounts entered in certain account-books. Of this class about ten debts secured by bonds were allotted to the plaintiffs. The remaining debts, including all those due on accounts, were allotted to the defendant. In addition to this allotment of the property under the compromise a sum of Rs. 3,400 was to be paid by the defendant. Of this, Rs. 400 was to be paid at once and the balance of Rs. 3,000 at the end of two years. The compromise on being duly verified was submitted to this Court, and a decree was passed thereunder on the 3rd of March, 1908. The sum of Rs. 400 was paid. In 1910 and 1911 there were applications made by the decree-holders in execution of the decree, whereby they sought to recover **[246]** the balance of Rs. 3,000. The present application for execution was made in January, 1912. On the 8th of March, 1912, the judgment-debtor filed certain objections. The objections were that the application was in contravention of the terms of the decree; that application was time barred; that interest had been charged by the decree-holders to which they were not entitled, and that since the date of the partition decree the plaintiffs decree-holders had realized a large sum of money out of those debts which had been allotted to the judgment-debtor under the partition decree. On the 16th of March the objections were slightly amplified by another application, in which the judgment-debtor sought for time to bring into court evidence to prove that the decree-holders had realized a large sum out of those debts based on acount-books which had been allotted to the defendant. The lower court has disallowed the objection. The plea of limitation was not pressed, and the lower court held that if the decree-holders had wrongfully recovered the debts, the judgment-debtor had his remedy against the decree-holders in a regular suit. The judgment-debtor comes here on appeal, and the first plea taken is that the point raised as to the collection of debts due to the judgment-debtor by the decree-holders is a point which falls under section 47 of the Code of Civil Procedure and the lower court ought to have gone into it. To this we cannot agree. The appellant has an entirely a separate cause of action against the decree-holders, if the latter have as a matter of fact recovered the debts due to him and not to themselves. Once the final decree in the partition suit was passed, the plaintiffs, decree-holders, ceased to have any title whatever to the debts in question. It is not pleaded that the plaintiffs' decree for Rs. 3,000 has been satisfied. There has been no voluntary payment. It is further urged on behalf of the appellant that under clause (2) of section 47 we should treat his present petition of objection more in the nature of a plaint, so that the whole proceedings may be treated as a suit by him to recover the amount which he claims to have been collected by the decree-holders. We see no reason to do so, assuming for a moment that the second clause of the section enables us to do as he wishes. The present proceeding is one which has arisen out of an application by the decree-holders and the objections are

merely objections asking the court to reject the application. No amount [246] is specifically claimed therein as having been collected by the decree-holders.

The second ground of appeal is not pressed. The third ground of appeal has no force. Assuming that the respondents have misappropriated the money due to the appellant, the latter has a remedy by regular suit.

The fourth ground of appeal is that as the plaintiffs have refused to fulfil their obligations under the decree they are not entitled to recover the money from the appellant. In so far as the decree itself is actually concerned there is no obligation on the decree-holders which they have to perform. It is urged that on the 31st of January, 1908, when the compromise filed in this Court was received in the court below an agreement was filed by the parties on the same day under which the plaintiffs, decree-holders, agreed to make over the account-books to the defendant. It is further urged that it was clearly understood by the parties that the defendant was to have two years' time given to him under the decree (as was actually granted thereby) for payment of Rs. 3,000, because he was to have the account-books at once handed over to him to enable him to recover the debts allotted to him. It is pleaded that the decree-holders have never handed over the accounts to him, and have thereby prevented him from recovering the debts, and as a consequence have prevented him also from paying the sum of Rs 3,000. It was urged that when the previous applications were made by the decree-holders this objection was all along taken, though it is also admitted that as a matter of fact it was not taken in the present instance in the court below. It seems to us quite clear that the rights of the parties, after the compromise had been arrived at were governed by the decree of the 3rd of March, 1908. It may be that on a true interpretation of that decree the judgment-debtor was entitled to the possession of the account-books, as the debts based on those account-books were entered therein and they formed the chief proof of those debts. It was open to the judgment-debtor to put the decree into execution and to recover the books, from the plaintiffs if they did not deliver them. As a matter of fact the decree is silent as to the possession of the account-books, and we do not think that we can go behind the decree to find out what other rights the parties may have. If any [247] portion of the compromise was accidentally omitted from the decree, it was open to the judgment-debtor to have the decree amended. If he intentionally omitted any portion of the compromise from the decree he has himself to blame. In any case he is not entitled to go behind the decree which finally decided the rights of the parties. This is a point which, as we have already pointed out, was not taken in the court below. If the appellant deems himself aggrieved in any way, we must leave him to his remedy by a separate suit. We think the decision of the court below is perfectly correct. We dismiss the appeal with costs.

Appeal dismissed.

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APPELLATE CIVIL.

35 A. 243=19 I. C. 622=11 A. L. J. 282.

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FEB. 15.

APPELLATE CIVIL.

35 A. 247=19 I. C. 614=11 A. L. J. 280.

35 A. 247 (=19 I. C. 614=11 A. L. J. 280).

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

GANESHI LAL AND OTHERS (*Plaintiffs*) *v.* CHARAN SINGH AND OTHERS (*Defendants*)*

[15th February, 1913.]

Mortgage—Parties—Suit for entire mortgage money and sale of entire mortgaged property—Omission to implead certain persons interested—Decree to which plaintiffs entitled.

Where a plaintiff mortgagee sued for the recovery of the whole of the mortgage money by the sale of the whole of the mortgaged property, but by an oversight omitted to implead certain persons who had acquired a share in the property subsequent to the mortgage in suit, it was *held*, that so much of the claim should be decreed as was proportionate to the interests of the persons who were before the court.

[Ref. 70 I. C. 542=35 C. L. J. 332; 72 I. C. 458; 75 I. C. 917.]

THIS was a suit on a mortgage made in favour of the first plaintiff in January, 1891. Some of the defendants were the mortgagors and remainder were impleaded on the ground that they had acquired an interest in the mortgaged property by purchase. One of the defences to the suit was that the plaintiffs had failed to implead four persons who had acquired one-sixth of the mortgaged property after the mortgage. The first court gave the plaintiffs a decree for 5/6ths of the amount due on the mortgage, to be recovered, if necessary, by sale of 5/6ths of the property mortgaged. The defendant appealed. The District Judge held that the non-joinder of owners of one-sixth of the property was fatal to the suit, which he accordingly dismissed.

The plaintiffs appealed to the High Court.

[248] Dr. *Satish Chandra Banerji* and Babu *Jogindro Nath Chaudhri*, for the appellants.

Mr. *M. L. Agarwala* and Munshi *Benode Behari*, for the respondents.

GRIFFIN and CHAMIER, JJ. :—This was a suit on a mortgage made in favour of the first plaintiff in January, 1891. Some of the defendants were the mortgagors and the remainder were impleaded on the ground that they had acquired interest in the mortgaged property by purchase. One of the defences to the suit was that the plaintiffs had failed to implead four persons who had acquired one-sixth of the mortgaged property after the mortgage. The first court gave the plaintiffs a decree for 5/6ths of the amount due on the mortgage, to be recovered if necessary, by sale of 5/6ths of the property mortgaged. The defendant appealed. The District Judge held that the non-joinder of the owners of one-sixth of the property was fatal to the suit, which he accordingly dismissed. In second appeal it is contended that the decision of the lower appellate court was erroneous. Reliance is placed on the decision in *Imam Ali* v. *Baij Nath Ram Suhu* (1) and some observations made by one of us in *Gendan Lal* v. *Babu Ram* (2). For the defendants respondents it is contended that a mortgagee must sue for recovery of the whole of the mortgage money by sale of the whole of the mortgaged property, and that if for any reason he is unable to ask for the sale of the whole mortgaged property his suit should be dismissed. In

* Second Appeal No. 454 of 1912 from a decree of H. M. Smith, Additional Judge of Agra, dated the 29th of November, 1911, reversing a decree of Kalika Singh, Additional Subordinate Judge of Agra, dated the 27th of June, 1911.

(1) (1906) I. L. R. 33 Cal 613. (2) (1911) 9 A. L. J. 86.

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APPELLATE CIVIL.

35 A. 247=19 I. C. 614=11 A. L. J. 280.

the present case the plaintiffs sued for recovery of the whole of mortgage money by sale of the whole of the mortgaged property. But by an oversight they omitted to implead certain persons who owned a share in the property distinct from the shares held by the other defendants. It seems to us that if the other questions in the case are decided in favour of the plaintiffs, so much of the claim should be decreed as is proportionate to the interest of the persons who are before the court. There seems to be some question as to whether the defendants are the owners of 5/6ths or a smaller share. This matter may be determined by the lower appellate court. We allow the appeal, set aside the decree of the lower appellate court, and remand the case to that court to be restored to the [249] pending file and disposed of according to law. Costs will be costs in the cause.

Appeal allowed and cause remanded.

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35 A. 249 (=19 I. C. 447=11 A. L. J. 248).

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

JAI DEI (*Applicant*), *v.* BANWARI LAL (*Opposite party*).*

[18th February, 1913.]

Act No. VII of 1889 (*Succession Certificate Act*), *section* 9—*Certificate in favour of Hindu widow to realize interest only—Certificate* ultra vires.

Held that, where a certificate was granted to a Hindu widow for collection of debts due to her late husband, it was not competent to the Court, in lieu of requiring security from the grantee, to give a certificate for realization of interest only without disturbing capital. *Shib Dei* v. *Ajudhia Prasad* (1) referred to

IN this case one Musammat Jai Dei, a Hindu widow, applied under section 6 of the Succession Certificate Act, 1889, for a certificate in respect of four debts due to her late husband. The application was opposed by certain reversioners, who asked the court to take security from the widow, as there was every likelihood of her wasting the corpus of the property if it reached her hands. On that the Judge passed the following order :—" The certificate asked for is granted, with the condition that the applicant may not disturb the capital sum and shall draw interest only." Mussammat Jai Dei appealed to the High Court, urging that the order in question was *ultra vires* the condition imposed being one which it was not in the power of the court to annex to the grant of a certificate.

Dr. *Surendra Nath Sen*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, JJ :—The appellant Musammat Jai Dei applied under section 6 of Act VII of 1889, the Succession Certificate Act, in respect of four debts due to her deceased husband. The application was opposed by certain reversioners, who asked the court to take security from the widow, as there was every likelihood of her wasting the corpus of the property if it reached her hands. On that the District Judge passed the following order :—" The certificate asked for is granted with the condition that the applicant may not disturb the capital sum and

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* First Appeal No. 148 of 1912 from an order of T. L. Johnston, District Judge of Farrukhabad, dated the 1st of August, 1912.

(1) F. A. f. O., No. 108 of 1910, decided on the 13th of February, 1911.

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FEB. 18.

APPELLATE CIVIL.

35 A. 249=19 I. C. 457=11 A. L. J. 248.

shall draw interest [250] only. This will obviate the necessity for security." Musammat Jai Dei has come here on appeal, and it is urged that the condition imposed by the court is *ultra vires* and that so much of the order passed is illegal. The case is similar in all respects to the case of Musammat *Shib Dei* v. *Ajudhia Prasad* (1), decided on the 13th of February, 1911. As in that cause, all that the Court could do was to require as a condition precedent to grant of the certificate that the widow should give security under section 9 for rendering an account of the debts and securities received by her and for indemnifying the persons who may be entitled to the whole or any part of the debt. The certificate as granted by the Judge would only entitle the widow to recover from the debtors the interest on the debts. It is not a question of the—"*securities and interest on securities*"—as defined in section 3 of the Act. We set aside the order of the Court below and direct that Court to readmit the application and to proceed to enter into and decide as to whether or not there is any necessity to take security from the widow under the circumstances. The parties will be allowed to go into evidence on the point and on that evidence the Court will come to a conclusion. If it comes to the conclusion that security is necessary, it will grant a certificate conditional on her furnishing security. If it comes to the conclusion that security is not necessary, it will grant a certificate unconditionally. The costs of this appeal will abide the result.

Appeal allowed.

35 A. 250 (=11 A. L. J. 241=18 I. C. 923).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

PARSOTAM DAS AND OTHERS (*Plaintiffs*) *v.* PATESRI PARTAB NARAIN SINGH AND OTHERS (*Defendants*).*

[18th February, 1913.]

Act No. III of 1877 (*Indian Registration Act*), *Section* 21—*Registration—How far a misdescription of property comprised in a deed may invalidate registration.*

Where one of several villages comprised in a registered mortgage deed was described as being in a wrong tappa, the description being, notwithstanding this error, sufficient for identification, it was *held* that the misdescription was not sufficient to invalidate the mortgage as regards the village in question. *Beni Madho Singh* v. *Jagat Singh* (2) referred to.

[Ref: 20 I. C. 385=21 M. L. J. 664=1913 M. W. N. 525.]

THIS was a suit for sale on a mortgage. The mortgage comprised several villages and was registered, but the court of first [251] instance had held it to be invalid as against one of the villages upon the ground of misdescription with reference to section 21 of the Indian Registration Act, 1877. The village in question was thus described in the deed:—" The entire mauza Rasulpur, tappa Padya, . . . pargana and district Basti . . . which are mortgaged with possession to other persons." The rest of the description was correct, but the village was not situate in tappa Padya, but in tappa Kadar.

The plaintiffs appealed to the High Court.

The Hon'ble Dr. *Sundar Lal*, Munshi *Govind Prasad* and Maulvi *Shafi-uz-zaman*, for the appellants.

* First Appeal No. 219 of 1911 from a decree of Shiva Prasad, Subordinate Judge of Gorakhpur, dated the 15th of December, 1910.

(1) F. A. f. O. No. 103 of 1910.

(2) (1912) 10 A. L. J. 33.

Dr. *Satish Chandra Banerji*, The Hon'ble Dr. *Tej Bahadur Sapru*, Maulvi *Muhammad Ishaq*, Munshi *Parmeshwar Dayal* and Munshi *Purushottam Das Tandan*, for the respondents.

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APPELLATE CIVIL.

35 A. 250=11 A. L. J. 241 =18 I. C. 923,

RICHARDS, C.J., and BANERJI, J.—This appeal arises out of a suit for sale upon a mortgage, and the only question we have to determine is whether the court below was right in dismissing the claim in so far as it sought to bring to sale the village Rasulpur, tappa Kadar. The court below has held that having regard to the provisions of section 21 of the Registration Act of 1877 the registration of the mortgage deed as regards that village was void and it has accordingly dismissed the claim in respect of that village. The correctness of this decision is challenged in this appeal by the plaintiffs.

The mortgage comprises a number of villages, among which is the village Rasulpur, and it is thus described in the deed. "The entire mauza Rasulpur, tappa Padya, . . . pargana and district Basti . . . which are mortgaged with possession to other persons". Mauza Rasulpur is not in tappa Padya, but is in fact in tappa Kadar. This is established by the evidence to which the court below has referred, but it is admitted that it is situate in pargana Basti and in the Basti district, and it was also mortgaged with possession to other persons. The court below holds that as the tappa in which the property in question is situate has been wrongly given in the mortagage deed, the registration of that document is thereby vitiated. Section 21 of the Registration Act merely provides that a non-testamentary document relating to immovable property should contain a [252] description of such property sufficient to identify the same, and the appendix to the Registration Manual required that the name of the village, pargana and district should be entered. In the present instance the name of the village and the names of the pargana and the district in which it is situate are given in the mortgage deed. The only defect is the mistake in the name of the tappa. The fact that it is further mentioned in the mortagage deed that the mortgaged property is subject to a prior mortgage under which the mortgagee is in possession is another circumstance which would enable one to identify the property intended to be mortgaged and mentioned in the mortgage deed. We are unable to hold that the mistake in the tappa is alone sufficient to vitiate the registration of the document which was accepted for registration and actually registered. The description given, in spite of the error in the tappa, was in our opinion sufficient to identify the property and that part of the description which was in fact erroneous may well be disregarded.

A similar question arose in *Beni Madho Singh* v. *Jagal Singh* (1) and it was held that a sale deed having been registered, the registration could not be a nullity merely by reason of there being an error in the description of the property. The court below was, therefore, in our opinion wrong in dismissing the claim as regards the village Rasulpur.

It was contended on behalf of the respondent, Kashi Prasad, that he was a *bona fide* purchaser without notice of the plaintiff's earlier mortgage. In the first place we may point out that the property was sold and was purchased by Kashi Prasad in execution of his own decree. In the next place there is nothing to show that he made any inquiry as to the existence of a prior mortgage on the property. If he had made any inquiry, it is clear that he would have found that the property which is mentioned

(1) (1912) 10 A. L. J. 33.

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APPELLATE CIVIL.

35 A. 250=11 A. L. J. 241 =18 I. C. 923.

in the mortgage deed in suit as being in the possession of a prior mortgagee is the property now sought to be sold. He never came forward to say that he was misled in any way by the misdescription in the mortgage deed. The plaintiff, therefore, is entitled to a decree for sale of Rasulpur as against the respondent Kashi Prasad.

[253] It was contended on behalf of the respondent Hira Prasad that the decree for sale of Rasulpur in favour of the plaintiff should be subject to two prior mortgages, namely, one of July, 1880, and the other of the 25th of November, 1880. The mortgage of the 2nd of July, 1880, is a usufructuary mortgage made in favour of Ram Narain and others, and the other mortgage is a simple mortgage in favour of Sham Narain and others, the predecessors in title of Hira Prasad. Hira Prasad has purchased the mortgagee rights in regard to half of the property and has redeemed the mortgage in respect of the other half and has thus stepped into the shoes of the prior mortgagee. He is, therefore, entitled to claim that the decree in the plaintiff's favour should be subject to the mortgage of the 2nd of July, 1880. This is conceded by the learned advocate for the plaintiff, and indeed in the plaint the plaintiff's prayer was that the sale should be subject to that mortgage. As for the mortgage of the 25th of November, 1880, the court below has held that, as a decree was obtained on the basis of that mortgage, the said mortgage has merged in the decree and that the decree has become time-barred and is no longer capable of execution. So that Hira Prasad cannot now claim that the sale in enforcement of the plaintiff's mortgage should be subject to the mortgage of the 25th of November, 1880. In the connected execution First Appeal, No. 303 of 1912, decided by us to-day, we have held that the decree obtained on foot of the mortgage of the 25th of November, 1880, is no longer capable of execution and is time-barred and it is clear that it was also time-barred on the date on which the plaintiffs brought their suit. That being so, that mortgage no longer subsists and cannot be enforced.

The result is that we allow the appeal so far that we vary the decree of the court below by adding to the decree a direction for sale of the village Rasulpur, tappa Kadar, subject to the mortgage of the 2nd of July, 1880. The appellants will have their costs in both courts as part of the decretal amount which may be recovered by sale of the village Rasulpur and the other villages ordered to be sold by the decree of the Court below. In other respects we affirm the decree of the court below. We extend the time for payment for six months from this date.

Decree modified.

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35 A. 254 (=19 I. C. 451=11 A. L. J. 260).

[254] APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

BADRI PRASAD AND ANOTHER (*Plaintiffs*) *v.* ABDUL KARIM AND OTHERS (*Defendants*).*

[20th February, 1913.]

Act No. I of 1872 (*Indian Evidence Act*), *section* 68—*Mortgage—Evidence of execution —Attesting witness—Scribe.*

* Second Appeal No. 183 of 1912 from a decree of D. R. Lyle, District Judge of Shahjahanpur, dated the 5th of December, 1911, reversing a decree of Iftikhar Husain, Munsif of Budaun West, dated the 18th of May, 1911.

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FEB. 20.

APPELLATE CIVIL.

35 A. 254=
19 I. C. 451=
11 A. L. J. 260.

Held that the scribe of a mortgage deed cannot be counted as an attesting witness merely because he has signed the deed, even though the deed may in fact have been executed in his presence. To be an "attesting witness" within the meaning of section 68 of the Indian Evidence Act, 1872, the witness must have seen the document executed and have signed it as a witness.

Ranu v. *Laxmanrao* (1); *Burdett* v. *Spilsbury* (2) and *Shamu Patter* v. *Abdul Kadir Ravuthan* (3) followed. *Radha Kishen* v. *Fateh Ali Khan* (4), *Raj Narain Ghosh* v. *Abdur Rahim* (5) and *Muhammad Ali* v. *Jafar Khan* (6), discussed.

[Ref. 62 I. C. 97=48 Cal. 61 ; 65 I. C. 64.]

THE facts of this case were as follows :—The plaintiffs sued upon a mortgage bond. They produced none of the attesting witnesses to prove the bond, although one of them was alive and procurable. They produced the scribe, Ghulam Jilani, who stated that at the request of the executant who was illiterate, he had signed the executant's name for him and that the executant had touched the pen. He also stated that the consideration was paid in his presence. Ghulam Jilani had signed the bond as a scribe and not expressly as an attesting witness. The Munsif held the bond proved. On appeal the District Judge held that the bond was not duly proved and dismissed the suit. The plaintiffs appealed to the High Court.

Maulvi *Muhammad Ishaq*, for the appellants: —

A scribe who has signed his name on the deed and who is in a position to give evidence as to the execution thereof may be considered to be an attesting witness although he has not signed specifically as such. The evidence of such a scribe is legally sufficient to prove the bond ; *Muhammad Ali* v. *Jafar Khan* (6), *Radha Kishen* v. *Fateh Ali Khan* (4). To be an attesting witness a person need not describe himself as such on the deed, [255] nor is it necessary that his name should appear on a particular part of the document, *e.g.*, the margin, rather than on any other part of it. He is an attesting witness if the execution of the document has happened in his presence, and he is able to testify to it. I am further supported by the cases of *Raj Narain Ghosh* v. *Abdur Rahim* (5) and *Dinamayee Debi* v. *Bon Behari Kapur* (7). At all events the District Judge should have granted our prayer for an opportunity to produce the attesting witness who is alive.

Munshi *Govind Prasad*, for the respondents :—

In order to be an attesting witness within the meaning of section 68 of the Evidence Act it is necessary that the witness should have seen the deed executed and have signed the deed as a witness of that fact. A scribe who signs the deed merely as the writer thereof, and not as purporting to be a witness of the execution he is not an attesting witness. I rely on the cases of *Ranu* v. *Laxmanrao* (1) and *Shamu Patter* v. *Abdul Kadir Ravuthan* (3). The appellants who deliberately failed to call the attesting witness have no right to be given an opportunity to call him now.

Maulvi *Muhammad Ishaq* replied.

GRIFFIN and CHAMIER, JJ.:—This was a suit upon a mortgage for Rs. 99 made in December, 1884. The claim was decreed by the first court, but was dismissed by the District Judge on appeal on the ground that the mortgage deed had not been proved as required by section 68 of the Evidence Act.

(1) (1908) I. L. R. 33 Bom. 44.
(2) (1843) 10 C. and F. 340.
(3) (1912) I. L. R. 35 Mad. 607.
(4) (1898) I. L. R. 20 All. 532.
(5) (1901) 5 C. W. N. 454.
(6) Weekly Notes, 1897, p. 146.
(7) (1901) 7 C. W. N. 160.

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APPELLATE CIVIL.

35 A. 253=
19 I. C. 451
=11 A. L. J. 260.

The only witness called to prove the execution of the deed was Ghulam Jilani, the man who wrote out the deed. He deposed that the deed was executed in his presence. The question is whether he was an attesting witness within the meaning of section 68 of the Evidence Act. He signed his name on the deed in the usual way, but he did so for the purpose of showing that it had been written out by him, not for the purpose of showing that he was an attesting witness. In fact there can be no doubt that he wrote his name on the deed before the deed was signed by the executant. The appellants rely upon the decision of BURKITT J. [256] in *Radha Kishen* v. *Fateh Ali Khan* (1) in which it seems to have been held that section 68 had been complied with where the plaintiff had called "scribe of the deed, who, though not an attesting witness, had affixed his name to the deed and who swore that the deed had been executed in his presence". That decision was cited with approval by HARINGTON J. in *Raj Narain Ghosh* v. *Abdur Rahim* (2). BURKITT J., professed to follow the decision of BANERJI and AIKMAN, JJ., in *Muhammad Ali* v. *Jafar Khan* (3). We do not think that those learned Judges intended to hold in that case that a man should be regarded as an attesting witness merely because he had written out the deed and signed his name on it and sworn that the deed was executed in his presence. We think that they intended to hold only that if the writer of a deed signed it with a view to testifying to the fact of the execution he would be an attesting witness although he was not so described on the face of the deed. Unless the report of the case of *Radha Kishen* v. *Fateh Ali Khan* is misleading, we think that BURKITT J., must have misinterpreted the decision of BANERJI and AIKMAN, JJ.

In *Ranu* v. *Laxmanrao* (4) it was held, following *Burdett* v. *Spilsbury* (5), that an attesting witness was a witness who had seen the deed executed and who had signed it as a witness. In the recent case of *Shamu Patter* v. *Abdul Kadir Ravuthan* (6) their Lordships of the Privy Council quoted the decision in *Burdett* v. *Spilsbury* with approval, and in particular approved of the statement of the Lord Chancellor that "the party who sees the will executed is in fact a witness to it and if he subscribes as a witness he is then an attesting witness". They held that the word "attested" in section 59 of the Transfer of Property Act was used in that sense. It is evident that the word 'attesting' in section 68 of the Evidence Act is used in the same sense. Ghulam Jilani may have witnessed the execution of the deed now in suit, but he did not sign the deed as a witness. We must therefore hold that he is not an attesting witness and the production of his evidence was not a compliance with section 60 of the Evidence Act. We think, however, that the case should go back to the lower [257] appellate court in order that the plaintiffs may have an opportunity of producing further evidence. Ghulam Jilani stated that one of the attesting witnesses was still alive. The decision of BURKITT J. justified the plaintiffs in supposing that they had complied with law. There is before us an affidavit that the plaintiffs asked the District Judge to give them an opportunity of producing other evidence. We allow the appeal, set aside the decision of the lower appellate court and remand the case to that court in order that it may be disposed of according to law with reference to the above remarks. Costs in this Court to be costs in the cause.

Appeal allowed and cause remanded.

(1) (1888) I. L. R. 20 All. 532.
(2) (1901) 5 C. W. N. 454.
(3) Weekly Notes, 1897, p. 146.
(4) (1908) I. L. R. 33 Bom. 44.
(5) (1843) 10 C. and F. 340.
(6) (1912) I. L. R. 35 Mad. 607.

35 A. 257 (=11 A. L. J. 357=20 I. C. 182).

MISCELLANEOUS CIVIL.

1913
FEB. 22.

MISCELLANEOUS CIVIL.

35 A. 257=11 A. L. J. 357=20 I. C. 182.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Muhammad Rafiq.

JAIRAJ MAL (*Applicant*) *v.* RADHA KISHAN AND ANOTHER (*Opposite Parties*).*

[22nd February, 1913.]

Civil Procedure Code (1882), *section* 287 (*c*)—*Execution of decree—Mortgage on property sold notified at time of sale—Subsequent suit on mortgage—Auction-purchaser not estopped from questioning validity of mortgage.*

In proceedings in execution of a decree a person alleging himself to be the mortgagee of property about to be sold asked the executing court to notify the existence of his prior incumbrance on the property to be sold, and the Court, without apparently making any inquiry as to the genuineness of the mortgage, did so, but did not sell the property subject to the prior incumbrance. The property was sold and purchased by the decree-holder.

Held on suit by the mortgagee that the decree-holder auction purchaser was not estopped from contesting the validity of the mortgage so notified. *Shib Kunwar Singh* v. *Sheo Prasad Singh* (1) followed.

[**Ref:** 63 I. C. 395=19 A. L. J. 400=43 All. 489 ; 47 Cal. 446=30 C. L. J. 496=24 C.W. N. 269 ; 66 I. C. 694=25 C. W. N. 942=34 C. L. J. 333.]

THE facts of this case were as follows :—

Muhammad Mushtaq executed a mortgage on the 14th of January, 1895, in favour of Radha Kishan. The mortgage was unregistered. In execution of a decree against Muhammad Mushtaq, Jairaj Mal attached and put up to sale the property of Muhammad Mushtaq which had been mortgaged. Thereupon Radha Kishan applied, on the 19th of September, 1904, to the execution court that the amount due to him under the mortgage might be notified along with the decretal amount : and on the same day the court passed the order :—" Let the amount be notified." This was done. **[258]** The property was put up to auction and purchased by Jairaj Mal. Subsequently, Radha Kishan sued on his mortgage, when Jairaj Mal raised the defence that the mortgage was fictitious and without consideration. The court of first instance gave effect to this plea, and dismissed the suit. The court of first appeal reversed this decision, being of opinion that Jairaj Mal was estopped from raising this plea, for the reason that he had not raised any objection when the mortgage was ordered to be notified. This view was upheld by the court of second appeal. Thereupon Jairaj Mal petitioned for a reference, and the case was referred to the High Court for opinion under rule 17 of the Kumaun Rules.

Mr. *Agha Haidar*, for the petitioner (defendant), contended that the application made by Radha Kishan was not a claim or objection coming under section 278 of the old Code of Civil Procedure. He merely asked that the amount of his lien might be notified in the sale proclamation. The court held no investigation into the matter and the property was not put up for sale subject to mortgage. If the court had intended to do that it would have said so. The order was not passed under section 282 of the Code. The mortgage was simply notified under section 287 (*c*). Under such circumstances the auction-purchaser was not debarred from raising the plea that the mortgage was fictitious and without consideration. He relied on the case of *Shib Kunwar Singh* v. *Sheo Prasad Singh* (1).

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* Civil Miscellaneous No. 377 of 1912.

(1) (1906) I. L. R. 28 All., 418.

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MISCELLANEOUS CIVIL.

35 A. 257=11 A. L. J. 357=20 I. C. 182.

Dr. *Satish Chandra Banerji* (with him Mr. *J. M. Banerji*), for the opposite party (plaintiff), contended that the ruling cited by the applicant could not apply to the facts of the present case. Here the decree-holder himself, who eventually became the auction-purchaser, had acquiesced in the proclamation of the lien. If the mortgage was fictitious he should have opposed the application to have the lien notified. But he agreed to the notification being made, and thus joined in the representation that only the equity of redemption was being sold, with the result that he was able to purchase the property for a small price. His conduct estopped him. Besides, there was nothing to show that the court did not inquire into the validity of the mortgage, and every presumption should be made in favour of the regularity of the court's proceedings.

[259] GRIFFIN and MUHAMMAD RAFIQ, JJ.:—This is a reference made to this Court under the Kumaun Rules. Jairaj Mal, in execution of a decree against one Muhammad Mushtaq, applied for sale of certain property. In the course of the execution proceedings one Radha Kishan, on the 19th of September, 1904, put in an application to the effect that a mortgage of the 14th of January, 1895, be notified at the time of the sale of the property. On the same date the court executing the decree passed the order :—" Let the mortgage be notified." We have no information as to whether any inquiry took place in that court as to the genuineness of the mortgage set up by Radha Kishan. The property was sold and was purchased by Jairaj Mal. In the year 1910, Radha Kishan sued to recover principal and interest on this document of the 14th of January, 1895. The defendant No. 2, Jairaj Mal, pleaded that the mortgage sued on was altogether a fictitious document. His defence was upheld by the court of first instance, which dismissed the plaintiff's suit. The plaintiff appealed. The court of first appeal held that, as the mortgage deed of 1895 was proclaimed as a lien on the property, Jairaj Mal cannot now claim that " this mortgage is to be as if it had never been. As he has taken no steps to set it aside, it seems to me that he is bound by it and must either satisfy the mortgage or suffer the land to be sold." That court allowed the plaintiff's appeal. On a further appeal by the defendant that court upheld the decision of the first appellate court. The Commissioner held that " it has been rightly held that he (defendant) is now estopped from putting forward an allegation that this mortgage-deed is not a genuine document." Jairaj Mal then petitioned the Local Government, with the result that we have before us this reference. The question as to which our opinion is invited is whether the Commissioner was wrong in law in holding that the appellant was estopped in questioning the mortgage deed. In our opinion, on the facts stated, the appellant is not estopped from questioning the mortgage deed in suit. The mortgage deed was notified in the proceedings of 1904 on the application of Radha Kishan. There was no declaration, act or omission on the part of Jairaj Mal which would operate as an estoppel. The ruling of this Court in *Shib Kunwar Singh* v. *Shro Prasad Singh* (1) [260] lays down that a person in the position of Jairaj Mal is not debarred from proving that the mortgage set up by the plaintiff was fictitious and without consideration. This being our opinion on the question of law involved, we think that the proper course to be adopted is to send the case back to the first appellate

(1) (1906) 1. L. R. 28 All. 418.

court for disposal of the other pleas in the appeal. We are further of opinion that costs of this reference should be costs in the cause, and that costs should abide the result.

Answer accordingly.

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MISCELLANEOUS CIVIL.

35 A. 260 (=19 I. C. 307=11 A. L. J. 286=14 Cr. L. J. 211).

35 A. 267= 11 A. L. J. 357=20 I. C. 182.

APPELLATE CRIMINAL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

EMPEROR v. GULABU.*

[24th February, 1913.]

Act No. I of 1872 *(Indian Evidence Act), section* 91—*Evidence, admissibility of—Confession made to inquiring magistrate, but not recorded by him in writing—Criminal Procedure Code, sections* 364 *and* 533.

Held that a confession of an accused person made to a magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of section 91 of the Indian Evidence Act, 1872, and that no evidence can be given of the terms of such a confession except the record, if any, made under section 364 of the Code of Criminal Procedure. Section 533 of the Criminal Procedure Code has no application to a case where no record whatever has been made of such a confession.

[Ref. 69 I. C. 264=14 L. W. 542=1921 M. W. N. 779=42 M. L. J. 37=45 Mad. 230.]

THIS was an appeal on behalf of the Local Government against an order of acquittal passed by the Sessions Judge of Saharanpur. The accused in this case made a confession before a Tahsildar who was holding an inquiry as a Magistrate. The Tahsildar did not record the confession in writing. At the trial the Tahsildar offered oral evidence of what the accused had stated to him in the confession. The Sessions Judge held that this evidence was inadmissible, and, there being no other evidence upon which much reliance could be placed, acquitted the accused.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown, contended that oral evidence of the confession was admissible. A confession made to a private individual might be proved by the oral evidence of that individual, and there was no provision of law which prohibited such a course when the individual to whom the confession was made was a magistrate holding an inquiry.

[261] Mr. *Nihal Chand*, for the accused, contended that it would be dangerous to allow such oral evidence to be given. Section 364 of the Criminal Procedure Code was enacted to guard against this danger. That section read with section 91 of the Evidence Act rendered such oral evidence inadmissible.

GRIFFIN and CHAMIER, JJ. :—This is an appeal under section 417 of the Code of Criminal Procedure against an order of the Sessions Judge of Saharanpur acquitting one Gulabu of a charge of having murdered his wife Musammat Khushalia. It appears the Tahsildar of Chakrata, who has the powers of a magistrate of the third class, and who has been invested by the Local Government with power to take cognizance of offences upon complaint or upon police reports, received information in the shape of a complaint that the woman had been murdered by her husband. He sent for a number of persons and had their statements recorded in his presence

* Criminal Appeal No 37 of 1913 by the Local Government, from an order of W. J. D. Burkitt, Sessions Judge of Saharanpur, dated the 13th of September, 1912.

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APPELLATE CRIMINAL.

35 A. 260=19 I. C. 307=11 A. L. J. 286=14 Cr. L. J. 211.

by a *wasil-baqi navis*. He also interrogated Gulabu. The case was subsequently taken up by the Cantonment Magistrate and Gulabu was committed for trial. At the trial the Tahsildar was asked by the public prosecutor to repeat a confession said to have been made to him by Gulabu. The Sessions Judge declined to allow this to be done. On behalf of the the Crown it is contended that the Sessions Judge ought to have allowed the Tahsildar to repeat the confession. The Tahsildar's evidence shows that he was conducting an inquiry into this affair at the time when the statement was made to him. In the court below it was contended on behalf of the accused that the Tahsildar had the powers of a police officer and was acting as such, but there is nothing to show that he had been invested with the powers of a police officer. The prosecution say, and we think rightly, that he must be deemed to have been conducting an inquiry as a magistrate. Section 364 of the Code of Criminal Procedure provides that whenever an accused person is examined by a magistrate the whole of the examination, including the questions put to him and every answer given by him, shall be recorded in full. But no record whatever was made of Gulabu's statement. Section 533 of the Code provides that if any court before which a confession, recorded or purporting to be recorded under section 364, is tendered, finds that any of the provisions of that section have not been complied with by the [262] magistrate recording the confession, it shall take evidence that such person duly made the statement recorded, and, notwithstanding anything contained in the Indian Evidence Act, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits. This reference to section 91 of the Evidence Act shows that the Legislature intended that the provisions of that section should apply to the case of a confession made by an accused person to a magistrate holding an inquiry. Reading section 364 of the Code of Criminal Procedure with section 91 of the Evidence Act we must hold that a confession of an accused person made to a magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of the latter section, and that no evidence can be given of the terms of such a confession except the record, if any, made under section 364. Section 533 has no application to a case where no record whatever has been made of such a confession. The learned Government Advocate is unable to refer to any case in which oral evidence of the terms of a confession made to a magistrate during the course of an inquiry has been admitted, and we know of no case in which this has been done. Apart from this objection to the reception of oral evidence of the confession, we would point out, as the learned Seasions Judge has done, that the confession was made under peculiar circumstances. It is more than doubtful whether it was made voluntarily. The evidence of the Tahsildar shows that it was made after the Tahsildar had arrested the accused and told him that evidence had been obtained which showed that he had committed murder. The Tahsildar admits that he took no steps to ascertain whether the confession was made voluntarily or under pressure. Lastly, assuming that the confession can be admitted in evidence, we do not think that the case calls for further inquiry. The only evidence in support of the alleged confession is the statement of a man named Jaswant. At the trial this man gave evidence to the effect that the woman had died as the result of a miscarriage. A previous statement made by the witness to the Tahsildar on the 24th of April, 1912, was put to him and he denied that he had made it, but he said that through fear he had told the Tahsildar that

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Gulabu had brought out the body and that blood was then oozing from the mouth and the nostrils. [263] The statement made by the witness on the 24th of April, 1912, in the absence of the accused, is not admissible in evidence under section 288 of the Code of Criminal Procedure. The witness was examined again by the CantonmentM agistrate on the 4th of June and he then admitted that he had made the statement of the 24th of April and also admitted that it was true. It is possible that the statement of the 24th of April might be treated as having been incorporated in and so forming part of the statement of the 4th of June which was made in the presence of the accused. If so, it might be admitted under section 288 of the Code of Criminal Procedure. But on the 4th of June, while admitting the truth of his previous statement of April 24th, Jaswant made other statements wholly inconsistent with that statement. It is impossible to place much reliance on such a witness. It seems to us that, even if the confession were admitted in evidence, it would be unsafe to rely on it and that the other evidence is wholly insufficient to justify a conviction. We therefore dismiss this appeal and direct that Gulabu be set at liberty.

Appeal dismissed.

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35 A. 263 (=18 I. C. 960=11 A. L. J. 293).

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

JHUNKA PRASAD (*Plaintiff*) *v.* NATHU (*Defendant*).*

[26th February, 1913.]

Hindu law—adoption—Ahirs—Validity of adoption after marriage of adopted son.

Held that amongst Ahirs the adoption of a son after his marriage has taken place is not permissible. *Pichuvayyan* v. *Subbayyan* (1) followed.

[Ref. 68 I. C. 763.]

THE plaintiff in this case sued on the allegation that over six years ago the defendant, who was his paternal uncle, had adopted him with all due ceremony. He claimed a declaration of title and possession of his share of the family property by partition. The defendant admitted the *factum* of the adoption, but pleaded that it was invalid in law for the reason that at the time of the adoption the plaintiff was a married man with a daughter of his own. The parties were *ahirs* by caste. Both the lower courts gave effect to [264] the defendant's plea and dismissed the suit. The plaintiff appealed to the High Court.

Mr. *Nihal Chand*, for the appellant:—

Ahirs do not belong to the twice-born classes. They have no *upanayan*. They are the descendants of mixed marriages and are *sudras*. Among the *ahirs* of the United Provinces a nephew can be adopted at any age; in the case of an outsider the age must not be more than 12 years; Crooke, Tribes and Castes of the North-Western Provinces, Vol. I, p. 50 et seq; and p. 59. Whether, apart from this special custom, a married man can be adopted by Sudras generally is a question on which the only authority of this High Court is an *obiter dictum* in the case of *Ganga Sahai*

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* Second Appeal No. 435 of 1912 from a decree of W. H. Webb, Additional Judge, of Saharanpur, dated the 8th of February, 1912, confirming a decree of Jawwad Husain Subordinate Judge of Saharanpur, dated the 17th of July, 1911.

(1) (1889) I. L. R. 13 Mad. 128.

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APPELLATE CIVIL.

35 A. 263=18 I. C. 960=11 A. L. J. 293.

v. *Lekhraj Singh* (1). There are rulings of the Bombay High Court in my favour. Secondly, the defendant having adopted the plaintiff cannot now, after the lapse of over six years, call it in question on any ground. He is estopped ; *Dharam Kunwar* v. *Balwant Singh* (2). Thirdly, the defendant is barred by the limitation of six years from impugning the validity of the adoption. The plea taken by him aims, though indirectly, at getting the adoption set aside. He cannot indirectly effect that which he is barred by limitation from doing directly ; *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (3).

Babu *Durga Charan Banerji*, for the respondent :—

A married person cannot be adopted by a Sudra. According to the Dattaka Chandrika *upanayan* is the limit of age for adoption among the twice-born classes and marriage is the limit for Sudras ; Bhattacharyya : Hindu Law (3rd Edition), Vol. I, p. 446 ; Mayne : Hindu Law (7th Edition), p. 181 ; *Vythilinga Muppanar* v. *Vijayathammal* (4). Secondly, the defendant is not estopped from denying the validity of the adoption ; *Pichuvayyan* v. *Subbayyan* (5). The case in I. L. R. 34 All. cited by the appellant, can be distinguished. It was there held that the adoptive mother was by her conduct estopped from denying the fact that she had authority from her husband to make the adoption. Here the defendant does not attempt to deny any previous statement of fact ; the adoption is by law altogether void.

[265] Mr. *Nihal Chand*, replied.

GRIFFIN and CHAMIER, JJ.:—The plaintiff claiming to be the adopted son of defendant sued for partition. His suit was dismissed by both the courts below on the finding that the alleged adoption was invalid. The plaintiff comes here in second appeal. The parties are *ahirs*. The plaintiff at the time of the alleged adoption was a married man. It is admitted that among the twice-born classes a married man cannot be adopted. The court below says that *ahirs* belong to the twice-born classes. This assertion is challenged in appeal. However that may be, there is authority for holding that the adoption of a married man is not valid even amongst Sudras. In the case of *Pichuvayyan* v. *Subbayyan* (5) it was said that an adoption in order to be valid even among Sudras must take place before the marriage of the adopted son. Reference is made to the Dattaka Chandrika. The same rule is to be found in the text-books on the subject. We see no reason to differ from the finding of the court below on this point. As to the question of estoppel we hold that there is no estoppel in a case of this nature. The plea of limitation in our opinion has no force. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1886) I. L. R. 9 All. 253 (328).
(2) (1912) I. L. R. 34 All. 398.
(3) (1892) I. L. R. 20 Cal. 487 (495).
(4) (1882) I. L. R. 6 Mad. 43.
(5) (1889) I. L. R. 13 Mad. 128.

35 A. 266 (=18 I. C. 927=11 A. L. J. 272.)

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35 A. 266=18 I. C. 927=11 A. L. J. 272.

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

KASTURI AND OTHERS (*Defendants*) *v.* CHIRANJI LAL (*Plaintiff*).*

[25th February, 1913.]

Hindu Law—Marriage—Marriage of a Hindu girl without force or fraud but without consent of legal guardians—Maxim "factum valet."

The marriage of a Hindu girl of some 16 years of age was effected by the maternal grandfather and the maternal uncle of the girl. There was no evidence of force or fraud; but the marriage was against the wishes of the paternal relatives of the girl, who desired to make a profit by marrying her to a rich but one-eyed man called Tulshi. *Held* that the case was one to which the doctrine of *factum valet* should be applied, and the marriage was declared to be valid. *Ghazi* v. *Sukru* (2), *Venkatacharyulu* v. *Rangacharyulu* (3), *Surjyamoni Dasi* v. *Kali Kanta Das* (4), *Mulchand* v. *Bhudhia* (5), and *Khushalchand Lalchand* v. *Bai Mani* (6) referred to.

[266] THE facts of this case were as follows:—

The appellant Mt. Kasturi, a *sonar* (goldsmith) girl of about 16 years of age, lived after the death of her parents with her paternal relatives, namely, an uncle and two cousins. She had an younger brother. After she had lived for some months with these relatives, they brought her to the house of the plaintiff, a relative of theirs, and she lived there for about a month and a half. The paternal relatives were negotiating a not very suitable marriage for her, for pecuniary consideration. In the meantime the maternal relatives of the girl arranged her marriage with the plaintiff, and she was married to him in the presence and with the consent of her maternal grandfather, but without the knowledge of the paternal relatives. The latter came to the plaintiff's house on the day after the marriage and took the girl away with them. The plaintiff thereupon brought the present suit for restitution of conjugal rights. Mt. Kasturi and the other defendants resisted the claim. Both the lower courts found that the marriage had been performed with all due religious ceremony, that the girl's consent had not been forced, and that no fraud had been employed. Both the courts decreed the suit.

The defendants appealed to the High Court.

Mr. *Nihal Chand*, for the appellants:—

Under the Mitakshara the right of guardianship over a minor girl, including the right of giving here in marriage, vests in the following persons in successive order, namely, father, paternal grandfather, brother, other paternal relations (Sakulya), mother. The maternal grandfather does not find a place on the list. The right is with the paternal relations and the mother only comes in as the last on the list which ends with her; Macnaghten, Principles and Precedents of Hindu Law (3rd Edition) page 104 and page 204 of the second volume (Appendix). It is only under the Bengal School that the maternal relatives find a place on the list: Banerjee, Hindu Law of Marriage and Stridhan (1879 Edition), page 47; Bhattacharya, Hindu Law (3rd Edition), Vol. I, page 234. Yajnavalkya's order enumerated above is accepted in the Mitakshara

*Second Appeal No. 434 of 1912, from a decree of W H. Webb, Additional Judge of Saharanpur, dated the 5th of March, 1912, confirming a decree of Priya Charan Agarwal, Additional Munsif of Saharanpur, dated the 10th of July, 1911.

(1) (1889) I. L. R. 13 Mad. 128.
(2) (1897) I. L. R. 19 All. 515.
(3) (1890) I. L. R. 14 Mad. 316.
(4) (1900) I. L. R. 28 Cal. 37.
(5) (1897) I. L. R. 22 Bom. 812.
(6) (1886) I. L. R. 11 Bom. 247.

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and in the law all over India, except Bengal. The maternal grandfather, accordingly, is not a legal guardian at all and has no authority to bestow the minor in marriage. In [267] this case, the father and paternal grandfather being dead and the brother being a minor, the paternal uncle is the legal guardian. The marriage is, therefore, invalid and can be set aside. Force or fraud are not the only grounds on which a Hindu marriage can be annulled. Any sufficient reason affecting the propriety of the marriage may afford a grant for avoiding it; Banerjee, Hindu Law of marriage and Stridhan (1879 Edition), page 53. *Anjona Dossee* v. *Proladh Chunder Ghose* (1). The girl has clearly signified her unwillingness to recognize this marriage. She has attained years of discretion and her wishes should be an important factor in considering the propriety or otherwise of the marriage. She never lived with the plaintiff after the marriage. The cases of *Ghazi* v. *Sukru* (2) and *Venkatacharyulu* v. *Kangacharyulu* (3), which are relied on by the lower courts, can be distinguished. There the girl was bestowed in marriage by the mother, who is one of the legal guardians recognized by the Mitakshara.

Babu *Durga Charan Banerji*, for the respondent:—

Under the Benares School of Hindu law the maternal grandfather and other maternal relatives do find a place on the list of guardians of a female minor. Yajnavalkya and the Mitakshara stop at the mother. But the list is not exhaustive, and other commentators of the same school continue the list further on and include the maternal grandfather and others, *e.g.*, the sages Narada and Vishnu do so; Bhattacharyya, Hindu Law (3rd Edition) Volume I, pages 233 and 234; Mayne, Hindu Law (7th Edition), page 101.

The difference between the Benares and Bengal Schools on this point is with regard to the relative position of the mother on the list. The former puts the mother before, and the latter after the maternal grandfather and maternal uncle; Trevelyan, Hindu Law, pages 42 and 43. Secondly, the rules relating to guardianship are of importance so long as the marriage rests in contract. A very different question arises where the marriage has actually been celebrated. If the marriage is duly solemnized, and there is no force or fraud, it is irrevocable. The rules are directory and not mandatory; Mayne, Hindu Law (7th Edition), [268] page 102. Golap Chandra Shastri, Hindu Law, pages 109 and 110.

I rely also on the ruling mentioned by the appellants. The finding is that the marriage with the plaintiffs is a fairly suitable one, and that there was no force or fraud employed to compel the consent of the girl to marriage with him. There are no sufficient grounds on which the marriage can be set aside.

Mr. *Nihal Chand*, in reply:—

Narada and Vishnu are not regarded as authorities in the Benares School; Bhattacharyya, Hindu Law (3rd Edition), Volume I, page 78, where Narada and Vishnu are not enumerated in the list of authorities followed by the Benares School. These texts, therefore, cannot override the Mitakshara, which is of paramount authority in these Provinces.

GRIFFIN and CHAMIER, JJ.:—This is an appeal in a suit brought by the respondent for restitution of conjugal rights. The courts below have found that the appellant Musammat Kasturi was given in marriage to the respondent by her maternal grandfather and maternal

(1) (1870) 14 W. R. C. R. 403.
(2) (1897) I. L. R. 19 All. 515.
(3) (1890) I. L. R. 14 Mad. 316.

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uncle against the wishes of the appellants, Mangal, Balmakund and Joti who are paternal uncle and paternal cousins of the girl, and who hoped to make a profit out of marrying her to a rich but one-eyed man named Tulshi. It has been found also that the marriage was not brought about either by force or by fraud.

The question for decision is whether the marriage is valid. The authorities are conflicting. According to Yajnavalkya (I-63-64) the father, paternal grandfather, brother, a Sakulya or member of the same family, and the mother, in default of the first among these the next in order, if sound in mind is to give a damsel in marriage. Vishnu says (XXIV-38-39): —"The father the paternal grandfather, the brother, the kinsman, the maternal grandfather, and the mother are the persons by whom a damsel may be given in marriage." Narada says (XII-20-21):—"The father himself shall give a damsel in marriage or with his assent the brother, the maternal grandfather and maternal uncle and her agnates and her paternal grandfather. In default of all these the mother." The Mitakshara, commentary on the text of Yajnavalkya, is silent about the maternal relations (I. VII, 3-6) Most of the **[269]** modern commentators seem to assume that the text of Yajnavalkya and the Mitakshara commentary upon it should not be treated as exhaustive and that the maternal relatives may give a girl in marriage, though the father, brother and other paternal relatives have a preferential right to do so (see Macnaghten's Hindu Law, edition of 1874, page 103; Guru Das Banerjee's Hindu Law of Marriage and Stridhan, page 47; Trevelyan's Hindu Law, page 43; Ghose's Hindu Law, pages 678-688, and Mayne's Hindu Law, 7th edition, page 101). Others, such as J. N. Bhattacharjee, Chapter XIII, and Golap Chandra Shastri, Chapter III, content themselves with noticing the divergence between the authorities. It has been established by a long line of decisions, going back to 1843 that if a girl is given in marriage by her natural guardian even without the consent of her legal guardian and the marriage actually takes place, it is irrevocable [see *Ghazi* v. *Sukru* (1), *Venkatacharyulu* v. *Rangacharyulu* (2), *Surjyamoni Dasi* v. *Kali Kanta Das* (3) and *Mulchand* v. *Bhudhia* (4)] and we are asked to apply this rule to the present case. But on the findings of the courts below it may be doubted whether the persons who gave the girl in marriage were her natural guardians. It appears that her mother died several years ago ; that her father died seven or eight months before the marriage now in question, and that she and her brother aged ten lived with their paternal uncle and cousins up to within a month or two before the marriage when they took her to the respondent's house.

We have not been referred to any case at all resembling the present case. But on the other hand, there is no case, of which we are aware in which the marriage of a Hindu girl effected without force and fraud by her relations has, after it has actually taken place, been declared to be invalid for want of the consent of the legal guardian. Neither Yajnavalkya nor the Mitakshara lays down that the marriage of a girl effected without the consent of her legal guardian is invalid. In the case of *Khushalchand* v. *Bai Mani* (5) the Court held that the texts on the subject were directory rather than mandatory, that the consent of the legal guardian was not necessarily of the essence of the marriage, and **[270]** that it

(1) (1879) I. L. R 19 All. 515.
(2) (1890) I. L. R 14 Mad. 316.
(3) (1900) I. L. R. 28 Calc. 37.
(4) (1897) I. L. R. 22 Bom. 812.
(5) (1896) I. L. R 11 Bom. 247.

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would be proper to apply the principle of *factum valet* to a marriage effected without such consent, but also without either force or fraud. In the present case the girl was sixteen years old at the time of the marriage: she appears to have entered upon it not unwillingly, and the object which her paternal relatives had in view in opposing her marriage with the respondent, and now have in view in resisting this suit, is the getting of a sum of money upon what would be something very like a sale of the girl to the one-eyed man Tulshi. It seems to us that this is eminently a case to which the principle of *factum valet* should be applied. We therefore hold that the marriage cannot now be declared void. The appeal fails and is dismissed with costs.

Appeal dismissed.

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35 A. 270 (=19 I. C. 238=11 A. L. J. 289).

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Tudball.

INDARJIT AND OTHERS (*Defendants*) *v.* GAJADHAR SAHAI (*Plaintiff*) AND DHANPAT RAI AND OTHERS (*Defendants*).*

[26th February, 1913.]

Act No. IX of 1871 (*Indian Limitation Act*), *section* 21—*Act No. IX of* 1908 (*Indian Limitation Act*), *section* 31—*Limitation—Mortgage with possession—Realisation of rents and profits equivalent to receipt of interest as such under the terms of the mortgage.*

Under the terms of a mortgage deed executed in 1850 the mortgagee was to take possession of the mortgaged property and appropriate the rents and profits in lieu of interest. The mortgagee remained in possession up to 1889 when he was dispossessed. In 1910 he brought a suit for sale. *Held*, that the realization of rents and profits in lieu of interest was equivalent to the receipt of interest as such under the terms of the mortgage and therefore under section 21 of Act No. IX of 1871 the mortgagee was entitled to compute limitation from the year 1889. Act No XV of 1877 having by that time come into operation, the plaintiff was in 1910 entitled to bring his suit within the limitation provided by section 31 of Act No. IX of 1908.

THIS was a suit for sale upon a mortgage executed in 1850. The mortgage was usufructuary, the rents and profits being taken in lieu of interest on the mortgage money. The plaintiff remained in possession and realized the rents and profits down to the year 1889, when he was dispossessed. The present suit was brought in 1910. Both the lower courts decreed the claim. The defendants mortgagors appealed to the High Court, and the only point raised in appeal was that the suit was barred by limitation before Act [271] No. XV of 1877 came into force, and therefore the plaintiff was not entitled to the benefit of section 31 of Act No. IX of 1908.

Babu *Jogendro Nath Chaudhri*, for the appellants.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

BANERJI and TUDBALL, JJ :—This appeal arises out a suit for sale upon a mortgage of the 26th of January, 1850. The question to be decided is whether the suit is barred by limitation. The mortgage deed provided that the mortgagee was to take possession and appropriate the rents and profits in lieu of interest. It has been found by the court below

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* Second Appeal No. 572 of 1912 from a decree of H. Dupernex, District Judge of Farrukhabad, dated the 3rd of February, 1912, confirming a decree of Joti Sarup, Munsif of Kaimganj, dated the 5th of December, 1910.

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APPELLATE CIVIL.

35 A. 270=19 I. C. 238 =11 A. L. J 289.

that in pursuance of this clause in the mortgage deed the mortgagee was in possession till the year 1889, when he was dispossessed. It is argued that the claim had become time-barred before Act XV of 1877 came into operation, and, therefore, the plaintiff was not entitled to the benefit of section 31 of the Limitation Act of 1908. Section 21 of Act IX of 1871 gave a fresh start for the computation of limitation from the date of payment of interest as such. The realization of rents and profits in lieu of interest was equivalent to the receipt of interest as such under the terms of the mortgage and, therefore, under section 21 of Act IX of 1871, the plaintiff was entitled to compute limitation from the year 1889, up to which year he has been found to have received interest. Before that date Act XV of 1877 had come into operation. Therefore in accordance with the provisions of section 31 of Act IX of 1908 the plaintiff was entitled to bring his suit within two years of the date on which that Act came into force. The suit having been brought on the 10th January, 1910, was well within time. The only point raised therefore fails. We dismiss the appeal with costs.

Appeal dismissed.

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35 A. 271 (=19 I C. 783=11 A.L.J. 291.)

APPELLATE CIVIL.

(*Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.*)

DHANPAL SINGH (*Plaintiff*) *v.* BUDH SIEGH AND AOTHER (*Defendants.*)*

[27th February, 1913.]

Act No. XVI of 1908 (*Indian Registration Act*), *section* 50—*Registered and unregistered documents—Priority—Effect on rights of prior unregistered mortgage of sale in execution of a decree on a subsequent registered mortgage.*

When property is sold in execution of a decree on a subsqunt registered mortgage taking priority over a prior unregistered mortgage suoh sale does not have the effect of invalidating the prior mortgage or of extinguishing altogether [272] the rights of the mortgagee thereunder, but his debt would still be recoverable from the surplus, if any, left after the satisfacation of the registered mortgage.

THIS was a suit by the holder of an unregistered mortgage for Rs. 95 executed on the 15th of December, 1887, by Budh Singh in favour of the defendants' predecessor in title. There had been another registered mortgage over the same property executed on the 5th of December, 1892, in favour of Sah Tejpal, in pursuance of which the mortgagee had caused the mortgaged property to be sold and had purchased it himself. Tejpal resisted the suit on the ground of such purchase. The court of first instance gave the plaintiff a decree conditional on his paying to Tejpal half the amount due to him under the decree in his favour. On appeal, however, the District Judge dismissed the suit in its entirety, holding that the plaintiff's rights under his unregistered mortgage were altogether extinguished by the proceedings in respect of Tejpal's registered mortgage, The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji* and Munshi *Benode Behari*, for the appellant.

The Hon'ble Dr. *Sundar Lal*, for the respondents.

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* Second Appeal No. 627 of 1912 from a decree of H. W. Lyle, District Judge of Agra, dated the 22nd of February, 1912, reversing a decree of Mubarak Husain, Subordinate Judge of Agra, dated the 18th of July, 1911.

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APPELLATE CIVIL.

35 A. 271=19 I. C. 783=11 A. L. J. 291.

GRIFFIN and CHAMIER, JJ.:—The plaintiff in the suit sued to recover principal and interest on an unregistered mortgage deed, dated the 15th of December, 1887, to secure an advance of Rs. 95. The mortgage was executed by Budh Singh, defendant No. 1, in favour of the plaintiff's predecessor in title. Defendant No. 2 Sah Tejpal held a registered mortgage, also for Rs. 95, executed on the 5th of December, 1892, hypothecating the same property. Tejpal brought a suit on his mortgage and obtained a decree, in execution of which he purchased the property himself. The present suit was resisted by Tejpal on the ground that he was purchaser in execution of a decree obtained on a document which by reason of registration took effect against the unregistered document held by the plaintiff. The court of first instance gave the plaintiff a decree conditional on his paying half the amount due to Tejpal defendant No. 2, under the mortgage deed in the latter's favour. Tejpal defendant No 2 appealed to the lower appellate court. In his memorandum of appeal various grounds were taken. But the lower appellate court has decided the appeal on one ground only. Tejpal contended that as he was a purchaser at an auction sale held in execution of a decree on a [273] mortgage having priority over the mortgage in favour of the plaintiff the rights of the plaintiff were altogether extinguished. The lower appellate court upheld this contention and without considering the other pleas raised in the appeal decreed the appeal and dismissed the plaintiff's suit *in toto*. In second appeal it is contended that the view taken by the lower appellate court is wrong. Section 50 of the Registration Act provides that a registered document of the kind mentioned in clauses (*a*), (*b*), (*c*) and (*d*) of section 17 and clauses (*a*) and (*b*) of section 18 shall, if duly registered, take effect as regards the property comprised therein against an unregistered document relating to the same property. The defendant Tejpal relies on his purchase in execution of a decree obtained by him on a registered mortgage. What he purchased at the auction sale was the right, title and interest of his mortgagor. The mortgage held by the plaintiff, although not created by a registered document, was not invalid merely by reason of the document not being registered. If a valid mortgage was created by that document the debt secured was recoverable from the surplus, if any, left after the satisfaction of the registered mortgage held by Tejpal. As the only point decided by the lower appellate court was that the rights of the plaintiff were altogether extinguished, and as we are unable to agree with that view, we must allow this appeal, set aside the decree of the lower appellate Court and remand the case to that court for decision of other questions raised in the appeal before that court

Cost of this appeal will be costs in the cause.

Appeal decreed and cause remanded.

35 A. 273 (=40 I. A. 86=17 C. L. J. 566=19 I. C. 340=17 C. W. N. 669=1913 M. W. N. 481=11 A. L. J. 469=15 Bom. L. R. 525=14 M. L. T. 64=25 M. L. J. 301).

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FEB. 11, 12.
MAR. 14.

PRIVY COUNCIL.

35 A. 273=40 I. A. 86=17 C. L. J. 566=19 I. C. 340=17 C. W. N. 669=1913 M. W. N. 481=11 A. L. J. 469=15 Bom. L. R. 525=14 M. L. T. 64=25 M. L. J. 301.

PRIVY COUNCIL.

BASANT SINGH (*Defendant*,) *v.* MAHABIR PRASAD (*Plaintiff*).*

[11th and 12th February and 14th March, 1913.]

[*On appeal from the Court of the Judicial Commissionor of Oudh.*]

Vendor and purchaser—Sale to raise funds for litigation—Transfer whilst vendor was out of possession—Agreement depending on success of litigation—Transfer of undivided share in joint ancestral property—Interest in property giving right to sue—Vendee and provider of funds made co-plaintiffs.

The original plaintiffs in the two suits out of which these appeals arose were in one suit the sons, and in the other the grandson of the heads and [274] managers of two distinct joint Hindu families, owners of an estate in Oudh, by whom alienations of the joint ancestral property had been made in favour of the appellant, whom they sued in ejectment to set aside those alienations on the ground that the managing members had no power to make them. As they required funds to enable them to prosecute the suits, they entered into agreements with a third person (who was made a co-plaintiff in the suits and was now respondent) to the effect that " in the share of each of them in the property he will be a co-sharer of a one-half share, and the remaining one-half share will, belong to us . . . He will bear the entire expenses in connexion with the suit, and in case of success he will be entitled to proprietary possession of the above mentioned one-half share, or one-half of the share which may be decreed which can remain joint or be partitioned by him as he pleases." In the course of the litigation the original plaintiffs compromised the suits with the appellant and withdrew from them leaving the respondent to prosecute them alone.

Held (reversing on this point the decision of the Courts in India) that the agreements (which constituted his only right to sue) conferred upon the respondent no present right to the possession of any share in the property in suit. He would only have the right to possession in case of success, and success had not been achieved. Until then he was merely a co-owner in a certain undivided share of the property. There was no present grant or assignment to him of any separate share of the property, divided or undivided, and he could not therefore maintain the suit.

Achal Ram v. *Kazim Husain Khan* (1) distinguished.

[**Ref** : 20 C. L. J. 426=26 I. C. 954 ; 51 I. C. 123=29 C. L. J. 241 ; 71 I. C. 849=36 C. L. J. 336 ; **Ref** ; 74 I. C. 793=36 C. L. J. 356=50 Cal. 292.

THREE consolidated appeals from the judgments and decrees (19th March, 1909, and 29th March, 1911) of the Court of the Judicial Commissioner of Oudh, which partly affirmed and partly reversed judgments and decrees (22nd July, 1908, and 5th February, 1910) of the Subordinate Judge of Partabgarh, and of the District Judge of Rae Bareli respectively.

For the determination of the only question decided by their Lordships of the Judicial Committee in these appeals, the facts will be found fully stated in their Lordships' judgment.

The original plaintiffs in the two suits out of which these appeals arose, were, in the first suit, Sheopal Singh and Chandra Bhukan Singh, the two sons of Binda Sewak Singh ; and in the second suit, Bhopal Singh, the grandson of Ram Prasad Singh. Binda Sewak and Ram Prasad were the heads of the two distinct joint families of which the plaintiffs were respectively junior members. Together Binda Sewak and Ram Prasad were owners of the village of Lohangpur in the Partabgarh district of Oudh, which was ancestral property ; Binda Sewak and his [275] family owning

Present :—Lord ATKINSON, LORD MOULTON, Sir JOHN EDGE and Mr. AMEER ALI.

(1) (1904) I. L. R. 27 All. 271 : L. R. 32 I. A. 113.

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35 A. 273=40 I. A. 86=17 C. L. J. 566=19 I C. 340=17 C. W. N. 689=1913 M. W. N. 481=11 A. L. J. 469=15 Bom. L. R. 525=14 M. L. T. 64=25 M. L. J. 301.

a 7 anna 2 pie share, and Ram Prasad and his family an 8 anna 10 pie share. The suits were brought to recover the undivided shares of the respective plaintiffs, in the estate on the ground that certain alienations made by Binda Sewak and Ram Prasad in favour of the principal defendant in each suit (the present appellant) were made without legal necessity, and were therefore not binding on the plaintiffs.

Being in want of funds to enable them to prosecute their suits, the plaintiffs had by two formal deeds transferred a moiety of their respective shares of the estate to one Mahabir Prasad (the present respondent) in consideration of his finding the money to pay for the expenses of the suits; and Mahabir was thereupon joined as a co-plaintiff in each suit. One of the agreements (which were similar in terms) is set out in their Lordships' judgment.

The suits were defended by Basant Lal, whose material pleas were that the alienations were made for family necessity and were binding on the plaintiffs; and that the plaintiff Mahabir Prasad had no existing interest in the property in suit. During the progress of the suits in the courts below the defendant Basant Lal came to a compromise in each suit with the original plaintiff; and Mahabir Prasad was eventually left to carry on the suits as sole plaintiff.

There were two main questions therefore for decision, (*a*) whether Mahabir Prasad had sufficient interest in the property to enable him to maintain the suit, and (*b*) whether the alienations sought to be set aside were or were not binding on the plaintiffs.

Of these the first question was not much discussed by the lower courts, the Subordinate Judge in the first suit merely holding on an issue raised that Mahabir had an existing right, and, after dismissing the suit on the second question, (holding that the alientions were binding) saying :— " The suit however cannot fail altogether as plaintiff No. 3 (Mahabir Prasad) has acquired an interest in half the property," and the Judicial Commissioner's Court agreeing that Mahabir Prasad was by the agreement "admitted as a partner to the extent of one half of the property."

Both suits were eventually disposed of on the second question by the Court of the Judicial Commissioner (Mr. *E. Chamier*, [276] Judicial Commissioner, and Mr. *T. C. Piggott*, 2nd Additional Judicial Commissioner) in favour of the present respondent (1) on the authority of a decision of a Full Bench in the case of *Chandradeo Singh* v. *Mata Prasad* (2).

On these appeals—

De Gruyther, K. C, and *B. Dube* for the appellant contended that the alienations were binding on the plaintiffs. In the absence of any allegation that the debts, to satisfy which the alienations had been made, were incurred for immoral purposes, the alienations, as having been made by the heads of the joint families, were binding upon the other members of the familes. The burden of proof that they were not binding was in any case on the plaintiffs, and they had failed to discharge it. The manager of a joint Hindu family had certain limited powers of alienation and where the joint family consisted of a father and his sons, the father had all those powers, and he also possessed the power to alienate the joint ancestral property for his antecedent debts, and the sons were liable unless those debts were tainted with immorality. Reference was made to *Girdharee Lall* v. *Kantoo Lall* (3): *Suraj Bunsi Koer* v. *Sheo Proshad*

(1) (1911) See *Mahabir Prasad* v. *Basant Singh*, 14 Oudh Cases, 299.
(2) (1909) I. L. R. 31 All. 176.
(3) (1874) 14 B. L. R. 187 (196) L. R. 1 I. A. 321 (330).

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35 A. 273=40 I. A. 86=17 C. L. J. 566=19 I. C. 340=17 C. W. N 669=1913 M. W. N. 481=11 A. L. J. 469=15 Bom. L. R. 525=14 M. L. T. 64=25 M. L. J. 301.

Singh (1) : *Nanomi Babuasin* v. *Modun Mohun* (2) : *Bhagbut Pershad Singh* v. *Girja Koer* (3) : *Mahabir Pershad* v. *Mohesswar Nath Sahai* (4) : and *Chandradeo Singh* v. *Mata Prasad* (5).

But it was contended that the respondent Mahabir Prasad was not entitled to carry on the suits, as he had, on the true construction of the agreements with the original plaintiffs, no title or interest to enable him to sue, especially after the withdrawal of the other plaintiffs as the result of compromising the suits. The suits were a mere gambling in litigation. The transferors were out of possession of the property, and the transferee acquired no title under the deeds. The case of *Achal Ram* v. *Kazim Husain Khan* (6) was referred to and distinguished.

[277] *G. R. Lowndes* for the respondent Mahabir Prasad contended that he had acquired a title under the agreements with the original plaintiffs which enabled him to maintain the suit. He was under these agreements a co-sharer with the original plaintiffs in the property. Both the Courts in India had decided that on the construction of the deed Mahabir Prasad had an existing right. In the present case, as in the case of *Achal Ram* v. *Kazim Husain Khan* (6), the agreements operated as a "present transfer" to the respondent Mahabir Prasad of the interest of the original plaintiffs. As to the alienations, it was contended that they were not within the competence of the alienors and were not binding on the original plaintiffs, nor on the respondent their transferee. They were not made for legal necessity nor required for the discharge of antecedent debts of the alienors. The decision of the majority of the Full Bench in the case of *Chandradeo Singh* v. *Mata Prasad* (5), on which the Judicial Commissioner's Court had relied, was correct.

Counsel for the appellant were not called upon to reply.

1913, *March* 14*th* :—The judgment of their Lordships was delivered by Lord ATKINSON :—

These are three consolidated appeals from three decrees of the Court of the Judicial Commissioner of Oudh, the first dated the 19th of March, 1909, and the other two the 29th of March, 1911.

By the first of these, certain decrees of the Subordinate Judge of Partabgarh, dated the 22nd of July, 1908, were in part affirmed and in part reversed, and by the two latter a judgment and decree of the District Judge of Rae Bareli, dated the 5th of February, 1910, was also in part affirmed and in part reversed.

By this decree of the 5th of February, 1910, a previous decree of the same Subordinate Judge, dated the 3rd of August, 1909, was in part affirmed and in part reversed.

The facts out of which all this litigation has arisen are shortly as follows :—

A certain estate in five villages in the Partabgarh district was owned by two joint Hindu families, the respective heads of which were two brothers Binda Sewak and Ram Prasad, the share of the [278] said Binda Sewak's branch being 7 annas 2 pies and that of Ram Prasad's branch 8 annas 10 pies.

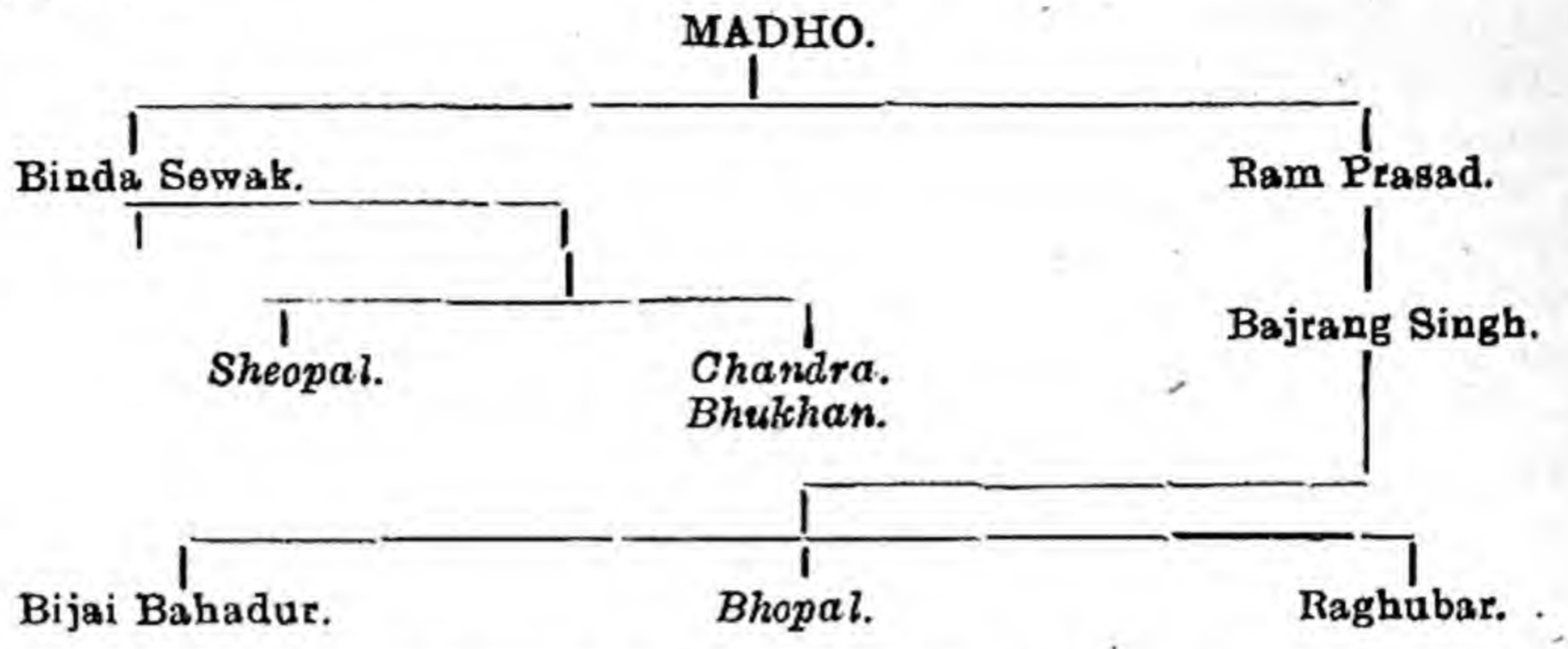
(1) (1879) I. L. R. 5 Cal. 148; L. R. 6 I. A. 88.
(2) (1895) I. L. R. 13 Cal. 21 (35): L. R. 13 I. A. 1 (15).
(3) (1888) I. L. R. 15 Cal. 717; L. R. 17 I. A. 99.
(4) (1889) I. L R. 17 Cal. 584: L. R. 17 I. A. 11.
(5) (1909) I. L. R. 31 All. 176.
(6) (1904) I. L. R. 27 All. 271: L. R. 32 I. A. 113.

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35 A. 273=40 I. A. 86=17 C. L. J. 566=19 I. C. 340=17 C. W. N. 669=1913 M. W. N. 481=11 A. L. J. 469=15 Bom. L. R. 526=14 M. L. T 64=25 M. L. J. 301.

A genealogical table set out in the respondent's case, the accuracy of which is not disputed, shows of what members these two families were composed :—



The persons whose names are printed in italics are plaintiffs in the two suits, numbered 518 and 549 of 1907, in which the decrees appealed from were respectively made, namely, Sheopal Singh and Chandra Bhukhan Singh in the first, and Bhopal Singh in the second. In each of these suits one Mahabir Prasad, not a member of either family, but claiming an interest in portions of the joint family property under certain agreements, was joined as a plaintff.

By two deeds, dated respectively the 2nd of January, 1900, and 3rd of October, 1901, Binda Sewak purported to sell to Basant Singh (the appellant) his share of the joint family property.

Thereupon Ram Prasad, as co-sharer in the family estate, instituted two pre-emption suits in respect of these two sales, and obtained decrees therein. He subsequently, by deeds, dated the 4th of June, 1903, and 3rd of August, 1903, respectively, purported to sell and convey to the same Basant Singh (the appellant) the share of the property the right to which he had thus acquired by pre-emption, together with all but a 6 anna share of his own share of the family property. In addition he, by deed dated the 4th of February, 1907, mortgaged this latter 6 anna share to the same Basant Singh to secure a sum of Rs. 12,000. The mortgage was a possessory mortgage for a period of 25 years. Sheopal Singh, Chandra Bhukhan Singh and Bhopal Singh determined to impeach all these dealings with the joint family properties as [279] being, on several grounds, void according to Hindu law, but they had no money to meet the cost of litigation.

Two agreements, both dated the 25th of April, 1907, were accordingly entered into between them and Mahabir Prasad, the one by Sheopal Singh and Chandra Bhukhan Singh jointly and the other by Bhopal Singh. They are practically identical in terms. They provided that Mahabir Prasad should in each case finance the contemplated litigation on certain terms to be presently considered in detail.

Two actions were accordingly instituted in the court of the Subordinate Judge of Partabgarh, the first on the 10th of August, 1907, in which Sheopal Singh, Bhukhan Singh and Mahabir Prasad were plaintiffs, and Basant Singh, Binda Sewak Singh and Ram Prasad defendants, praying for "a decree for proprietary and actual possession of 4 annas 9 pies 6¾ karants under-proprietary share" in five villages therein named and for Rs. 1,704-14-9 33/36 mesne profits. In other words, it was an action of ejectment and for recovery of mesne rates.

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35 A. 273=40 I. A. 86=17 C. L. J. 566=19 I. C. 340=17 C. W. N. 669=1913 M. W. N. 481=11 A. L. J. 469=15 Bom. L. R. 525=14 M. L. T. 64=25 M. L. J. 301.

In the second suit Bhopal Singh and Mahabir Prasad were plaintiffs, and Ram Prasad and his grandsons Bijai Bahadur Singh and Raghubar Singh defendants. The relief claimed was similar, namely, to recover possession of one-sixth of the property conveyed away by Ram Prasad by the three deeds already mentioned.

In both suits a plea was filed to the effect that Mahabir Prasad was not entitled to recover possession. That point was thus distinctly raised. Both suits were contested, and both heard together.

The principal defendant in the first suit, by deed, dated the 22nd of April, 1908, compromised with the two principal plaintiffs in that suit, namely, Sheopal Singh and Chandra Bhukhan. The deed provided, amongst other things, that the claim of these plaintiffs to recover the possession of the lands mentioned should be dismissed, and their claim for mesne profits rejected. This deed was filed in court, and on an application made under section 375 of the Code of Civil Procedure, the suit was dismissed as against these plaintiffs. A similar compromise was entered into in the second suit with Bhopal Singh, and that suit was similarly [280] dismissed as against him. Mahabir Prasad thus became the sole plaintiff in both suits. His claim to recover the possession of the shares of the property mentioned in them respectively thus rests entirely upon the agreements he so entered into with these plaintiffs. Even if all the impeached deeds were absolutely void, he would not be entitled to the relief he claims unless these agreements conferred upon him a right to recover possession of the undivided shares of these villages of which he seeks to recover the possession. The agreements thus become the foundation of his title. Until their true construction and the nature of the rights they confer have been determined, it is irrelevant to consider the question of the validity or invalidity of the deeds. The other is the preliminary question, and it has not only been raised, but actually ruled upon by the Subordinate Judge in his judgment delivered upon the 22nd of July, 1908. In the last paragraph but one of this he, when dealing with the seventh issue, said :—"The suit, however, cannot fail altogether, as was contended by defendant 1. Plaintiff 3 has acquired an interest as to half the property." This seventh issue ran thus :—"To what relief, if any, are the plaintiffs entitled?" Owing to the compromise, that issue came to mean, to what relief is the third plaintiff, Mahabir Prasad, entitled? And the last of the reasons stated in the appellant's case lodged in these appeals is that the respondent, Mahabir Prasad, is "not entitled to possession of the property in suit or to any other relief." It may well be that this question, though raised, was not much discussed, or not at all discussed on the hearing of the appeals before the court of the Judicial Commissioner, but since the point arises on the very face of the documents on which the plaintiff's case is founded, their Lordships think they are bound to decide it. It would be quite impossible for them to advise His Majesty to grant to a litigant relief to which, they were of opinion he was not entitled, simply because those concerned for the parties in the cause abstained from discussing in the court from which the appeal to His Majesty had been taken a vital point plainly appearing on the very face of his written proofs, and plainly raised, as this point has been, in this case.

As the two agreements are practically identical in terms, it will be sufficient to consider one of them.

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40 I. A. 86=
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19 I. C. 340=
17 C. W. N.
669=1913 M.
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11 A. L. J.
469=15Bom.
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301.

[281] It is elementary law that a plaintiff in an action of ejectment must recover by the strength of his own title, not the weakness of his adversary's.

What may be the rights or interests, if any, which the plaintiff may have under these agreements in the subject-matter of the suit are irrelevant considerations if he has not a right to the possession he seeks to recover.

The primary question for decision, therefore, is, did the agreement in the first action confer upon Mahabir Prasad at the time that action was instituted a then present right to that possession? There is no suggestion that if he had not the right then he has since acquired it.

The provisions of the agreement setting forth the conditions upon which it was entered into, relevant on this point, run as follows :—

"1. That in the share of each declarant amounting to 2 annas 4 pies and 13⅓ karants Mahabir Prasad *will be a co-sharer of one-half share*, and the remaining one-half share will belong to us, the declarants, as follows :—

Sheopal Singh	... 2 annas 4 pies 13⅓rd karant share.
Chandra Bhukhan Singh	... 2 ,, 4 ,, 13⅓rd ,, ,,

"2. We, the declarants and Mahabir Prasad, will be bound by the following conditions :—

(*a*) That Mahabir Prasad will bear the entire expenses in connection with the suit from the original Court to the Court of Appeal from his own pocket in the way he pleases, and if the opposite party prefer any appeal, then Mahabir Prasad will have to defend the appeal also with his own costs.

(*b*) That in case *of success Mahabir Prasad will be entitled to proprietary possession of the share entered in* paragraph 1 of this document or one-half of the share which may be decreed, and it will be at the pleasure of Mahabir Prasad either to keep his share joint or to have it partitioned. But during the period of jointness he will have all rights to making collections and management of the *zamindari* share decreed.

(*c*) That Mahabir Prasad will remain a co-sharer and proprietor like ourselves in all the *sir* and *khudkasht* lands and all zamindari rights relating to the zamindari share like ourselves, and we will have no right to keep separate possession over any *sir* and *khudkasht* land, nor will we raise any plea as to exproprietary right."

In the view of their Lordships these provisions did not confer upon Mahabir Prasad a then present right to the possession of any share in the property the subject-matter of the suit. That right would arise, if at all, only when success in the contemplated [282] litigation had been achieved. Success had not been achieved. By the agreement it was contracted that up to that time, at all events, he, Mahabir Prasad, should merely be a partner, or co-owner with his co-plaintiffs in a certain undivided fraction of the property mentioned in the first of its paragraphs. There was no present grant or assignment to him of any separate share or fraction of the property divided or undivided. At best the contract only amounted to this, that in a certain future event he should become entitled to the proprietary possession of a certain undivided fraction of it, and then have the right to have that fraction partitioned.

The case of *Lal Achal Ram* v. *Raja Kazim Husain Khan* (1) is wholly different from the present. There the sole owner of certain lands, who had already sold one-half of them, executed a deed of sale in which it was set forth that "he has sold half the estate to the Raja for a lakh and a half of rupees." He acknowledged the receipt of one lakh, the balance was to be paid on the termination of certain litigation, which the Raja was to

(1) (1905) I. L. R. 27 All., 271 ; L. R. 32 I. A., 113.

conduct at his own expense. The statement of the amount of the consideration was no doubt exaggerated. But the vendor never impeached his deed as not being a valid transfer of the property. On the contrary, he had more than once affirmed it, urged the Raja to take proceedings founded upon it, and continued to receive payments due to himself under it. The terms of the instrument are not set out at length in the report of the case, but Lord Macnaghten in delivering the judgment of the Board, after dealing with all the facts and quoting from the deed the passage already mentioned, says, at page 121 of the report (1):—" Their Lordships agree with the judgment of the Court of the Judicial Commissioner that the transaction was a present transfer by Ardawan (the sole owner) of one moiety of his interest in the estate giving a good title to Raja on which it was competent for him to sue." The case cannot be relied upon as a guide to the true construction of the agreements in the present case.

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35 A. 273=40 I. A. 86=17 C. L. J. 566=19 I. C. 340=17 C. W. N. 669=1913 M. W. N. 481=11 A. L. J. 469=15 Bom. L. R. 525=14 M. L. T. 65=25 M. L. J. 301.

On that construction their Lordships are clearly of opinion that neither agreement by its terms confers upon the respondent Mahabir Prasad any present right to recover the possession of [283] the share of the property mentioned in it which he claims to recover. They accordingly think that these appeals should be allowed, that the three judgments and decrees of the Court of the Judicial Commissioner, dated the 19th of March, 1909, and the 29th of March, 1911, respectively, should be set aside, that the two judgments and decrees of the lower Courts, namely, that dated the 3rd of August, 1909, of the Subordinate Judge and that of the District Judge of Rae Bareli, dated the 5th of February, 1910, should also be set aside, and that both the suits should be dismissed with costs, and they will humbly advise His Majesty accordingly. The respondent must pay the costs of these consolidated appeals.

Appeals allowed.

Solicitors for the appellants:—*Barrow Rogers and Nevill.*
Solicitors for the respondents:—*Watkins and Hunter.*

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35 A. 283 (=40 I. A. 97=19 I. C. 337=17 C. W. N. 741=11 A. L. J. 548=17 C. L. J. 612=15 Bom. L. R. 606=1913 M. W. N. 536=14 M. L. T. 27).

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MOHAN LALJI AND ANOTHER (*Plaintiffs*) *v.* GORDHAN LALJI MAHARAJ AND OTHERS (*Defendants*).

[11th February and 17th March, 1913.]

[*On appeal from the High Court at Allahabad*],

Hindu Law—Endowment—Right of succession to sebaitship of temple belonging to Ballavacharya Gossains—Evidence of dedication—claim of persons incompetent to be sebaits (as being Bhats) of Balav temple disallowed as defeating the purpose for which the founder established the worship—Title—Proof of, independent title to succession as sebait.

In a suit for possession and the right of sebaitship of a temple belonging to the Ballavacharya Gossains founded by one Muttuji, the maternal grandfather of the plaintiffs (appellants) the defendant (respondent) contended that the ordinary Hindu law was not applicable as alleged by the plaintiffs, and that daughter's sons were excluded by custom from succession.

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* *Present*:—Lord ATKINSON, Lord MOULTON, Sir JOHN EDGE and Mr. AMEER ALI.

(1) I. L. R. 27 All., 290.

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35 A. 283=
40 I. A. 97=
19 I. C. 337=
17 C. W. N.
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J. 548=17 C.
L. J. 612=15
Bom. L. R.
606=1913 M.
W. N. 536=
14 M. L. T.
27.

Held that, apart from positive testimony on the point, the performance of the worship of the idol in accordance with the rites of the sect for whose benefit it was held, might be treated as good evidence of dedication, and the ordinary rule of Hindu law relating to the descent of private property was not applicable.

Held also that the rule that the heirs of the founder succeed to the sebaitship laid down in *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee* (1) was, as there implied, subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. In the present case the appellants being Bhats, and not belonging to the Gossain *kul* were not competent to be sebaits of a Ballav temple where the rites were performed according to the Ballav [284] ritual, which, it was clearly established they could not perform. To allow their claim would defeat the purpose for which the worship was established.

Held further that the respondent had established an independent title of his own to the temple as being the nearest male relative of Muttuji both being descendants of two full brothers. The idol in the temple was brought from his temple at Nathdwara, and the worship founded by Muttuji was an off-shoot of the worship at Nathdwara. The temple was also built on land belonging to the Tekait respondent with the permission of his ancestor who held the office of Tekait at the time. He had therefore a clear title according to the customs and usages of the Ballav *kul* to the sebaitship of the temple.

[Ref. 24 I. C. 899=20 C. L. J. 312; 53 I.C. 661; 60 I. C. 467; 63 I. C. 370; Expl. 41 Mad 886=47 I. C. 341; Ref. 72 I. C. 686=36 C. L. J. 441=27 C. W. N. 411=50 Cal. 235; 72 I. C. 1026=36 C. L. J. 478; 74 I. C. 793=36 C. L. J. 356=50 Cal. 292.]

APPEAL from a judgment and decree (28th February, 1910) of the High Court at Allahabad, which affirmed a judgment and decree (5th August, 1907) of the Judge of the Small Cause Court at Agra, exercising the powers of a Subordinate Judge, dismissing the appellants' suit.

The facts of this case, which is an appeal from the decision of the High Court (RICHARDS and TUDBALL, JJ.) reported in Indian Law Reports, 32 Allahabad, 461, sufficiently appear from the judgment in that case, and are also stated in the judgment of their Lordships of the Judicial Committee.

On this appeal—

De Gruyther, K. C. and *Ross, K. C.*, for the appellants contended that the burden lay on the respondents to prove the custom they alleged of the exclusion of the sons of daughters of the founder by his male kinsmen and that they had failed to discharge it. The High Court had wrongly placed the burden of proof on the appellants to show that they, the daughters' sons, were entitled to succeed. The question was on whom the *onus* lay. Did it lie on the appellants who alleged that the orininary Hindu law was applicable, or on the respondents who set up a special custom (contrary to the Hindu law) which, they contended, applied and governed the present case? Reference was made to *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (2); *Gossamee Sree Greedharreejee* v. *Rumanlolljee Goswamee* (1); *Greedharee Doss* v. *Nundokissore Doss* (3); *Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (4), *Genda Puri* v. *Chatar Puri* (5) and *Janoki Deti* v. *Gopal Acharjia Goswami* (6). On the [285] evidence it was submitted that it was proved that the daughters' sons do succeed to the office of sebait of a temple of the kind in suit. The High Court had found that Muttuji was the founder of the worship

(1) (1889) I. L. R. 17 Cal. 3; L. R. 16 I. A. 137.
(2) (1904) I. L. R. 32 Cal. 129; L. R. 31 I. A. 203.
(3) (1867) 11 Moo. I. A. 405 (427, 428).
(4) (1874) L. R. 1 I. A. 209. (228).
(5) (1886) I. L. R. 9 All 1 (8); L. R. 13 I. A. 100 (105).
(6) (1882) I. L. R. 9 Cal. 766 (771); L. R. 10 I. A. 32 (37).

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conducted in the temple ; and, on the above authorities the appellants as his heirs-at-law were entitled to hold the office of sebait, and to obtain the custody of the idols, temple, and the properties appertaining thereto as superintendents and managers.

Sir *Erle Richards*, *K.C* , and *B. Dube*, for the first respondent were not called upon.

1913, *March* 17*th*.—The judgment of their Lordships was delivered by Mr. AMEER ALI:—

35 A. 283=40 I. A. 97=19 I. C. 337=17 C. W. N. 741 =11 A. L. J. 548=17 C. L. J. 612=15 Bom. L. R. 606=1913 M. W. N. 536= 14 M. L. T. 27.

The dispute in this case relates to the shebaitship of a Hindu temple belonging to the Ballavacharya Gossains situated at a place called Jatipura in the Muttra district of the United Provinces of India.

The Ballavacharya cult, in reality an offshoot of Vaishnavism, was founded in the 16th century of the Christian Era by one Ballavacharya, who is usually designated among his followers and disciples as Maha Pirbhuji. He and his descendants, who constitute the Ballavacharya Gossain *Kul*, are held in great veneration by the members of the sect and regarded as the incarnation of the famous and favourite Hindu deity Krishna, whom in common with other Vaishnavs (Vishnuvites) they worship. The cult established by Ballavacharya differed in several particulars from the practices in vogue among other votaries of Krishna, the principal point of difference consisting in the fact that he repudiated the practice of celibacy and asceticism practised by the other Gossains.

The Ballavacharya Gossains, in other words, the descendants of Ballav, possess several principal temples, each of which is presided over by a member of his *Kul* or family, who is styled a *Tikait*.

The defendant Gordhan Lalji is in possession of one of the most important of these temples, if not the most important, which is situated at Nathdwara in the Odeypore State.

In order to make the contentions of the parties intelligible, it is necessary to state in this connection certain admitted facts relating to the customs and usages in vogue among the Ballavacharya *Kul*.

[286] In the first place the Ballavacharyas do not intermarry in their own *Kul*, as the members belong to the same *gotra*. They take wives from among the Bhats, a well-known Brahmanical caste, and marry their daughters to Bhats.

In the Ballavacharya Gossain temples, besides the principal image, which is directly or indirectly a presentment of Krishna, there are subsidiary images not enjoying the same worship or veneration but nevertheless regarded as representations of Krishna They are almost invariably images of one or other of the descendants of Maha Pirbhuji.

Another fact necessary to bear in mind is that the ministrations in the Ballavacharya temples are entirely in the hands of the direct descendants of the founder, and the Gossains of his *Kul* are the preceptors of the cult taught by him.

The temple which forms the subject-matter of dispute in the present case is stated to have been built about the time of the Indian Mutiny, by one Muttuji, a descendent of Ballav and thus a member of his *Kul*. The worship he set up in this new temple was of the image of Sri Madan Mohanji, which is proved to have been brought from the Tikait defendant's temples at Nathdwara. This was one of the subsidiary images that were worshipped there along with the principal deity.

Muttuji remained in possession of the temple built by him and of the worship performed there until his death in 1883. He left a widow, Satbinda Bahuji, and two daughters, Musammat Ganga Beti and Gordhana

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Beti. After the death of Muttuji, his widow, Satbinda, carried on the worship until 1888 when she died, and the charge of the temple devolved on Ganga and Gordhana. Ganga died in 1896 and Gordhana in 1902. Both Ganga and Gordhana were married, according to the custom of the sect, to Bhat husbands and their sons are accordingly called Bhats. The plaintiffs, Mohan Lalji and Gordhan Lalji, are the sons of Ganga, whilst the defendant, Madhusudan Lala, is the surviving son of Gordhana, and Damodar Lala is her husband.

On the death of Gordhana, these two, together with Anrudh Lala, another of her sons, who was alive at the time, appear to have taken possession of the temple. In 1904 a suit was instituted by the defendant Tikait Gordhan Lalji, against Damodar and [287] his two sons to establish his title to the shebaitship, and for possession of the temple. This suit was referred to arbitration, and an award was made in his favour under which he obtained possession.

During the pendency of that suit, the plaintiffs, the sons of Ganga, brought the present action against Damodar and his two sons for joint possession of the temple and its appurtenances. On the 25th of August, 1905, Tikait Gordhan Lalji was added as a defendant to the suit of Musammat Ganga's sons.

The plaintiff's claim against Gordhan Lalji is for ejectment; whilst against the other defendants it is for joint possession. They allege that Muttuji, their maternal grandfather, was the owner of the temple with all its appurtenances; that on his death his widow came into possession of the same by right of inheritance; and that upon her death their mother and their aunt "became the owners of the temple." And they claim to be entitled on the death of Gordhana to joint possession with her husband and sons to an equal share as "owners". It will be noted that they based their right on the ordinary right of inheritance under the Hindu Law.

The Tikait, the real contesting defendant, denied the title put forward by the plaintiffs. He urged that the temple was not the personal property of Muttuji and that the right of inheritance did not attach to it. He further alleged that, according to the custom in force among the Ballavacharyas, daughter's sons did not belong to their *Kul* and were debarred from taking part in the ministrations at the temple for the benefit of the worshippers; and he claimed that, as a collateral relative of Muttuji in the male line, he was entitled to succeed him as shebait.

He also alleged that the temple was built by Muttuji on land belonging to his (the defendant's) father with his permission, and that on Muttuji's death without leaving any lawful heir the right to the possession devolved on him by virtue of an agreement executed by Muttuji.

On these respective allegations of the parties the Trial Judge framed a number of issues, only four of which need attention. The second and third put in issue the incapacity alleged by the defendant of daughter's sons succeeding to their maternal grandfathers or taking part in the worship at a Ballav temple. The fourth [288] raised the question whether the property was *debuttur*. The fifth dealt with the claim of the defendant to succeed to the shebaitship by right of heirship to Muttuji.

The Subordinate Judge, on an exhaustive review of the evidence, held on all the issues against the plaintiffs and accordingly dismissed the suit. His decision has been affirmed on appeal by the High Court of Allahabad.

From the decree of the High Court the plaintiffs have appealed to His Majesty in Council. They, or rather their advisers, abandoned, if not in the first court, certainly in the High Court, their contention that the

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temple in suit with the appurtenances formed the private property of Muttuji subject to the ordinary law of inheritance. In the High Court the case was discussed and decided on the admission of the plaintiffs' counsel that the property in suit was *debutter*. In fact, in their Lordships' judgment, the evidence left no room for the opposite contention, for, apart from positive testimony directly bearing on the point, the performance of the worship in accordance with the rites of the sect for whose benefit it was held may be treated as good evidence of dedication. That being so, the ordinary rule of Hindu Law relating to the descent of private property is not applicable to the particular right in controversy in this case.

Stress, however, is laid on the printiple enunciated in *Gossamee Sree Greedharreejee* v. *Rumunlolljee Gossamee* (1), where Lord Hobhouse, delivering the judgment of this Board, said as follows:—

> "According to Hindu Law, when the worship of a thakoor has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution."

This rule must, from the very nature of the right, be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. This qualification is in fact covered by the words used by Lord Hobhouse.

Starting from this point, the first question to determine is whether the plaintiffs suing for the joint exercise of the right of [289] shebaitship to the temple in suit, have established their competency for the office. The duties which are imposed on the person in charge of the temple and of its worship are to be found very comprehensively set forth in Professor Hayman Wilson's "Religious sects of the Hindus." Both the courts in India have found that the plaintiffs, being Bhats, and not belonging to the Gossain *Kul*, cannot perform the diurnal rites for the deity worshipped by the sect; they cannot wash, dress or adorn the image or perform the *arti* (one of the most important rites) which seems to consist in waving the light before the image of the deity. They cannot touch the food offerings placed before the idols, which are afterwards distributed among the Vaishnava votaries. Nor can they communicate the *mantras* to the disciple for purposes of initiation. It is to be noted in this connection, that whilst the daughters of the Ballav Gossains married to Bhat husbands continue to live in their father's houses and remain within their father's *Kul*, their sons do not acquire that status; as sons of Bhats they are Bhats, and not Ballavacharya Gossains who are by virtue of their descent entitled to act as ministers of the cult established by Ballav Maha Pirbhuji.

Another fact is equally clear on the evidence that Bhat girls married into the Gossain *Kul* receive the *mantras* and become thenceforth members of the *Kul*. It is not surprising, therefore, that after Muttuji's death his widow and daughters remained in charge of the temple and it worship. But to allow the plaintiffs' claim to an admittedly Ballav temple, where the rites are performed according to Ballav ritual, which, it is clearly established, they cannot perform, would, in their Lordships' judgment, defeat the purpose for which the worship was established.

In an action of ejectment the conclusion at which their Lordships have arrived would be sufficient for the affirmance of the decree appealed against dismissing the plaintiffs' suit.

(1) (1889) I. L. R., 17 Cal., 3; L.R., 16 I.A., 187.

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35 A. 283=40 I. A. 97=19 I. C. 337=17 C. W. N. 741 =11 A. L. J. 548=17 C. L. J. 612=15 Bom. L. R. 606=1913 M. W. N. 536=14 M. L. T. 27.

But their Lordships are of opinion that the Tikait defendant has succeeded in establishing an independent title of his own to the temple in suit. He appears to be the nearest male relative of Muttuji, both being descendants of two full brothers; there can be little doubt, also, that the image installed at Jatipura was brought from his temple at Nathdwara, and that the worship founded [290] by Muttuji was an off-shoot of the worship in Nathdwara. The temple, again, was built on land belonging to the Tikait defendant, with the permission of his ancestor, who held the office of Tikait at the time.

It seems to their Lordships that, apart from the statements contained in Muttuji's letter, on which the defendant relied in his written statement, he has a clear title, according to the customs and usages of the Ballav *Kul*, to the shebaitship of the temple in suit.

On the whole their Lordships are of opinion that the judgment and decree of the High Court are right, and that this appeal must be dismissed. And they will humbly advise His Majesty accordingly.

The appellants will pay the costs.

Appeal dismissed.

Solicitors for the appellant:—*T. L. Wilon, & Co.*
Solicitor for the first respondent:—*Douglas Grant.*

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35 A. 290 (=20 I. C. 216=11 A. L. J. 309=14 Cr. L. J. 392.)

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* TULSHI RAM.*

[28th February, 1913.]

Act No. II of 1899 (*Indian Stamp Act*), *sections* 2 (23), 62 *and* 63—Sarkhat—*Memorandum of account—Receipt—Several items of over Rs.* 20 *each—Each item to be stamped.*

Held that a memorandum of account between debtor and creditor, which was left in the possession of the debtor and consisted of items entered from time to time of money advanced and repaid, was a document which required a separate receipt stamp in respect of each item of over Rs. 20.

ONE Tulshi Ram was in the habit of borrowing money from time to time from a money-lender. The account of the sums of money borrowed and repaid was left in the hands of the debtor, and consisted of a paper upon which such sums were entered as occasion arose in opposite columns. When the account was finally closed, a balance of Rs. 50 odd was paid and one receipt stamp attached and signed by the creditor firm. The receipt stamp was not cancelled. The debtor Tulshi Ram was on these facts convicted under section 62 of the Stamp Act, 1899, on the finding [291] that each entry of a receipt for over Rs. 20 required to be stamped separately. He was also convicted under section 63 of the Act. Tulshi Ram applied in revision to the High Court.

Munshi *Lakshmi Narain*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

TUDBALL, J.—In this case the applicant has been convicted under sections 62 and 63 of Act II of 1899 in respect of what has been called a

* Criminal Revision No. 82 of 1913 from an order of Ram Saran Das, Magistrate, first class, of Ballia, dated the 23rd of October, 1912.

sarkhat throughout the case. This *sarkhat* is a document on a piece of paper which appears to have been written up from time to time. It shows on one side sums of money advanced, and on the opposite side various sums of money repaid by the debtor. When the account was finally closed, a balance of Rs. 50 odd was paid and one receipt stamp attached and signed by the creditor firm. The receipt stamp was not cancelled. The Magistrate has held that the entry in respect of each of the items of receipt of over Rs. 20, is an acknowledgement within the definition of the word "receipt" in section 2, clause (23), of the Act, and that each of such entries should have been stamped, and he has, therefore, convicted the accused under section 62 of the Act. In respect of the non-cancelment of the receipt stamp affixed, he has convicted him under section 63. There cannot be any doubt that the *sarkhat* was written up from time to time and that it was left in the hands of the debtor, so that the entry of each item of payment and receipt might be entered thereon to act as an acknowledgement of payments and receipts. When each item of receipt was entered by the creditor therein, there can be no doubt that the memorandum imported an acknowledgement of a part-payment of the debt, and as each entry was made it ought to have been stamped with a receipt stamp. Technically, therefore, the applicant was guilty, and as only a nominal fine has been imposed, there is no reason for interference on the question of sentence. The conviction under section 63 is of course good. The application is rejected.

Application rejected.

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REVISIONAL CRIMINAL.
35 A. 290=20 I. C. 216=11 A. L. J. 309=14 Cr L. J 392.

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35 A. 292 (=18 I. C. 928=11 A. L. J. 301).

[292] APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

BHAGWAN DAS AND ANOTHER (*Defendants*) *v.* MUHAMMAD YAHIA (*Plaintiff*).*

[1st March, 1913.]

Landholder and tenant—House in abadi*—Well sunk by tenant inside his house—Mandatory injunction—Discretion of Court.*

In this case the High Court refused to grant a mandatory injunction at the suit of the zamindar for the removal of a well recently constructed inside their house by tenants of a house in a town; the position of the tenants being that they and their predecessors in title had paid no rent for generations, and were only liable to ejectment in the event of the site occupied by them being cleared of buildings.

IN this case the plaintiff was the zamindar of a patti in the town of Mariahu. The defendants were tenants of a house in the patti, but they had never paid rent, and were apparently only liable to ejectment in the possible event of the site occupied by them becoming denuded of buildings. The defendants started to build a well inside their house. The plaintiff thereupon instituted the present suit praying for an injunction restraining the defendants from building their well and directing them to restore the land to its original condition. The court of first instance held that the defendants were entitled to build the well and accordingly dismissed the

* Second Appeal No. 533 of 1912 from a decree of Prem Behari Lal, Subordinate Judge of Jaunpur, dated the 13th of February, 1912, reversing a decree of Gopal Das Mukerji, Munsif of Jaunpur, dated the 4th of September, 1911.

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35 A. 292=
18 I. C. 928
=11 A. L. J.
301.

suit. On appeal, however, the lower appellate court reversed this decision. The defendants appealed to the Hight Court.

Mr. *S. A. Haidar* (with him Dr. *Satish Chandra Banerji*), for the appellants :—

A tenant who occupies a house in the village *abadi* can make improvements in his house. He can do any reasonable thing which will add to the comforts and conveniences thereof ; *Balkishen* v. *Muhammad Ismail Khan* (1), *Bholai* v. *The Rajah of Bansi* (2). A well is a reasonable improvement ; it is a necessary adjunct or appurtenance to a house. The plot of land was given by the zamindar for the purpose of a house. The sinking of a well inside the house is not an act inconsistent with that purpose, and is not destructive of or permanently injurious to the land. The wajib-ul-arz gives to each tenant the unrestricted power to build or to [293] demolish within his compound at his own pleasure. This power includes the right of sinking a well therein as an appurtenance to the house. The construction of a well in a house is so common that it must be presumed that such a contingency was contemplated at the time when the wajib-ul-arz was framed. If the zamindar had intended to disallow wells there would certainly have been an express provision in the wajib-ul-arz prohibiting them.

Mr. *C Dillon* (with him Nawab *Muhammad Abdul Majid* and Dr. *S. M. Sulaiman*), for the respondents :—

In an agricultural village, such as the village Mariahu was at one time, the grant of a piece of land to build a house thereon does not carry with it a right to sink a well. The main purpose is that of agriculture. The wajib-ul-arz contains provision by which tenants are empowered to make *pakka* wells. The sinking of wells would be permanently injurious to the rights of the zamindar. If it be held that the appellants can, as a matter of right, sink a well, then each and every tenant can do likewise, and there would be nothing to prevent a tenant from constructing more wells than one if he so chose. This would be destructive and permanently injurious to the zamindar's land. The case in the Weekly Notes for 1898, cited by the appellants, lays down that a tenant may make improvements in his house only so long as he can do so without injury to the rights of the zamindar. The second case cited by the appellants is not in point, as it relates to wells constructed on land used for agricultural purposes. A tenant has only a limited interest in the site of the house occupied by him, and cannot make permanent alterations in that site.

Mr. *S. A. Haidar*, replied.

GRIFFIN, J.—The plaintiff in this case is the zamindar of a patti in the town of Mariahu, where the defendants reside. The plaintiff brought this suit for an injunction to restrain the defendants from constructing a well in their house and for an order directing them to remove the materials and to restore the land to its original condition. The defendants are shop-keepers whose family has been in occupation of the premises for generations without paying any rent. They pleaded that they had a right to construct the well on their premises, that the well had been constructed for their own comfort and convenience, and that the suit was brought out of malice. The court of first instance dismissed [294] the suit, holding that the construction of the well inside the house was not such a user as affected the zamindar's rights injuriously, and that the well was a necessary adjunct to the comfort of the occupants of the house. The

(1) Weekly Notes, 1898, p. 44.

(2) (1881) I. L. R. 4 All 174.

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lower appellate court on appeal held that the plaintiff zamindar was entitled to the relief asked for on the ground that the construction of the well was an interference with the plaintiff's right as zamindar. The lower appellate court having decreed the suit the defendants come here in second appeal. The courts below find that the occupiers of houses in Mariahu have a right to transfer houses subject to payment of one-fourth of the sale price to the zamindar. We have heard the learned counsel for the parties at considerable length. The question, as it appears to me, for decision, in this appeal is whether the plaintiff has made out a case for issue of an injunction. The plaintiff is the zamindar of the patti where the defendants' house is situated. His rights as zamindar appear to be limited by the rights which occupants of houses have acquired by custom against the zamindar so long as the houses are in the occupation of the family. The houses only escheat to the zamindar in case of the family dying out. I am unable to hold that the construction of the well on the premises of the defendants is a breach of any obligation existing in favour of the plaintiff whether expressly or by implication. A well on the premises is an undoubted adjunct to the convenience of the occupants, and it is difficult to see in what way the zamindar's interests are injuriously affected by its construction ; while its removal would undoubtedly cause inconvenience to the defendants. If there be an invasion of the zamindar's rights it is of so slight and doubtful a nature as not to call for interference, more particularly in view of the fact that the chance of the zamindar entering into possession of the house is very remote. There appears to be some reason for holding, as held by the court of first instance, that the plaintiff was actuated by malice in instituting the present suit. Taking all the circumstances into consideration I am of opinion that this is not a case in which the injunction asked for should be granted. I would therefore allow the appeal and dismiss the plaintiff's suit.

CHAMIER, J.—I agree that this appeal should be allowed. The appellants are the owners and occupiers of a shop and an adjoining [295] house in qasba Mariahu. The respondent is the zamindar of the qasba. The question for decision is whether the appellants are entitled to sink a well inside the shop without the permission of the respondent. It has been found by the courts below, and it is now admitted by the appellants, that the respondent is the exclusive owner of the land on which the house and shop stand, but that the appellants are entitled to retain possession as long as the buildings remain on the land. The Munsif held that the appellants were entitled to sink the well without the respondent's permission. On appeal the Subordinate Judge held that they were not.

It must be taken that the predecessors of the appellants obtained the land from the zamindar for the time being, for the purpose of erecting buildings thereon, and that they agreed expressly or impliedly not to use the land for any other purpose. Therefore, if the acts now complained of are inconsistent with the purpose for which the land was given to the appellants' predecessors, the repondent is entitled to a mandatory injunction. It was not suggested by counsel for the appellants that a mandatory injunction was not a suitable form of relief or that any other relief would meet the case. In this connection I may note that it was admitted before us that the respondent objected to the construction of the well as soon as he came to know of it.

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Two provisions in the wajib-ul-arz have been referred to. One of them certainly has no bearing upon the case. It relates to the digging of wells by *kashtkars*, and evidently was not intended to apply to the *atadi*. The other says that a *kashtkar*, or *ryot*, can build and pull down as he pleases within his own inclosure (*andar ahate apne ke bana o bigar sakta hai*). I doubt whether this was intended to authorize the construction of wells. It was probably intended to authorize a *kashtkar* or *ryot*, to make structural alterations inside his premises without reference to the zamindar.

But I am not prepared to hold that the sinking of a well within the premises was an act necessarily inconsistent with the purpose for which the land was granted. A well is one of the amenities or conveniences of an Indian house, and I consider that the grant of land for building purposes carries with it the right of making a well for the convenience of the occupiers. I would therefore restore the decree of the Munsif.

[296] BY THE COURT.—The appeal is allowed, the decree of the lower appellate Court is set aside and that of the court of first instance restored. The plaintiff will pay the costs of the defendants throughout.

Appeal allowed.

35 A. 296 (=11 A. L. J. 297=18 I. C. 959).

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

ABDUL GHAFUR (*Plaintiff*) *v.* GHULAM HUSAIN AND ANOTHER (*Defendants*)*

[3rd March, 1913.]

Civil Procedure Code (1908), *order XXI, rule* 88—*Execution of decree—Sale in execution—Pre-emption—Title of pre-emptor defeasible.*

Held that a title to a share in undivided immovable property sold in execution of a decree which is still defeasible at the date of the sale in execution is not sufficient to support a claim for pre emption under order XXI, rule 88, of the Code of Civil Procedure, 1908. *Kamta Prasad* v. *Mohan Bhagat* (1) and *Nabian Bibi* v. *Kauleshar Rai* (2) followed.

[Ref., 26 I. C. 95=12 A. L. J. 1148.]

THE facts of this case were briefly as follows:—A certain mahal was divided into two pattis, namely, (1) patti Fakir Bakhsh, in which the plaintiff was a co-sharer, and (2) patti Mumtaz-ud-din, in which the defendant was a co-sharer by virtue of shares purchased by him under two sale-deeds, dated the 11th of August, 1910. A share in the latter patti was put up, on the 20th of September, 1910, to sale by auction in execution of a decree. The plaintiff bid for the property, and the defendant, offering the same bid, claimed the right of pre-emption under order XXI, rule 88, of the Code of Civil Procedure. The sale was confirmed in the defendant's favour. Then the plaintiff brought a suit for a declaration that the defendant had no right of pre-emption, and for possession of the property. Both the lower courts dismissed the suit, hence this second appeal. Shortly before the institution of this suit, but subsequent to the date of the

* Second Appeal No. 39 of 1912 from a decree of Muhammad Shafi, Judge of the Court of Small Causes exercising the powers of a Subordinate Judge of Allahabad, dated the 15th January, 1912, confirming a decree of Sumer Chand, First Additional Munsif of Allahabad, dated the 29th of August, 1911.

(1) (1909) I. L. R. 32 All. 45.

(2) (1907) 4 A. L. J. 351.

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35 A. 296=11 A. L. J 297 =18 I. C. 959.

auction sale, the plaintiff had brought two suits for pre-emption in respect of the shares purchased by the defendant in patti Mumtaz-ud-din on the 11th of August, 1910: both these suits were decreed and the decrees had become final.

Dr. *Satish Chandra Banerji* (with him Pandit *Braj Nath Vyas*), for the appellant :—

[297] The question for determination is whether the plaintiff is a co-sharer within the meaning of order XXI, rule 88. That rule applies only when there are real bids between a co-sharer and an entire stranger. It does not deal with the question of preferential right between two co-sharers; *Farzand Ali* v. *Alimullah* (1). That case was decided under the corresponding section 14 of Act XXIII of 1861, and is an authority for the proposition that a share-holder in one patti of a pattidari estate is a co-sharer, within the meaning of that section, with reference to a share in another patti of the estate. The two pattis were formed by an imperfect partition, and the entity of the mahal was unaffected. The co-sharers of both the pattis were jointly liable for the revenue assessed on the whole mahal and there was thus a bond of union subsisting between them. The plaintiff is thus a member of the co-parcenary body and a co-sharer in the undivided immovable property, namely, the mahal. I am further supported by the case of *Ram Autar* v. *Sheo Dutt* (2). Secondly, the defendant cannot be entitled to pre-empt under order XXI, rule 88, unless he is a co-sharer. His title as a co-sharer rested on his purchases, dated the 11th of August, 1910. But both those sales were pre-empted by the plaintiff. Under such circumstances the defendant cannot be regarded as being a co-sharer at all, because he never acquired an absolute title; *Kauleshar Rai* v. *Nabihan Bibi* (3), *Nabihan Bibi* v. *Kauleshar Rai* (4), *Kamta Prasad* v. *Mohan Bhagat* (5).

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents :—

The two pattis were absolutely separate, although for purposes of revenue the mahal remained the same, still for all other purposes it was broken up into two pattis. The mahal as a whole could not, after partition, be regarded as "undivided immovable property" within the meaning of order XXI, rule 88. The partition may have been an imperfect partition, but the fact remains that there was a division. As soon as a division, of whatever sort and to whatever extent, has taken place, the mahal ceases to be an undivided immovable property. In the present case it was patti Mumtaz-ud-din which was the undivided immovable property within the meaning of order XXI, rule 88, and the plaintiff, admittedly, was [298] not a co-sharer therein. I am supported by section 182 of the Land Revenue Act and by the cases of *Digambur Misser* v. *Ram Lal Roy* (6) and *Ganga Singh* v. *Chedi Lal* (7).

Dr. *Satish Chandra Banerji*, replied.

GRIFFIN and CHAMIER, JJ. :—This was a suit by the appellant for possession of a share in patti Mumtaz-ud-din in mahal Fakir Bakhsh, mauza Mani Umarpur. This share was put up for sale on the 20th of September, 1910, in execution of a decree of a civil court. The plaintiff's bid was Rs. 530. The respondents offered the same amount and the share was knocked down to them under order XXI, rule 88, on their showing

(1) (1876) I. L. R. 1 All. 272.
(2) (1874) 6 N. W. P. H. C. Rep. 243.
(3) (1906) 3 A. L. J. 426.
(4) (1907) 4 A. L. J. 351.
(5) (1909) I. L. R. 32 All. 45.
(6) (1887) I. L. R. 14 Cal. 761.
(7) (1911) I. L. R. 33 All. 605.

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that they had purchased two other shares in the same patti on the 11th of August, 1910. The appellant was at the time the holder of a share in the other patti in the mahal, namely, patti Fakir Bakhsh, but held no share in patti Mumtaz-ud-din. His case is that he was at the time of the sale a co-sharer within the meaning of order XXI, rule 88, and that the respondents must be regarded as strangers, inasmuch as their title to the shares purchased by them on the 11th of August, 1910, was at the time defeasible and they have since been compelled to surrender those shares to the appellant under decrees for pre-emption obtained by him on the 8th of July 1911, and the 31st of January, 1912.

It appears that mahal Fakir Bakhsh was recently the subject of an imperfect partition at which the two pattis were constituted. It appears also that the whole of the land comprising the original mahal lies either in one patti or the other, there being no *shamilat* patti. In these circumstances it is a nice question whether the 'undivided property' for the purposes of order XXI, rule 88, is the whole mahal or only the patti Mumtaz-ud-din. But we need not decide this question, for, in accordance with the decisions of KNOX, A. C. J. and TUDBALL, J. in *Kamta Prasad* v. *Mohan Bhagat* (1) and of STANLEY C.J. and BURKITT, J. in *Nabihan Bibi* v. *Kauleshar Rai* (2) on appeal from the decision of RICHARDS, J. in 3 A. L. J. 426, we feel bound to hold that the defeasible title to the shares in patti Mumtaz-ud-din acquired by [299] the respondents in August, 1910, did not give them the right to pre-empt the share now in question as co-sharers.

We allow this appeal, set aside the decrees of the courts below, and decree the appellant's claim to possession of the share in question with costs in all three courts.

Appeal allowed.

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35 A. 299 (=11 A. L. J. 310=18 I. C. 957.)

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BIRHAM KHUSHAL (*Defendant*) *v.* SUMERA (*Plaintiff*).*

[4th March, 1913.]

Act (Local) No. of 1901 (*Agra Tenancy Act*), *sections* 79 *and* 95—*Jurisdiction—Landholder and tenant—Occupancy holding—Suit for declaration that plaintiff is heir of deceased occupancy tenant and for possession of holding—Practice—Useless declaration refused.*

The son of a deceased occupancy tenant filed a suit against the zamindar in the civil court asking (1) to have it declared that he was the son and lawful heir of the late tenant and (2) for possession of the occupancy holding held by him. The plaintiff had been ejected more than two years before suit.

Held, that although so far as the first relief claimed was concerned the suit might be cognizable by a civil court, so far as the second relief was concerned the plaintiff's remedy was by suit under section 79 of the Agra Tenancy Act, and, inasmuch as the time for filing such a suit had long since expired there was no object to be gained by granting the first relief. The entire suit was accordingly dismissed. *Dori Lal* v. *Saraar Singh* (3) referred to.

[Ref. 36 All. 48 ; Dist. 23 I. C. 705 ; Ref. 68 I. C. 247=20 A. L. J. 570=44 All. 692.]

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* First Appeal No. 161 of 1912 from an order of Pirthvi Nath, Additional Judge of Bareilly, dated the 12th of September, 1912.

(1) (1909) I. L. R. 32 All. 45.
(2) (1907) 4 A. L. J. 851.
(3) (1908) 5 A. L. J. 514.

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IN this case the plaintiff sued as the son and heir of a deceased occupancy tenant praying for a declaration of his status as such and for possession of the occupancy holding which had been of his father. He had previously made an unsuccessful application for mutation of names in respect of the holding and had also brought a suit under section 95 of the Agra Tenancy Act 1901, which had been dismissed in appeal by the Commissioner two years before the filing of his present suit. The present suit was dismissed by the court of first instance upon the ground that it was not cognizable by a civil court. On appeal, however, this decision was set aside and the suit remanded. Against this order of remand the zamindar defendant appealed to the High Court.

Munshi *Satya Narain*, for the appellant.

Babu *Lalit Mohan Banerji*, for the respondent.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—This appeal arises out of a suit, which was orginally brought by the plaintiff Sumera in [300] the Munsif's court, first, to have it declared that he was the son and lawful heir of one Jhau, deceased, and, as such, was entitled to the possession of a certain occupancy holding left by Jhau, and, secondly, for possession of the same as an occupancy tenant. The plaintiff claimed to be the legitimate son of Jhau and as such entitled to the holding. The zamindar resisted the claim. The plaintiff first of all applied to the revenue court for mutation of names in his favour. The zamindar objected, pleading that the plaintiff was not the legitimate son of Jhau. The application was disallowed. The plaintiff then brought a suit, under section 95 of the Tenancy Act, in the revenue court, asking for a declaration that he was the occupancy tenant of the holding. The suit was against the zamindar, who again raised the plea that the plaintiff was not the legitimate son of Jhau. The first court dismissed the suit and the court of the Commissioner upheld the decision on appeal in a very brief judgment, which runs as follows :—"The suit has been rightly dismissed. A suit under section 95 of the Tenancy Act is not the way in which to decide a question of legitimacy. The zamindar denies the existence of the tenancy and this is fatal to the suit. The appeal is dismissed with costs." This decision was passed on the 15th of November, 1909, apparently some two years or more after the death of Jhau. It is also clear that the Commissioner dismissed the suit on the ground that the tenancy was no longer in existence. Two years and six days after this decision the plaintiff comes to the civil court with this suit, in which he claims possession of the occupancy holding as against the landlord. The first court dismissed the suit on the ground that it was not cognizable by the civil court. This decision has been set aside in appeal and the suit remanded to the court of first instance by the Additional District Judge of Bareilly.

The defendant comes here on appeal, and urges that the suit is not cognizable by the Civil Court. The suit is very similar in its aspects to that of *Dori Lal* v. *Sardar Singh* (1), the only difference being that in that suit only a declaration was asked for that the plaintiff was the adopted son. It seems to us quite clear that on the death of Jhau, assuming that the plaintiff was [301] his legitimate son, he was entitled to the tenure and to continue the cultivation thereof, and if the zamindar unlawfully prevented him from going on to the holding, the plaintiff as occupancy tenant thereof was illegally dispossessed, and it was open to him to bring a suit

(1) (1908) 5 A. L. J. 514.

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under section 79 of the Tenancy Act for possession. In that suit it would have been open to the landlord to plead that he was not the occupancy tenant, and that he was not the legitimate son, and the matter could have been fought out in that suit. Section 95 of the Tenancy Act is hardly the section under which to proceed, and the suit brought under that section was rightly dismissed, as the plaintiff was not in possession. Even in the present suit it had to be admitted on behalf of the plaintiff that his suit for possession could not lie in the civil court, and it is said that all that he requires and asks for is a declaration that he is the legitimate son of Jhau. We are not prepared to say that if the plaintiff had come to the civil court for a simple declaration that he was the legitimate son of Jhau, he would not have been entitled to the declaration, provided that he proved his case; but the suit is actually one for possession of an occupancy tenure and is brought against the landlord. For two years after the dismissal of his suit by the Commissioner he did nothing. A suit for possession by a tenant illegally dispossessed has to be brought within six months of the dispossession. Such a suit, if it be now brought by the plaintiff, could not succeed. Therefore to grant a declaration that he is the legitimate son of Jhau would be of no use to him now. It could not be followed up by a suit for possession in the revenue court. In these circumstances, in our opinion, the suit must fail. In so far as it is a suit for possession of the holding, it is not cognizable by the civil court, and in so far as it is a suit for a declaration that he is the legitimate son of Jhau, and as such entitled to the occupancy holding, the Court cannot grant such a declaration as it would be of absolutely no value to the plaintiff. He has misconceived his remedy. He ought, in the first instance, to have sued for possession in the revenue court. We allow the appeal, and, setting aside the decision of the lower appellate court, restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

35 A. 302 (=18 I. C. 904=11 A. L. J. 402).

[302] APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Rafiq.

JALESHAR RAI AND OTHERS (*Defendants*) *v.* ANRUT RAI AND OTHERS (*Plaintiffs*).*

[4th March, 1913.]

Hindu law—Mitakshara—Joint Hindu family—Liability of sons in respect of a mortgage executed by father—Exemption of sons' interests—Subsequent suit against the sons—What plaintiffs are entitled to recover.

In 1892 a decree was passed on appeal for sale on a mortgage of joint family property against the father of the family. In 1896 the sons, who were not made parties to the original suit, obtained a decree exempting their shares in the family property. In 1897 the share of the father was sold and realized less than half the amount of the decree. In 1910 the mortgagees brought a suit against the sons to recover the balance of the mortgage debt after giving credit for the amount realized by sale in execution of the decree of 1892.

Held the suit was not barred, but that the plaintiffs could only recover the unsatisfied portion of the decree of 1892 together with future interest as allowed by that decree. They could not treat the suit as an ordinary mortgage suit, merely giving credit for the amount realized under the decree of 1892, nor could they claim interest at the contractual rate on the unpaid amount of the decree.

* Second Appeal No. 1114 of 1911 from a decree of Ram Auatar Pande, District Judge of Azamgarh, dated the 27th of May, 1911, modifying a decree of Ram Chandra Chaudhri, Subordinate Judge of Azamgarh, dated the 16th of December, 1910.

Lachhman Das v. *Dallu* (1) followed. *Dharam Singh* v. *Angan Lal* (2) and *Ran Singh* v. *Sobha Ram* (3) referred to.

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35 A 302= 18 I. C 904 =11 A. L. J. 402.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Munshi *Gokul Prasad*, for the appellants.

Maulvi *Muhammad Ishaq*, for the respondents.

KNOX and MUHAMMAD RAFIQ, JJ.:—It appears that one Payag Rai, father of the first five defendants appellants and grandfather of the other six, executed a deed of mortgage on the 27th of September, 1883, in favour of Anrut Rai plaintiff respondent No. 1, and the ancestors of the other plaintiffs respondents. The mortgage was given in respect of ancestral property in lieu of Rs. 999, carrying fourteen annas per cent. per mensem interest, and was redeemable on the 27th of June, 1885. In 1891 the mortgagees instituted a suit against Payag Rai only without impleading his sons, to recover, Rs. 1,567-7-4½, the amount due on foot of the mortgage of 1883 and for sale of the mortgaged property in default of payment. One of the objections to the suit was that **[303]** post diem interest at the stipulated rate of fourteen annas per cent. per mensem could not be claimed under the terms of the deed of the 27th of September 1883. The court of first instance disallowed the objection and passed a decree on the 3rd of July, 1891, against Payag Rai for Rs. 1,548-11-6. On appeal the learned District Judge gave effect to the objection of Payag Rai as to interest, holding that the mortgagees were entitled to recover post diem interest by way of damages only, which he allowed at six per cent. per annum. The decree of the first court was modified and the claim of the mortgagees was decreed for Rs. 1,321-7-6 on the 11th of June, 1892.

On the 18th of August, 1896, the first five defendants appellants, the sons of Payag Rai, instituted a suit against the mortgagees for a declaration that the decree obtained by the latter against Payag Rai was not binding on them, as they were not parties to it, and that their share in the mortgaged property was not liable to sale under it. The claim of Payag Rai's sons was decreed on the 11th of November, 1896. On the 20th of February, 1897, the share of Payag Rai only in the mortgaged property was sold in execution in the decree of the 11th of June, 1892. The sale realized Rs. 725.

On the 13th of February, 1910, eighteen years after the decree obtained against Payag Rai and thirteen years after the sale of his share, the plaintiffs respondents brought the suit out of which this appeal has arisen in the court of the Subordinate Judge of Azamgarh against the sons and grandsons of Payag Rai to recover Rs. 2,093-2-6, the balance alleged to be due on the mortgage of 1883.

The suit of the plaintiffs respondents was in form an ordinary mortgage suit and they claimed Rs. 2,093-2-6 by making up the accounts from the date of the original mortgage as in an ordinary suit on a mortgage bond, crediting the amount realized by Payag Rai's share. In making up accounts, interest was charged at the stipulated rate of fourteen annas per cent. per mensem from the date of the mortgage till the date of the institution of the suit, thus ignoring the decree of 1892, under which interest after due date was allowed at six per cent. per annum only.

(1) Weekly Notes, 1900, p. 125.
(2) (1899) I. L. R., 21 All., 301.
(3) (1907) I. L. R. 29 All. 544.

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The claim was resisted on several grounds, two of which need only be mentioned here as they alone have been pressed in the [304] appeal before us. It was urged in defence that as the decree of 1892 against Payag Rai had become barred and incapable of execution on the date of the institution of the present suit, the claim of the plaintiffs respondents was also barred. The principle on which accounts were made up in the plaint was also objected to. The Subordinate Judge disallowed the pleas in defence and decreed the claim for Rs. 2,093-2-6. On appeal the learned District Judge modified the decree of the first court. He held that the plaintiffs respondents should get the unsatisfied amount of the decree of 1892 together with interest at the contractual rate of fourteen annas per cent. per mensem from the 20th of February, 1897, up to date of decree.

The defendants appellants challenge the decree of the lower appellate court on the two grounds already mentioned. They contend that the original mortgage debt contracted by Payag Rai was merged in the decree of 1892. The mortgage of 1883 no more exists. The only outstanding debt against the ancestor of the appellants, for the payment of which they are liable under the Hindu law, is the unsatisfied amount of the decree. And as the decree has become barred and incapable of execution, the debt for the recovery of which the present suit is brought has also become barred and no claim in respect of it can be maintained.

The learned vakil for the appellants relies in support of his argument on the case of *Lachhman Das* v. *Dallu* (1). That case, in almost every respect, resembles the present case. In that case one Data Ram, father of a Mitakshara joint family, executed a mortgage in respect of ancestral property. The mortgagee sued Data Ram alone and obtained a decree against him. In execution of the decree-mortgaged property was sold for the amount of the decree and purchased by the mortgagee. Subsequently the sons of Data Ram sued the mortgagee and obtained a decree for recovery of possession of their share in the mortgaged property on the ground that they were not parties to the suit in which the decree for sale had been passed against their father. Then the mortgagee brought a suit against the sons, framing his suit as an ordinary mortgage suit and making up accounts from the date of the mortgage and giving credit for the money realized at the sale. [305] The sons resisted the claim. They denied their liability for the mortgage debt as also the power of their father to charge their share in the ancestral property. They further disputed the manner in which the accounts had been made up in the plaint. They said, that if they were made liable for the mortgage-debt, they should pay only one-fourth of the money paid at the sale of the mortgaged property, as their share which was released from the operation of the decree against their father was one-fourth only. In disposing of his last objection HENDERSON, J., remarked as follows:—

"I have already drawn attention to the finding that previous to the suit by the respondents (*i.e.* the sons) the mortgaged decree had been fully satisfied, and it is only because the plaintiff (*i e.* the mortgagee) has since been deprived of a one fourth share of the mortgaged property which he himself purchased for Rs. 1,100, that he is now able to say that any portion of the debt has not been discharged. In my opinion that original mortgage no longer exists, and if there it still outstanding a portion of the debt due upon the decree against Data Ram, then the respondents as sons of Data Ram, are liable to that extent for the debt of their father, as they do not allege that the debt was one from which they could claim to be relieved . . . It would

(1) Weekly Notes, 1900, p. 125.

not be unfair to deduct one-fourth from Rs. 1,100, which was paid for the whole property and take the balance Rs. 825 as the amount for which credit should have been given, leaving Rs. 275 still outstanding as a debt for which the respondents are still liable . . . The sum of Rs. 275 became an outstanding debt as from the date of the respondents' decree declaring them entitled to possession of their one-fourth share, and it will carry such interest, if any, as was allowed on the principal amount of the mortgage decree. For this amount the respondents are undoubtedly liable to the plaintiff."

It is on the basis of these observations that the learned vakil for the appellants contends that the mortgage of 1883 merged in the decree of 1892; and as the mortgage of 1883 no more exists and the decree debt due from Pavag Rai has become barred, the claim of the plaintiffs respondents is also barred. We do not think, that the contention of the appellants is sound. The plaintiffs respondents have not framed their suit on the basis of the decree of 1892. They do not seek to charge the appellants' share in the ancestral property on the strength of that decree. And indeed they could not do so in the face of the decree of 1896 in favour of the appellants declaring that the latter were not bound and that their interest in the ancestral property was not affected by the decree obtained against their father. If, according to the appellants, the mortgage [306] of 1883 has merged in the decree of 1892, then the unsatisfied portion of that decree can be recovered only as a simple money debt. If the contention of the appellants is correct, the present suit is not maintainable, that is, the plaintiffs respondents cannot enforce payment of the debt charged on the ancestral property by Pavag Rai against the interests of his sons in that property, though the debt was not tainted with immorality or otherwise objectionable.

The plea of limitation urged on behalf of the appellants can only be given effect to if we hold that the suit of the plaintiffs respondents in its present form is not maintainable. That such a suit is maintainable is amply borne out by the case-law on the subject, vide *Dharam Singh* v. *Angan Lal* (1) and *Ram Singh* v. *Sobha Ram* (2). We, therefore, find that the claim of the plaintiffs respondents is not barred by limitation. The observations of HENDERSON, J. quoted above, upon which great stress is laid by the learned vakil for the appellants, do not apply to the nature of the remedy open to a mortgagee against the Hindu sons, but to the amount recoverable by him after he has obtained a decree against the father only and a portion of that decree remains unpaid. Those observations do, however, certainly support the second contention for the appellants, namely, that the plaintiffs respondents cannot recover more than the unsatisfied portion of the decree of 1892 with future interest allowed on that decree. The plaintiffs respondents cannot make up accounts as in an ordinary mortgage suit, and, giving credit for the money realized at the sale of Payag Rai's share, claim the balance. Nor can they claim to recover interest at the contractual rate on the unpaid amount of the decree, as has been allowed to them by the learned District Judge. We allow the second contention of the appellants. The result is that we modify the decree of the lower appellate court by decreeing the claim of the plaintiffs respondents for Rs. 529-3-0 with interest at six per cent. per annum from the 20th of February, 1897, up to the date of the decree of this Court, that is, Rs. 1,038-5-0. The appellants will pay the sum of the Rs. 1,038-5-0 within six months of the decree of this Court with future interest at six per cent, per annum. In default of payment within six

(1) (1899) I. L. R. 21 All. 301. (2) (1907) I. L. R. 29 All. 544.

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35 A. 302= 18 I. C. 904= 11 A. L. J. 402.

[307] months the amount will be realized by sale of the share of the appellants in the property specified in the mortgage of 1883. Future interest at six per cent, per annum is allowed. Costs in all courts in proportion to success and failure.

Decree modified.

35 A. 307 (=19 I. C. 125=11 A. L. J. 437).

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

JAMNA PRASAD RAUT (*Judgement-debtor*) *v.* RAGHUNATH PRASAD AND OTHERS (*Decree-holders*).*

[11th March, 1913.]

Civil Procedure Code (1908), *section* 60 (*c*)—*Execution of decree—Attachment—Objection that attached property is the house of an agriculturist—Judgment-debtor both zamindar and agriculturist—Burden of proof.*

Where a judgment-debtor whose house was attached in execution of a decree took objection that the house was the house of an agriculturist to which section 60 (*c*) of the Code of Civil Procedure applied and was not susceptible of attachment, and it was found that the judgment-debtor was both an agriculturist and a zamindar:

Held that it lay on the judgment-debtor to prove that the house was strictly of the nature contemplated by the provisions of section 60 (*c*).

IN this case in execution of a simple money decree against one Jamna Prasad Raut a house belonging to him in a certain village was attached. The judgment-debtor took objection that the house was the house of an agriculturist within the meaning of section 60 (*c*) of the Code of Civil Procedure and could not be attached. This objection was overruled on the finding that the house was not in fact occupied by the judgment-debtor (who was both a zamindar and an agriculturist) as an agriculturist. The judgment-detor appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* and Munshi *Haribans Sahai*, for the appellant.

Munshi *Mangal Prasad Bhargava* (with him Babu *Jogindro Nath Chaudhri*), for the respondent.

TUDBALL and MUHAMMAD RAFIQ JJ:—The appellant is a judgment-debtor whose house in a certain village has been attached in the execution of a simple money decree. Two portions of the same house have already been attached and sold, and the remainder, which is described as a six anna share, has now been attached. The judgment-debtor came forward and objected that he was an agriculturist and therefore his house was exempt from attachment [308] and sale. The court below has decided that the house is not occupied by him as an agriculturist and is therefore not exempt from sale. He has come here on appeal. The question is whether or not he has produced evidence to show that he is an agriculturist and occupied the house as such. The appellant was formerly the zamindar of the village, but his interest as such has been sold and he now holds his *sir* land as an exproprietary holding. He lives in another village and holds zamindari in several villages. He has produced two witnesses who state that his cattle and implements are kept in the house in dispute. The appellant being both a zamindar and a cultivator of land, the question

* First Appeal No. 301 of 1912, from a decree of Harbandhan Lal, First Additional Subordinate Judge of Gorakhphur, dated the 1st of June, 1912.

arises as to what is his main source of income and whether or not he is an agriculturist within the strict sense of the term and occupies the house as such. The burden of proof lay on him, and it was for him to show to the court that his main source of income was cultivation and not zamindari and that he was in the strict sense of the term an agriculturist. He produced two witnesses, and in our opinion their evidence is not sufficient to prove that his main source of income is agriculture and that he is an agriculturist within the strict sense of the term. As a matter of fact in the past he held considerable zamindari, though he has lost some of it by reason of decrees obtained against him. In this case it has not been satisfactorily proved that he is an agriculturist within the strict meaning of the term. The appeal fails and is dismissed with costs.

Appeal dismissed.

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35 A. 307=19 I. C. 125=11 A. L. J. 487.

35 A. 308 (=11 A. L. J. 349=20 I. C. 490).

APPELLATE CIVIL.

Before Mr. Jutice Sir Harry Griffin and Mr. Justice Chamier.

RAGHUNANDAN PRASAD (*Plaintiff*) *v.* SHEO PRASAD (*Defendant.*)*
[11th March, 1913.]

Act No. XV of 1883 (*Noth-Western Provinces and Oudh Municipalities Act*), *section* 10—*Act* (*Local*) *No. I of* 1900 (*United Provinces Municipalities Act*), *section* 187—*Municipal Board—Election—Suit to set aside election-Jurisdiction of Civil Court—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule* 1, *article* 120.

Held that an order of the Government directing that a particular municipal election held in the year 1911 should be conducted according to certain rules passed in 1884, and not according to the rules passed *in pari materia* in 1910, which superseded those of 1884, was *ultra vires*, and that, inasmuch as the [309] rules of 1884 did not apply and the election was not held under the rules of 1910, a suit would lie in a civil court to contest the election, irrespective of anything contained in either set of rules, the period of limitation applicable to which was that prescribed by article 120 of the first schedule to the Indian Limitation Act, 1908. *Gur Charan Das* v. *Har Sarup* (1) referred to.

[Ref. 35 All. 450.]

In this case the appellant and the respondent were rival candidates for a seat on the municipal board of Bareilly at an election held on the 18th of March, 1911. The respondent, having been declared duly elected, the appellant, on the 24th of March, preferred a petition to the District Magistrate. On the 10th of May, that petition was rejected, and on the following day the appellant filed his present suit in the court of the Subordinate Judge of Bareilly claiming a declaration that he had been elected by a majority of the lawful votes given, and in the alternative a declaration that the election was void as having been held under rules which had been already cancelled. The suit was dismissed in appeal by the District Judge of Bareilly, on the ground that the election had been held under certain rules framed by Government in 1884, one of which barred the jurisdiction of the civil court, and that the appellant was not empowered to maintain the suit either under the rules for municipal elections framed in 1910 or under the Specific Relief Act. The plaintiff appealed to the High Court.

* Second Appeal No. 1012 of 1912 from a decree H. N. Wright, District Judge of Bareilly, dated the 13th of June, 1912, confirming a decree of Baijnath Das, Officiating Subordinate Judge of Bareilly, dated the 12th of July, 1911.

(1) (1912) I. L. R. 34 All. 391.

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35 A. 308=11 A. L. J. 349 =20 I. C. 490.

Dr. *Satish Chandra Banerji*, for the appellant.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondent.

GRIFFIN and CHAMIER JJ.—The appellant and the respondent were rival candidates for a seat on the municipal board of Bareilly at an election held on the 18th of March, 1911. The respondent having been declared to have been duly elected, the appellant on the 24th of March, contested the validity of the election by a petition presented to the District Magistrate. On the 10th of May that petition was rejected, and on the following day the appellant brought this suit in the court of the Subordinate Judge of Bareilly claiming a declaration that he had been elected by a majority of the lawful votes given and, in the alternative, a declaration that the election was void having been held under rules which had been cancelled. This Court has already held that the suit is cognizable by a civil court, but the suit has been dismissed by an appellate order of the [310] District Judge on the ground that the election was held under rules made in 1884, one of which barred jurisdiction of the civil court, and the appellant was not entitled to maintain this suit under some new rules made in July, 1910, or under section 9 of the Specific Relief Act. The suit is obviously one of a civil nature, and it is unnecessary to cite authority for the proposition that it is maintainable in a civil court, unless it is barred by some Act of the Legislature or by some rule having the force of law.

Rules regarding elections of this kind in Bareilly were made in 1884 under section 10 of Act XV of 1883. Rule No. 45 provided that the validity of an election might be questioned by petition to the District Magistrate presented within fifteen days of the election. Those rules were superseded by rules made in July, 1910, under section 187 of the Municipalities Act, 1900, one of which expressly recognized the right of recourse to a 'competent court' to challenge the election. This Court has held [see *Gur Charan Das* v. *Har Sarup* (1)] that the competent court is the civil court. It is quite clear that the election now in question ought to have been held under the rules of July, 1910. The Local Government seems to have directed that this election should be held under the rules of 1884. That order does not appear to be a rule made under the Act, but appears to be merely an executive instruction to the Magistrate. The only rules of which we can take notice are the rules made under the Act. We must, therefore, hold that the election was contrary to law.

We have grave doubts whether the Government was competent to bar the jurisdiction of the civil court by means of a rule made under section 10 of the Act of 1883. The respondent relies upon clause (*g*) of section 9 read with section 10 of the Act, but that clause refers only to '*the system of representation and of election*'. It is, however, unnecessary to decide this question, for the rules made under the Act of 1883 had ceased to have any effect before the election now in question was held. It is admitted that the election was not held under the rules of July, 1910, and cannot be justified by those rules. For the above reasons we hold that at the date of the election there was no provision having the force of law which barred the maintenance of [311] the present suit. The suit was, therefore, maintainable. On the merits the appellant is entitled to a declaration that the election of the respondent was void having been held contrary to law.

The only other question is whether the suit was brought within time. The period of limitation prescribed by the rules of 1884 may be

(1) (1912) I. L. R. 34 All. 391.

disregarded, both because it applies only to a petition to be] presented to the District Magistrate and because those rules had ceased to have any effect when the election was held. If the rules of 1884 are disregarded, the limitation applicable to the present suit is that prescribed by article 120 of schedule 1 to the Limitation Act, 1908, and the suit was brought within time. We express no opinion upon the question of the validity of the rule made under section 187 of the Municipalities Act, 1900, which prescribes a period of limitation for a suit to contest an election held under the rules of July, 1910.

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We allow this appeal, set aside the decree of the court below, and give the appellant a declaration that the election of the respondent was invalid. The respondent must pay the appellant's costs in all three courts.

Appeal allowed.

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35 A. 311 (=11 A. L. J. 317=19 I. C. 138.)

FULL BENCH.

Before Mr. Justice Sir George Knox, Mr. Justice Tudball and Mr Justice Chamier.

DURGA KUNWAR (*Plaintiff*) *v.* MATU MAL AND OTHERS (*Defendants*).*

[12th March, 1913.]

Hindu law—Hindu widow—Powers of alienation possessed by a Hindu widow in respect of property of her husband—Transfer of debt secured by a mortgage.

A Hindu widow in possession as such of property which had been the property of her husband in his life-time can always alienate her life interest in such property and a transfer by her of the corpus of the property without legal necessity and not for a pious purpose is not void but only voidable at the instance of the reversioners.

A Hindu widow, without legal necessity transferred a mortgage debt and the security therefor, which had been the property of her late husband, to D, who thereafter sued to recover the debt by sale of the mortgaged property. *Held* that the transferee acquired all the rights which the widow had and could exercise during her life-time in respect of the mortgage, one of these being to recover the debt. *Bijoy Gopal Mukerji* v. *Krishna Muhishi Debi* (1) referred to.

[Ref. 36 All. 21 ; 60 I. C. 872=1919 Pat. 245=4 Pat. L. J. 548.]

THIS was a suit for sale on a mortgage, dated the 12th of June, 1879, made by Tara Singh and Bahadur Singh in favour of [312] one Murli Dhar. The mortgagee died shortly after, leaving a son, Rup Ram, who died leaving Musammat Parbati, his mother, and Musammat Ganga Kunwar, his widow, surviving him. The two widows transferred the mortgagee right under the mortgage of the 12th of June, 1879, to Musammat Durga Kunwar, the plaintiff appellant in the present case. The plaintiff brought this suit for sale on foot of that mortgage. The defendants 1—6 were prior mortgagees of the same property under a mortgage of 1872, and they had purchased the property in 1890 in execution of a decree on their mortgage, to which decree neither the plaintiff nor her tranferors or their predecessors in interest were parties. The defendants, 2nd party, were the mortgagors and their representatives, and the defendants, 3rd party, were the two ladies Ganga Kunwar and Parbati, the transferors. The plaintiff offered to redeem the prior mortgages, but in the alternative

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*Appeal No. 140 of 1911 under section 10 of the Letters Patent.

(1) (1907) I. L. R. 34 Cal. 329.

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prayed that the property might be sold subject to those mortgages. The defendants, 3rd party, admitted the claim of the plaintiff, and defendants, 2nd party, did not appear. The defendants, 1st party, contested the claim on these grounds:—(1) The transferors being widows of members of a joint Hindu family, including others than their husbands, could not transfer the debt and the plaintiff did not get the widow's estate in the mortgage. (2) The sale to the plaintiff was without legal necessity and therefore void, and as a corollary from this, (3) that it was for the purpose of defeating the rights of the reversioners. The widows of Murli Dhar and Rup Ram were alive at the date of suit. The reversioners were no parties to the suit, but another suit was brought by them alleging themselves to be bandhus of Rup Ram and asking for a declaration that the transfer by Ganga Kunwar to plaintiff was void against them. The plaintiff defended that suit on the ground that the widows were competent to transfer. The Subordinate Judge found that the family was not joint, and that Ganga Kunwar had a widow's estate in the property left by her husband, including the mortgage, but that there was no legal necessity for the transfer. He dismissed the suit of the plaintiff, Durga Kunwar, and decreed that of the reversioners against her on these findings and gave them a decree that the plaintiff had acquired no rights whatever against them.

[313] On appeal to the High Court the case came up before RICHARDS, C.J. and BANERJI, J., who delivered the following judgments:—

RICHARDS, C.J.—This suit was brought to recover a sum of Rs. 70,000, principal and interest due under a mortgage, dated the 12th of June, 1879. The mortgage was made in favour of Murli Dhar by Tara Singh and Bahadur Singh. The principal was Rs. 4,000. The rate of interest was Re. 1-5-0 per mensem, compound interest. The bond in suit is alleged to have been sold to the plaintiff on the 21st of May, 1909, in consideration of the sum of Rs. 7,500 by Musammat Parbati and Musammat Ganga Kunwar. Musammat Parbati was the wife of Murli Dhar, and Musammat Ganga Kunwar was the wife of Rup Ram, the son of Murli Dhar. Both the father and the son were dead prior to the execution of the sale-deed. It appears from the plaint itself that the property which it is now sought to bring to sale had already been sold under a mortgage decree on foot of a prior mortgage dated the 19th of February, 1872. The decree had been obtained as far back as the year 1890. The decree-holders had purchased the property themselves, and they have been in actual possession since some time between the years 1892 and 1895. The respondents are the representatives of these prior mortgagees. The plaintiff claims that when the suit was brought on foot of the prior mortgage neither Murli Dhar nor Rup Ram were made defendants, and that accordingly she, as assignee of the bond of the 12th of June, 1879, is now entitled to bring the property to sale on terms of paying to the respondents the amount, if any, due upon the mortgage of the 19th of February, 1872. She claims that over a lakh is due on foot of the mortgage of the 12th of June, 1879, but she relinquishes the sum of Rs. 76,938-14-0 and sues to realize the balance, that is to say, the sum of Rs. 70,000.

The suit out of which the connected First Appeal No. 174 of 1910 arises was tried in the lower court at one and the same time. It was a suit in which the plaintiffs in the suit claimed as reversioners a declaration that the sale deed of the 21st of May, 1909, was void as against them. A

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number of issues were tried in this last mentioned suit. The learned Subordinate Judge held that the bond in suit became vested in Rup Ram after the death of Murli Dhar, and that the plaintiffs Sri Gopal, Hoti Lal and Piari [314] Lal where the reversioners. He found further that the sale of the 21st of May, 1909, was made without legal necessity and with a view to deprive the reversioners of their right. The court accordingly gave a decree in favour of the plaintiffs 2 to 4 declaring that the sale was void and ineffectual against them.

The learned Subordinate Judge also dismissed the plaintiff's claim in the present suit holding that, inasmuch as the bond was sold without legal necessity and for the purpose of defeating the rights of the reversioners, the plaintiff did not acquire by virtue of the sale any title to maintain the suit.

The plaintiff, Musammat Durga Kunwar, has appealed against the decree dismissing her suit and also against the decree in the connected appeal declaring that the sale was void against the reversioners.

It is difficult to understand why the owners of the bond in suit slept on their rights so long. There can, I think, be no doubt whatever that the purchase of the bond by the plaintiff was a speculative purchase. It is impossible to know exactly how much of the consideration for the sale actually passed, or what was the arrangement between the vendors and the vendee. I think, however, that we are bound to assume that the plaintiff became the assignee of the bond with such rights and title as Musammat Parbati and Musammat Ganga Kunwar could under the circumstances give her. She is entitled to get a decree if she can make good her claim. Bearing in mind the facts of the case and the date of the institution of the connected suit, I think there can be little doubt that the defendants in the present suit put forward the reversioners of Rup Ram to challenge the sale to Musammat Durga Kunwar, and that in all probability there was some arrangement between them. We can, however, hardly blame the defendants for using any weapon they can to retain the property, in the absolute possession of which they have so long been. It has not been attempted to show that the finding of the court below that the sale by Musammat Parbati and Musammat Ganga Kunwar was made without legal necessity is wrong. In fact the argument did not challenge the decision in the connected appeal, save to contend that the decree actually passed went a little too far, in that it declared that Musammat Durga Kunwar acquired no [315] right to the aforesaid bond. It was urged that she had acquired some title. She had acquired title as against her vendors. This, it seems to me under the circumstances of the present case, is purely a matter of form.

The argument put forward on behalf of the plaintiff appellant is as follows:—The widow represented the estate. She undoubtedly might have sued upon the bond and recovered the amount due thereon without being liable to account to any one. Therefore the plaintiff as her assignee has the same right that she had and she can sue upon the bond. Furthermore the sale by a Hindu widow is voidable, not void, and that therefore it cannot be questioned by the defendants in this suit. These where the points argued. It seems to me that it by no means follows that because a Hindu widow can sue on foot of a bond and give a good discharge to the mortgagor that her assignee has the same right. A Hindu widow can sue upon a bond and collect the debts due to the estate because she is an heir and represents the estate, in other words, by virtue of the fact that

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she is a Hindu widow and in possession as such. Nothing I think can be more clearly established than the proposition that a Hindu widow cannot alienate the property except for certain special purposes or legal necessity: See *The Collector of Masulipatam* v. *Cavaly Venkata Narrainapah* (1).

It has no doubt been held that the reversioners cannot question the sale during the life of the widow save to the extent of getting a declaration that the sale is not to be binding on them, and it is argued that the sale is voidable only and not void; and the case *Bejoy Gopal Mukerji* v. *Krishna Mahishi Debi* (2) is relied upon. That was a case in which the reversioners sued to recover possession of certain property in respect of which a Hindu widow could alienate subject to certain conditions being complied with, and that therefore the alienation was not absolutely void but was voidable at the election of the reversionary heir, who might, if he thought fit, affirm it or treat it as a nullity. The Court was there dealing with the partial alienation made by the widow, *i.e.*, a lease which her successors might or might not adopt if they found it was made without authority. It seems to me, however, that the question whether or not an alienation by a **[316]** Hindu widow is void or voidable is immaterial in the present appeal. It has not been suggested that there is any distinction as to the class of property which a Hindu widow is restrained from alienating. She has no more right to assign that part of the estate which consists of mortgagee rights than she has to assign the immovable property strictly so called. In either case she or her assignee must show that circumstances existed which made the alienation a valid alienation.

In the present case the sale by the widow has been successfully challenged unless we set aside the decree in the connected case. It is said, however, that this is a question beteen the reversioners on the one side and the widow on the other, and that third parties are not entitled to raise the question of the validity or invalidity of the sale. I do not think that this proposition is sound. Suppose that a Hindu widow alienated mortgagee rights in a case in which it had to be admitted that she was not justified in making the alienation according to the Hindu Law. Suppose that her assignee sued on the bond and recovered the full amount, from the mortgagor. Suppose futher that afterwards the reversioners obtained a declaration that the sale was void as against them. Would not the mortgagor in such a case in a suit by the reversioners after the death of the widow be obliged to pay the mortgage debt a second time, save perhaps to the extent of the interest which had accrued during the life-time of the widow? Could not the reversioners say :—" The widow is now dead and as against us the sale is a complete nullity? " It seems to me that it could be argued with irresistible force that the assignee of the widow could not give a good discharge for the mortgage debt until after it was established that the sale was a sale which a Hindu widow was entitled to make for legal necessity or for a pious purpose. It seems to me that where it is or may be necessary for the protection of a third party to question the validity of an alienation by a Hindu widow, such third party is undoubtedly entitled to do so. See *Hazari* v. *Lallu* (3).

I do not think that an unauthorized sale by a Hindu widow can clothe her assignee with the Hindu widow's right to represent the estate and collect the debts. It is possible that under certain **[317]** circumstances it might be shown that the widow was driven to sell the mortgagee rights,

(1) (1860) 8 Moo. I. A. 529 (551).
(2) (1907) I. L. R., 34 Cal., 329.
(3) (1904) 7 O. C. 181.

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as, for example, if she had no means to institute a suit to recover the amount. In such a case, however, I think the transaction would be justified on the ground of necessity or perhaps on the ground that under the special circumstances of the case it was the only possible way of realizing the debt due to the estate. In such a case I think the Court to be consistent, should hold that the whole estate had passed to the transferee and that the reversioners were absolutely bound by the transfer made by the widow. I would dismiss the appeal.

BANERJI, J.—The question in this appeal which arises out of a suit for sale upon a mortgage, is whether an assignee of the mortgage from a Hindu widow, on whom the mortgagee rights devolved by right of inheritance, is entitled to maintain the suit, if the assignment was not made for legal necessity. The facts are these:—Tara Singh and Bahadur Singh executed the mortgage in question in 1879 in favour of Murli Dhar. Upon the death of Murli Dhar the mortgage devolved on his son Rup Ram, whose widow Musammat Ganga, jointly with Mussammat Parbati, the widow of Murli Dhar, transferred the mortgage to the plaintiff on the 21st of May, 1909. As Musammat Parbati had no right to the mortgage, the transfer by her is of no consequence and the transfer must be deemed to be a transfer by Musammat Ganga, who alone was entitled to the mortgagee rights. It has been found by the court below that the transfer was without legal necessity, and this finding has not been challenged before us. It is by virtue of this transfer that the plaintiff is seeking to enforce the mortgage.

The defendants to the suit are the representatives of the mortgagors and certain purchasers of the mortgaged property in execution of a decree upon an earlier mortgage of 1872. The suit was contested by these transferees alone and they contended that the plaintiff had no right to sue. Murli Dhar, the person in whose favour the mortgage in suit was executed, was not made a party to the suit under the earlier mortgage and therefore he or his representative in interest has still the right as subsequent mortgagee to redeem that mortgage and then to sell under the mortgage in his favour. This is what the plaintiff seeks to do in this case.

[318] The court below has dismissed the suit, apparently under the impression that the transfer of the mortgage of 1876 made by Musammat Ganga being without legal necessity is absolutely void and that therefore the plaintiff is not entitled to maintain the suit. This view is clearly erroneous. An alienation by a Hindu widow without justifying necessity is not absolutely void, but it is voidable only. In any case it will hold good during the life-time of the widow. This has been so repeatedly held by their Lordships of the Privy Council that it is unnecessary to cite authorities. I may however refer to the recent case of *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1).

The mortgage which is sought to be enforced in this suit secures a principal sum of Rs. 4,000. The plaintiff has purchased it for Rs. 7,500. It has been found in the connected suit brought by the reversioners that she paid full consideration and that the sale is a real transaction. On this point there is no controversy in this appeal. The amount claimed by the plaintiff is Rs. 70,000. Apparently she is a speculator, but, that circumstance should not induce us to overlook the real question involved in the case. If she has a legal right to maintain the suit that right must be enforced. The decision of the case, in my opinion, depends on the nature

(1) (1907) I. L. R. 34 Cal. 329.

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of the estate held by a Hindu widow and her powers of alienation in respect of it.

The nature of a Hindu widow's estate was thus stated by their Lordships of the Privy Council in *Moniram Kolita* v. *Keri Kolitani* (1):—"According to the Hindu law a widow who succeeds to the estate of her husband in default of male issue . . . does not take a mere life estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is 'an anomalous one". Mr. Mayne describes it in the following terms:—" Her (the widow's) absolute right to the fullest benefit of her life interest appears long to have been recognized . . . A woman is in no sense a trustee for those who may come after her. She is not bound to save the income. She is not bound to invest the principal. If she chooses to invest it, she is not bound to prefer one form of investment to another form as being more likely to [319] protect the interests of the reversioner. She is forbidden to commit waste or endanger the property in her possession, but short of that, she may spend the income and manage the principal as she thinks proper" (7th Edition, p. 840). She has no power absolutely to alienate the estate or a part of it, whether movable or immovable, except for certain purposes, but if she alienates it the transfer is, in every case, valid during her life-time and will have full effect and operation till her death. The only distinction between an alienation for a legal necessity and any other alienation is that the former endures after her death and is binding on the reversioners, whereas in the case of the latter it has full force and effect till her death, but may be avoided by the reversionary heirs of her husband after her death. From the operation of the above rule no class of property is exempt and it applies as much to mortgagee rights as to any other rights. Therefore when a Hindu widow sells the mortgagee rights which she inherited from her husband, but the sale is without legal necessity, the transferee, in my opinion, acquires all the rights which the widow had and could exercise during her life-time in respect of the mortgage. Such a transfer is not absolutely void, and I do not know of any authority which declares it to be so. There can be no doubt that the widow herself could bring a suit to enforce the mortgage. It is equally clear that she could give a full discharge to the mortgagor. If she received the mortgage money from the mortgagor and gave him a discharge, it would not lie in the reversioner to claim that money over again from the mortgagor. Her powers are not, as pointed out by Mr. Mayne, less than those of the manager of a family property. That a manager can give a complete discharge to the mortgagor is beyond controversy and doubt. Therefore, a Hindu widow also may do so. If she transfers her rights under the mortgage the transferee is, in my opinion, entitled to give a discharge to the mortgagor. If the mortgagor has obtained a discharge from the transferee he would not, any more than in the case of a discharge by the widow, be liable to the reversioner for the mortgage debt. The only right of the reversioner will be, as it seems to me, to prevent the widow, in the case of the widow, from wasting the corpus of the mortgagee-estate, *i.e.*, the amount of the mortgage debt inherited by her, [320] and in the case of the transferee, to claim the amount of the mortgage due at the date of the death of the last male owner of the mortgagee rights. This point, however, I am not called upon to decide in this case, as the reversioners are not

(1) (1880) I. L. R. 5 Cal 776

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parties to it and the contingency to which I have referred has not yet arisen. But I fail to see that there is any bar to the right of the transferee from the widow to enforce the mortgage. As the widow was entitled to do so, her transferee is, in my opinion, equally entitled. The transferees of the mortgaged property are in this respect in no better position than the mortgagor. Any other view is likely to cause hardship and in some cases would result in injury to the rights of the reversioners. Suppose the widow has not the means to defray the costs of bringing a suit to enforce the mortgage. If she cannot transfer it so as to give the transferee a right to sue upon the mortgage a claim for sale may become time-barred and the mortgagee rights may become extinct. This will be to the prejudice of the reversioners. Again, if the widow has made an assignment of the mortgage she has no longer any right to sue on it. And if we hold that the transferee cannot sue, no suit can be brought upon the mortgage. The reversioner has no right to bring such a suit in the widow's life-time. The result will be that no one would be able to enforce the mortgage, and if the widow lives for more than twelve years after the mortgage has become due the mortgage will become incapable of enforcement. For these reasons I am of opinion that the plaintiff is entitled to maintain the suit, and I am unable to agree with the decision of the court below on this point.

The plaintiff is, of course, not entitled to sell the mortgaged property unless she redeems the prior mortgage under which the defendants, first party, purchased it, or she may do so subject to the prior mortgage. There are other questions involved in the suit which the court below has not decided. I would, therefore, allow the appeal and remand the case to that court for trial on the merits.

The decree of the Court accordingly followed the judgment of the Chief Justice and from that judgment the plaintiff appealed under section 10 of the Letters Patent.

[321] The Hon'ble Pandit *Moti Lal Nehru* (Munshi *Gulzari Lal* with him), for the appellant:—

A Hindu widow could give a valid discharge to the creditors of her husband. The appellant stood in the shoes of the widow and could represent her. In dismissing her claim the court was protecting not the reversioner, but the debtors, because any future suit on the mortgage would be time-barred now. No question of legal necessity arose in the case, because for her life a widow could transfer all her rights. Whatever may be the nature of the property the rights of the widows were the same. The rights of reversioners could only arise when the mortgage money came into the hands of the widows or their transferees. There was no question about it yet. The plaintiff might never redeem, or the sum payable to the prior mortgagees may work out to a figure which the plaintiff might not be able to pay. Again, the reversioners were only entitled to the sum due on the mortgage on the death of Rup Ram. Whatever interest has accrued since then it is the property of the widow and through her of her transferee. A reversioner had no vested interests and was not entitled to a personal decree. The widow was not a trustee for the reversioners, nor has a case of waste been made out; *Hurrydoss Dutt* v. *Sreemutty Uppoornath Dossee* (1) Golapchander Shastri's Hindu Law, p. 426, summed up the law as

(1) (1856) 6 Moo. I. A. 433.

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to the estate enjoyed by a Hindu widow; *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1) *Modhu Sudan Singh* v. *Rooke* (2).

Munshi *Govind Prasad* (Nawab *Muhammad Abdul Majid* with him), of the respondents:—

There was no dispute so far as the rights of a Hindu widow were concerned, but certain restrictions had been placed on those rights. She could sue on a mortgage and the reversioners could restrain her from waste, but here she had transferred her rights without any necessity. The question would be as to the position of the assignee. If the plaintiff got a decree and the property was sold, either the decree-holder or a third party would purchase the property. Before the sale the prior mortgage would have to be redeemed. If the purchase was made by a third party, the question [322] would remain—could the reversioners proceed against the purchaser? The widow could not transfer the corpus. Again what exactly would be the corpus? Interest had gone on accumulating and was an accretion to the estate; Mayne, p. 628, 6th edition. Could a person holding under an assignment from another with a limited interest bring a suit upon the mortgage? It would mean a transfer of the corpus. The sale would not bind the reversioners.

The Hon'ble Pandit *Moti Lal Nehru* was not heard in reply.

KNOX, TUDBALL and CHAMIER JJ.:—The facts of this case as found by the court below and which are not now contested before us are briefly as follows:—

Rup Ram, a separated Hindu, died leaving a widow, Musammat Ganga Kunwar, and a mother, Musammat Parbati. One part of his estate was a debt secured by a simple mortgage over certain property. The widow and mother without legal necessity transferred this by deed of sale in favour of the present plaintiff appellant, who has brought this suit for sale impleading as defendants,

(1) the mortgagors or their representatives,

(2) the transferors of the bond, and

(3) certain prior mortgagees who had sued upon their bond without impleading the puisne mortgagee and having obtained a decree for sale had in execution thereof purchased the property and obtained possession.

The mortgagors did not defend the suit. The vendors admitted the claim. The prior mortgagees contested it, and the one defence with which we are concerned in this appeal was that the plaintiff had no right to sue, as the sale was without legal necessity and the widow could not transfer her right to sue.

During the pendency of this suit certain reversioners brought another suit against the two ladies and their vendee asking for a declaration that the sale in favour of the latter was null and void as against them, and that under it the vendee acquired no right to the bond. They claimed that their maternal grand-father Puran Mal and Rup Ram had been joint, and that on the death of the latter Puran Mal became the sole owner of the joint family property, and on his death their mother, whom they also impleaded, became entitled to a life interest.

[323] The two suits were heard together, and the court held that Rup Ram was separate from Puran Mal and was the last male owner, but that the plaintiffs in the second suit were the next reversioners as being bandhus; that the transfer was without legal necessity, and that the transferee acquired no right under the sale-deed. It accordingly

(1) (1907) I. L. R. 34 Cal. 329 (338). (2) (1898) I. L. R. 25 Cal. 1.

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decreed the suit of the reversioners *in toto* and dismissed that of the transferee Musammat Durga.

The latter appealed in both suits, and the appeals coming before a Bench of this Court, the Judges who constituted that Bench, differed on the question of law which arises for decision in the case. The learned Chief Justice agreed with the court below. Mr. Justice Banerji held that the widow at least transferred to the appellant her interest as a Hindu widow, and she being still alive the transferee was entitled to sue and recover the debt, and that the reversioners were only entitled to a declaration in their suit that the transfer, as against them, was null and void.

The present appeal has been preferred under the Letters Patent.

In our view the decision of Mr. Justice Banerji is correct.

In the circumstances the suit of the reversioners is, from the point of view of their interests, suicidal. If the assignee cannot sue to recover the debt, the bar of limitation will prevent both the widow and the reversioners, who succeed her, from recovering the money. Their suit has, therefore, been brought really in the interests of the prior mortgagees.

It is not denied that the estate of a Hindu widow is more than a mere life interest. She is an owner whose powers of alienation are restricted. See *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1). In certain circumstances she can represent the estate and her acts will bind the reversioners.

She is entitled to enjoy and spend the whole income of the estate, though she can be restrained from wasting and destroying the corpus, and there is nothing in law to prevent her from transferring her so-called life interest. A transfer by her of the corpus of the estate without legal necessity and not for a pious purpose, is not void, but is voidable by the reversioners and may be so declared at their instance. It cannot be denied that if she [324] transferred immoveable property in this manner her transferee would be entitled to hold and possess it during her life-time and to recover possession of it by suit as against a third party who was wrongfully in possesion; *i.e.*, if the mortgage in the present instance had been usufructuary, her transferee would clearly have been entitled to sue for possession, provided there was no bar of limitation.

In the present case the widow is entitled to spend all income accruing on the debt after the death of Rup Ram and her transferee is "*at least*" entitled to recover this amount and to appropriate it to her own use. It is impossible to hold, therefore, that the latter has no power to sue. It may be that if the reversioners intervened in the suit of the assignee, the court might pass such a decree as would protect their interests and the corpus of the estate, but in the present case, though they are fully aware of the suit, they have not intervened to protect their own interests; on the contrary, they have preferred the suicidal course of attempting to destroy the corpus by preventing the recovery of the debt.

We agree with BANERJI, J., that the transferee acquired all the rights which the widow had, and could exercise, during her life-time in respect of the mortgage, one of those being the right to recover the debt. It is plead ed that if the mortgagors pay the debt they will be open to another suit by the reversioners on the death of the widow and may have to pay a se°ond time. The widow is a party to the suit and the estate is duly represented, and we do not think that there is any force in the argument.

(1) (1907) I. L. R. 34 Cal. 329.

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It is urged that the sale for Rs. 7,500 in the present case of a debt amounting to over one lakh is, on the face of it, a wasting of the corpus by the widow. We can express no opinion on this at this stage, nor are we called upon to do so. The value of the property mortgaged and the amount of the prior burden are two other material factors which would have to be considered in this connection. But the point does not arise for our decision.

We, therefore, allow this appeal and set aside the decrees both of this Court and of the Additional Subordinate Judge, and remand the suit to the latter court for decision on the merits. The appellant will have her costs in this Court in any event.

Appeal allowed.

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35 A. 325.

[325] APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

PHAGGU MAL (*Defendant*) *v.* BABU LAL (*Plaintiff*).*

[13th March, 1913.]

Contract—Sale—Goods sent to purchaser not in accordance with terms of contract—Purchaser not bound to return goods to vendor.

When goods sent to a purchaser, professedly in execution of a contract of sale are not of the kind which the vendor had agreed to supply, it is not the duty of the purchaser to see that such goods are returned to the vendor; it is enough if he gives notice to the vendor that the goods are lying at the place to which they were sent at the vendor's risk. *Grimoldby* v. *Wells* (1) followed.

IN this case the plaintiff agreed to supply the defendant with stone for building purposes to be delivered at Karnal in the Punjab. The stone was sent to Karnal, but on examination it was found to be wholly unsuitable to the purposes for which it had been supplied. The defendant then brought a suit against the plaintiff in the Punjab and obtained a decree for a refund of the price of the stone and for damages. The plaintiff subsequently sued the defendant for the return of the stone. The court of first instance dismissed the suit, but this decree was reversed on appeal and a decree given in favour of the plaintiff. The defendant thereupon appealed to the High Court.

Babu *Sital Prasad Ghosh*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent.

GRIFFIN and CHAMIER, JJ.—The plaintiff in this case, who is respondent here, agreed to supply the defendant with stone for building purposes. The stone was delivered at Karnal, but on examination it was found to be wholly unsuitable to the purposes for which it was supplied. The defendant then brought a suit against the plaintiff in the Punjab and obtained a decree for a refund of the price of the stone and for damages. The plaintiff has now brought this suit asserting that it was the duty of the defendant to return the stone to him. The defendant's plea is that he is not bound to put himself to the expense and trouble of returning the stone, and that it was the business of the plaintiff to take the stone [326] away if he was

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*Second Appeal No. 716 of 1912, from a decree of Girraj Kishore Dutt, Judge, Small Cause Court, exercising the powers of a Subordinate Judge, of Agra, dated the 14th of May, 1912, reversing a decree of Raja Ram, Munsif of Agra, dated the 26th of October, 1911.

(1) (1873) L. R. 10 C. P. 391.

so minded. The case appears to be covered by a decision of the Court of Common Pleas in England in the case of *Grimoldby* v. *Wells* (1). We hold that it was not the duty of the defendant to return the stone, and that the plaintiff has no cause of action against him. It was sufficient for the defendant to notify to the plaintiff that the stone was lying at Karnal at his risk. That, and more than that, has been done by the defendant in the present case. The decision of the lower appellate court cannot be supported. We allow this appeal, set aside the decree of the lower appellate court and dismiss the plaintiff's suit with costs in all courts.

Appeal allowed.

1913
MAR 13.

APPELLATE CIVIL.

35 A. 325.

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35 A. 326 (=11 A. L. J. 382=19 I. C. 814).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice and Mr. Justice Tudball.

MEGHU RAI (*Defendant*) *v.* RAM KHELAWAN RAI AND ANOTHER (*Plaintiffs*) AND MATA KUNWAR AND OTHERS (*Defendants*).*

[17th March, 1913.]

Hindu law—Hindu widow—Suit for declaration that mortgage by widow did not affect plaintiffs' reversionary rights—Plaintiffs not nearest reversioners.

Where plaintiffs sued as next reversioners for a declaration that a mortgage executed by a Hindu widow was not binding on them, and it was found that as a matter of fact even the nearest of the plaintiffs could only succeed to the estate if four males and one female died in his life-time; it was *held* that the plaintiffs ought not to have a decree.

[Fol. 40 All. 518=46 I. C. 186.]

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case sufficiently appear from the judgment under appeal, which was as follows: —

"This was a suit brought by the reversioners to the estate of Ram Saran Rai, to set aside the mortgage made by his widow, Musammat Mata Kunwar, in favour of the second defendant. It has been found by the lower appellate court that Ram Saran Rai left a son, who predeceased him; that the defendant Musammat Taluqa Kunwar, who has some minor children, is his daughter and that the defendant Mohender Rai is Ram Saran Rai's grandson by another daughter who has died. The plaintiffs are admittedly the reversioners who would come in after the sons of Ram Saran Rai's daughters. It has been found that the mortgage in question was without justifying necessity The court of first instance decreed the claim, but the lower appellate court has dismissed it on the ground that between the plaintiff and Musammat Mata Kunwar, who made the alienation, there intervene Taluqa Kunwar, her sons, and the defendant Mohendar Rai. It was alleged in the plaint that the persons who were nearer reversioners than the plaintiffs were in collusion with Musammat Mata Kunwar and the transferee from her. If this is so, the plaintiffs are entitled to [327] maintain the suit, as held in *Rani Anand Kunwar* v. *The Court of Wards* (2). The court below did not frame any issue on the question of collusion. As there are materials on the record which would enable this Court to come to a finding on the point, I have not deemed it necessary to refer an issue to the lower appellate court. Musammat Taluqa Kunwar, the daughter of Ram Saran Rai, in her written statement, supports the mortgage and so does Musammat Mata Kunwar, who is the guardian of Mohendar Rai. They live with Mata Kunwar, so that the persons who are nearer reversioners than the plaintiffs are in collusion with the first two defendants. That being so, the plaintiffs are entitled to a declaration that the mortgage made by the first defendant will not affect their reversionary rights. I accordingly allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs in all courts."

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* Appeal No. 56 of 1912 under section 10 of the Letters Patent.

(1) (1873) L. R. 10 C. P. 391.

(2) (1880) I. L. R. 6 Cal. 764.

1913
MAR. 17.

APPELLATE CIVIL.

35 A. 326=11 A. L. J. 382 =19 I.C. 814.

The defendant appealed.

Mr. *W. Wallach*, The Hon'ble Dr. *Sundar Lal*, Munshi *Gobind Prasad*, and Munshi *Benode Behari*, for the appellants.

Mr. *M. L. Agarwala* and Munshi *Gokul Prasad*, for the respondents.

RICHARDS, C. J. and TUDBALL, J.—This appeal arises out of the following circumstances:—The plaintiffs sued alleging that they were the reversioners to a property which had been alienated by way of mortgage by one Musammat Mata Kunwar, the widow of Ram Saran Rai, and mother of one Jagmohan. The claim was that the mortgage made by the Musammat Mata Kunwar should be declared not to be binding upon the plaintiffs as reversioners. There was no allegation in the plaint that the plaintiffs were suing as distant reversioners, the nearer reversioners having done something to prevent them from bringing the suit. No such allegation was necessary, because, as already mentioned, the claim of the plaintiffs was that they were the next reversioners. This contention was based upon the allegation that Jagmohan survived his father Ram Saran Rai. The lower appellate court found that the plaintiffs' allegation that Jamohan survived Ram Saran Rai was not only false but was supported by fabricated evidence. The learned District Judge gives very cogent reasons for this finding, and in any event we are bound by it in second appeal. The result of this finding and a further finding of the lower appellate court that even the nearest of the plaintiffs can only succeed to the estate if four males and one female die in his life-time. The learned District Judge dismissed, and we think rightly dismissed, the plaintiffs' suit on these findings. [328] The learned Judge of this Court seeing an allegation in the plaint that there had been collusion between the transferee and the defendants 3 and 4 raised the issue whether or not the defendants 3 and 4 had done something which rendered them unfit to protect the estate and having come to a finding upon this issue in favour of the plaintiffs, decreed the plaintiffs' suit. We doubt very much that the plaintiffs would ever have brought the present suit at all if they had to do so in the capacity of reversioners who had four males and a female in front of them, and certainly suits for a declaration by remote reversioners are not to be encouraged. The learned Judge of this Court seems to have overlooked the fact that there were reversioners nearer than the plaintiffs who were not even parties to the suit at all, and other nearer reversioners were minors. Had the plaintiffs brought the present suit upon the allegation that they were the distant reversioners, and brought the suit as such we would not be disposed to interfere with the decision of the learned Judge of this Court merely on the ground that there was no specific allegation in the plaint that the nearer reversioners had precluded themselves from bringing the suit; but we think, in the circumstances of the present case and after the finding of the court against the plaintiffs as to their being the next reversioners to the property, that it was not right to read into the plaint an allegation that they were bringing the suit as distant reversioners because the nearer reversioners had either precluded themselves from bringing this suit or had refused to do so. We think that the present appeal, ought to be allowed. We accordingly allow the appeal, set aside the decree of this court and restore the decree of the lower appellate court. The appellant will have his costs of both the hearings in this Court.

Appeal allowed.

35 A. 329 (=21 I. C. 657=11 A. L. J. 752=14 Cr. L. J. 609).

1912
JUNE 27.

APPELLATE CRIMINAL.

35 A. 329=21 I. C. 657=11 A. L. J. 752=14 Cr. L. J. 609.

[329] APPELLATE CRIMINAL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

EMPEROR *v.* KANHAI AND OTHERS.*

[27th June, 1912.]

Act No XLV of 1860 (*Indian Penal Code*), *sections* 300 *and* 325—*Murder—Grievous hurt—Common intention—Deadly assualt with* lathis *on an unarmed person—Presumption.*

Four persons armed with *lathis* attacked and severely beat a fifth, who was unarmed, over a dispute about irrigation. The person attacked died in consequence of this beating, and it was found that he had received several severe blows on the head, the result of which was that the bones of the skull were broken to pieces, and also other injuries about the body, most of the injuries having probably been inflicted whilst the person attacked was on the ground; but the evidence did not disclose which of the assailants caused which of the injuries. *Held*, that all four assailants were properly convicted of murder under the fourth clause of section 300 of the Indian Penal Code, and that the inference was not justified that common intention of the assailants was not more than the causing of grievous hurt.

[Ref. 35 All. 506; Rel : 69 I. C. 449=23 Cr. L. J. 721.]

THE facts of this case were as follows :—

In the month of August, 1911, one Sujan was irrigating his field, when four persons—Kanhai, Diwan, Karan Singh and Ganga Sahai—came up armed with *lathis* and told him to stop, because they wanted to irrigate their own. A dispute ensued, and the four attacked Sujan, who was unarmed, and beat him severely so that he died. The medical evidence disclosed that several blows were inflicted on Sujan's skull, which resulted in a compound fracture thereof, the bones being broken into many pieces. In addition to these injuries to the head there were six injuries on other parts of the body, and it appeared that most of the injuries had been inflicted whilst the deceased was lying on the ground.

The four assailants were tried by the Assistant Sessions Judge of Aligarh and convicted under section 325 of the Indian Penal Code and sentenced to five years' rigorous imprisonment each. They appealed to the High Court, and their convictions and sentences were set aside and a fresh trial ordered. On the second trial they were convicted of the offence of murder and sentenced to transportation for life. From these convictions and sentences the four accused again appealed to the High Court.

Babu *Satya Chandra Mukerji* (for whom Babu *Piari Lal Banerji*), for the appellants.

[330] The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

KARAMAT HUSAIN and TUDBALL, JJ :—The four appellants Kanhai, Diwan, Karan Singh and Ganga Sahai have been convicted of the offence of murder and have been sentenced to transportation for life. They appeal. They were originally tried and convicted by the Assistant Sessions Judge under section 325, Indian Penal Code, and sentenced to five years' rigorous imprisonment each. They appealed to this Court and the learned Judge before whom their appeals came set aside the convictions and sentences and ordered them to be re-tried for the offence of murder under section 302, Indian Penal Code. They have now been tried and

* Criminal Appeal No. 370 of 1912.

1912
JUNE 27.

APPELLATE CRIMINAL.

35 A. 329=21 I. C. 657=11 A. L. J. 752=14 Cr. L. J. 609.

convicted of that offence. The facts established by the evidence are briefly as follows :—In the month of August last, when there was a great demand for water for the purpose of irrigation and all cultivators were eager to get as much water as possible, the deceased was watering his field early in the morning before day-break, when the four accused, armed with *lathis*, went up to him and demanded that he should cease irrigating his field, so that they might irrigate their own. A wrangle ensued. The deceased was unarmed and defenceless. Finding that he was obstinate and would not give way, the four accused attacked him with their *lathis*. The medical evidence shows that several blows were inflicted on the skull, which resulted in the compound fracture thereof, the bones being broken into many pieces. In addition to these injuries on the head there were six injuries on other parts of the body. It is therefore quite clear that the accused inflicted a very severe beating, and that most of the injuries must have been inflicted when the deceased was lying on the ground. It is urged in their defence that the evidence does not disclose which of the injuries were inflicted by each of the accused respectively; that their common intention cannot possibly have been more than to voluntarily cause grievous hurt to the deceased, and that therefore, they ought to have been convicted under section 325 of the Indian Penal Code. We are unable to agree with this contention. The circumstances of the case and the fact that the accused were all armed with *lathis*; that the deceased was defenceless and unarmed; that the beating must have **[331]** been a prolonged one that several blows were inflicted on the skull completely smashing it, leave very little doubt that the intention of the accused was to inflict such bodily injury as was likely to cause death. The fourth clause of section 300 of the Indian Penal Code applies, and the accused have been rightly convicted of the offence of murder as defined in the Code. The lesser of the two sentences has been imposed, and there is no doubt as to the guilt of the accused. We therefore dismiss the appeal and maintain the convictions and sentences.

[*Cf. Emperor* v. *Bhola Singh*, I. L. R. 29 All. 282—ED.]

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35 A. 331 (=40 I. A. 161=11 A. L. J. 625=17 C. W. N. 829=18 C. L. J. 9=15 Bom. L. R. 640=14 M. L. T. 33=1913 M. W. N. 566=25 M. L. J. 14?=19 I. C. 526.)

PRIVY COUNCIL.

DEBI BAKHSH SINGH (*Plaintiff*) *v.* HABIB SHAH (*Defendant*).*

[16th and 29th April, 1913.]

[*On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.*]

Plaintiff, non-appearance of—Dismissal of suit—Order setting aside dismissal when plaintiff was found to have been dead at the time suit was dismissed—Civil Procedure Code (1908), *order IX, rules* 8 *and* 9—*Order XXII, rules* 3 *and* 9—*Sections* 115 *and* 151—*Rules and orders applicable only to defaulters wrongly applied in case of dead party.*

On the non-appearance of the plaintiff in a suit against the respondent an order was made on the 4th of July, 1911, dismissing the suit for default. The plaintiff was in fact dead at the time the order was made, and his son the appellant was engaged in performing his father's funeral ceremonies and was unable to attend court. These facts were brought to the notice of the Deputy

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* *Present* :—Lord SHAW, Lord MOULTON, Sir JONE EDGE and Mr. AMEER ALI.

Commissioner in an application made under order XXII, rules 3 and 9, of the Civil Procedure Code (Act V of 1908) by the appellant as the heir and legal representative of the plaintiff, which was filed and accepted by the Deputy Commissioner within the time allowed by law and an order was made on the 11th of September setting aside the dismissal of the suit, and substituting the name of the appellant on the record in place of the deceased pfaintiff. On an application for revision of the Deputy Commissioner's order of the 11th of September made by the respondent under section 115 of the Code to the Court of the Judicial Commissioner, that Court reversed the order, and confirmed that decision on review, mainly on the grounds that the order of the 4th of July dismissing the suit was a proper order under order IX, rule 8, of the Code; that the appellant's application to set aside that order was not within time, and was therefore barred, and that order XXII, rule 3, of the Code applied only to a still pending suit, and not to one that had been dismissed.

Held (reversing the decisions of the Court of the Judicial Commissioner) that those decisions were vitiated by applying to a dead man orders and rules [332] applicable only to a mere defaulter. An "abuse of the process of the Court" within the meaning of section 151 of the Code had occurred by the course adopted in the Judicial Commissioner's Court. Quite apart from that section, any Court might rightly have considered itself to possess inherent power to rectify the mistake inadvertently made in dismissing the suit. The order of the Deputy Commissioner setting aside the dismissal was manifestly sensible and correct, and their Lordships restored it, and remitted the case to India to be disposed of on the merits.

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[Ref. 18 C. W. N. 1266=20 C. L. J. 341=27 I. C 294; 52 I. C. 546=9 L. W. 513; 2 Lah. 66=68 I. C. 720; 45 Bom. 648=23 Bom. L. R. 110; 62 I. C. 246; 63 I. C. 440; 64 I. C. 420; 64 I. C. 864=35 C. L. J. 53; dist. 1 Lah. 363; 2 Lah. L. J. 249; Fol. 31 M. L. J. 819=1916 M. W. N. 203; 68 I. C. 643; Ref. 69 I. C. 112; 70 I. C. 867=31 M. L. J. 215; 72 I. C. 394; 73 I. C. 230; 74 I. C. 410=17 L. W. 54; Dist. 76 I. C. 836=18 L. W. 870=45 M. L. J. 813=33 M. L. T. 207; Fol. 80 I. C. 775.]

APPEAL from a judgment and decree (15th December, 1911) of the Court of the Judicial Commissioner of Oudh (affirmed on review on the 20th of February, 1912), which reversed on appeal an order (11th September, 1911) of the court of the Deputy Commissioner of Bahraich.

On the 3rd of May, 1911, Raja Maneshar Bakhsh Singh, the father of the appellant, brought in the court of the Deputy Commissioner of Bahraich, a suit against the respondent for the recovery of arrears of rent under a lease, to which suit the respondent filed his defence on the 31st of May, and the suit was fixed for hearing on the 4th of July, 1911; Raja Maneshar Bakhsh Singh died on the 21st of June, 1911; and on the day fixed for hearing the suit was dismissed in default for non-appearance of the plaintiff.

On the 3rd of August, 1911, an application was made on behalf of the appellant as the heir and legal representative of his father, by his general agent, to the clerk or General Superintendent of the office of the Deputy Commissioner, under order XXII, rule 3, and order IX, rule 9, of the Civil Procedure Code (Act V of 1908) in which the appellant stated that owing to the death of his father, and his being engaged in the performance of the necessary funeral ceremonies he had been unable to be present in court on the 4th of July; and prayed that the suit which had been dismissed in default might be restored, and that his name might be substituted for his father's on the record of the suit.

When leaving the application with the clerk, the appellant's agent said he had been waiting in the court since 2 p. m. (it was then 4-30 p. m.) to present it to the court, but that as the Deputy Commissioner had not taken applications on that day, he had been unable to do so. The General Superintendent reported this statement to the Deputy Commissioner, who

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on the 4th of August, 1911, made the following order :—" He was in my court and might have filed it then. It may be accepted."

[333] On the 11th of September, 1911, the Deputy Commissioner granted the application and made an order in the terms set out in the judgment of their Lordships of the Judicial Committee.

On the 9th of October, 1911, the respondent applied to the Court of the Judical Commissioner of Oudh under section 115 of the Civil Procedure Code (Act V of 1908) for revision of the orders of the Deputy Commissioner of the 4th of August, and the 11th of September, 1911, and on the 5th of December, 1911, that Court (Mr. B. LINDSAY, 1st Additional Judicial Commissioner, and Mr. M. RAFIQ, 2nd Additional Judicial Commissioner) held that the application ought to have been dismissed by the Deputy Commissioner because the appellant had not reported to the authorities his succession to his father Maneshar Bakhsh Singh as required by clause 5 of section 34 of the United Provinces Land Revenue Act (III of 1901); and because the application could not be entertained by the Deputy Commissioner as having been made more than 30 days after the dismissal of the suit. The clerk of the court, it was said, had no authority to receive the application, which therefore must be considered as not having been received until the 4th of August, 1911, and consequently out of time; that order XXII, rule 3 of the Civil Procedure Code, 1908, did not give the legal representative six months within which to set aside the dismissal of the suit; and that the appellant had produced no evidence in support of his application. The Judicial Commissioner's Court accordingly set aside the orders of the Deputy Commsssioner which were under revision.

The appellant thereupon applied for a review of the judgment of the 5th of December, 1911, mainly on the grounds that the dismissal of the suit under order IX, rule 9, was *ultra vires*, that the court of the Deputy Commissioner had inherent jurisdiction under section 151 of the Civil Procedure Code to set aside its own order, and that no effect had been given to order XXII, rule 3, of the Code.

The Court of the Judicial Commissioner (consisting of the same Judges as before) said—

" We are unable to admit that the Deputy Commissioner's order of dismissal was an order *ultra vires*. On the contrary it is clear that the order was *intra vires*, and one which the court was in the circumstances bound to make. The words of order IX, rule 8, are imperative :—' Where. . . the plaintiff does not [334] appear. . . the court *shall make an order that the suit be dismissed*'. There can be no doubt whatever that on the 4th of July, the plaintiff did not appear, and in the absence of any information as to the cause of his non-appearance we fail to see how the court could have acted otherwise than it did. It is said that the Deputy Commissioner could have ignored this previous order or could have set it aside under section 151 of the Code of Civil Procedure. But the case cannot be brought within the terms of section 151, for the court could not take action under that section seeing that a procedure for setting aside an order of dismissal is specially provided in order IX of the Code.

" It is said that the effect of our decision is to set at naught all the provisions of the Code of Civil Procedure and the Limitation Act, which allow a period of six months within which the representative of a deceased party can apply to have his name substituted on the record . . . No doubt six months from the date of the decease of the plaintiff are allowed to his legal representative for the purpose of making an application to have his name brought on the record so as to enable him to continue the suit. But a reference to order XXII in general and to rule 3 of that order in particular shows clearly that what is contemplated in the cases referred to in order XXII is an application made while a suit is still pending. To take the words contained in rule 8 of that order—' The court . . . shall cause the legal representative of the deceased plaintiff to be made a party, *and shall proceed with the suit*'. These last words

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obviously refer to a case which is still undecided. The court having made the substitution continues the hearing of the suit from the point to which it had advanced at the time when the deceased party died. In the present case the suit had come entirely to an end by virtue of the order of the 4th of July, 1911, by which the suit was dismissed for default and no substitution of the name of Debi Baksh Singh as plaintiff in place of his deceased father could be made unless and until the suit had been revived by means of an order passed under order IX, rule 9 . . . Debi Baksh Singh had in any case a remedy by application under order IX, rule 9, and he availed himself of it, but did not do so within the time (30 days from the date of the order of dismissal) prescribed by law. We are unable, therefore, to see how it can be said that our decision of the 5th of December, 1911, in any way ignores the provisions of the Code of Civil Procedure and the Limitation Act."

The application for review was consequently dismissed.

On this appeal, which was heard *ex parte*—

De Gruyther, *K. C.* and *S. A. Kyffin* for the appellants contended that pending an application to substitute on the record the appellant's name as heir to his deceased father, the suit had been wrongly dismissed for default of prosecution; and when it was brought to the notice of the Deputy Commissioner that the plaintiff's non-appearance was owing to his having died before the order dismissing the suit was made, the Deputy Commissioner had rightly held that the order of dismissal was not under the circumstances a proper order, and that the appellant [335] was entitled to continue the suit. The appellant applied within the time limited by law to be put on the record in place of his father, and was entitled to the further relief that the order of the 4th of July dismissing the suit should be set aside. The appellant's application having been admitted, and accepted by the order of the Deputy Commissioner as being within time, could not, it was submitted, be regarded as being barred by limitation. The provisions of clause 5 of section 34 of the United Provinces Land Revenue Act (III of 1901) did not operate as a bar to the continuance of the suit. The Court of the Judicial Commissioner had no power under the Civil Procedure Code (Act V of 1908) to interfere with the orders made by the Deputy Commissioner on the 4th of August and the 11th of September, 1911: any defect in procedure was cured by the powers conferred on the Deputy Commissioner by section 151 of the Code which justified his making the orders. The orders of the Court of Judicial Commissioner were erroneous and should be set aside. Reference was made to the Civil Procedure Code (Act V of 1908), section 115; order IX, rules 8 and 9; order XXII, rule 3, clauses (1) and (2); order XXII, rule 9, clauses (1) and (2): and the Limitation Act (IX of 1908), schedule I, article 176.

1913, *April*, 29*th*.—The reasons for the report of their Lordships were delivered by Lord SHAW:—

The appellant's father, Raja Maneshar Baksh Singh, instituted a suit against the respondent for payment of sums amounting to Rs. 15,908. The plaint was filed on the 3rd of May, 1911, in the court of the Deputy Commissioner of Bahraich. The respondent filed his written statement on the 31st of May, 1911. On the 4th of July the following occurred before the Deputy Commissioner:—"On the case being called to-day the plaintiff was not present. I therefore dismiss the claim. Costs upon plaintiff."

The fact, unknown to the Deputy Commissioner, was that the plaintiff was dead. He had died about a fortnight before, namely, on the 21st of June. It is plain to their Lordships that, upon this being pointed out, it was the duty of the Deputy Commissioner to rectify the situation. This

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duty Mr. Clarke, the Deputy Commissioner, seems fully to have recognized. It requires no words of their Lordships to show the inapplicability of rules or orders dealing with the case of the non-appearance of a suitor to the [336] situation which arises when the suitor is dead. The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment is respect of such default, but the punishment of the dead or the ranking of death under the category of default, does not seem to be very stateable.

The deceased plaintiff's son took the proper steps to have his name substituted in place of his deceased father under order XXII, rule 9, of the Civil Procedure Code. He did so on the 3rd of August, which was well within the period of six months' limitation under article 175 of the first schedule of the Indian Limitation Act of 1908. Some question arose as to the application being time-barred, but the latter was very properly accepted by Mr. Clarke. The appellant had also taken the proper steps to have a report of his succession made under section 34 of the Land Revenue Act.

On the 11th of September, 1911, the Deputy Commissioner pronounced the following order :—

"The case was dismissed as no one appeared on the previous hearing. This was due to the death of the Raja of Mallanpur. The other side claim that the re-hearing is barred under section 34 of the Land Revenue Act, but that section clearly requires a report of the succession, which has already been made. It is argued that the application is time-barred, but it was filed and accepted under my order within time. But I cannot allow any technicality to obscure the fact that the case was only not heard because of the calamity which prevented applicant's putting up this case. Under these circumstances I accept this application, and fix the 27th of October for hearing of issues, if necessary, and proof."

This order by the Deputy Commissioner is so manifestly sensible and correct that their Lordships are of opinion that it ought to be reverted to, and the case proceeded with accordingly.

On the 5th of October, 1911, however, the Court of the Judicial Commissioner of Oudh reversed the Deputy Commissioner's order and on the 20th of February, 1912, on review, that judgment was affirmed. In their Lordships' opinion these judgments cannot stand, being vitated by applying to a dead man orders and rules applicable to a defaulter. By the Code of Civil Procedure, section 151, it is provided that "nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court.' In their Lordships, [337] opinion such abuse has occurred by the course adopted in the Court of the Judicial Commissioner. Quite apart from section 151, any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made. But section 151 could never be invoked in a case clearer than the present, and their Lordships are at a loss to understand why, apart from points of procedure and otherwise, it was not taker advantage of.

Their Lordships have humbly advised His Majesty that the appeal be allowed, the order appealed from set aside and the order of the Deputy Commissioner of the 11th of September, 1911, restored, and that the appellant be found entitled to the costs of the proceedings since the 3rd of

August, 1911, in India, and to the costs of this appeal. The suit will be remitted to India to be disposed of on the merits.

Appeal allowed.

Solicitors for the appellant :—*T. L. Wilson, & Co.*

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BRIJRAJ SINGH AND ANOTHER (*Defendants*) *v.* SHEODAN SINGH AND OTHERS (*Plaintiffs*) 2 *appeals consolidated.**

[*On appeal from the High Court of Judicature at Allahabad.*]

[16th and 17th April and 5th May, 1913.]

Hindu law—Partition—Requisites for partition—Partition created by so-called will in life-time of father dividing family property among his sons and taking no shares himself—Double share to eldest son—Unequal partition under alleged custom—Provision for forfeiture on mismanagement or bad behaviour—Conduct of Parties after execution of document of partition.

By a document called a " will " dated the 26th of November, 1895, the father and head of a Hindu joint family governed by the Mitakshara law recorded a division of the ancestral family property amongst his three sons (giving himself no share but allotting a double share to his eldest son). The document recited that, " my three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present, while in a sound state of body and mind, and of my own free will and accord, divided the property among my sons, heirs, as follows." Then followed the details of the division. There was a provision that, " If I at any time come back from pilgrimages and find mismanagement or character of any one bad then I shall have power to cancel this will which shall be enforced from the date of its execution " and the document concluded as follows :—" All the three sons were put in separate possession of the estate in the beginning of the year 1303 Fasli" [338] (September 1895) " I have no other heir having a right besides those mentioned in this will. I have therefore executed this will in order that it may serve as evidence." Mutations of the various shares were subsequently made into the names of those to whom they were separately allotted, and the evidence showed that the division had been assented to, acquiesced in and acted upon by the sons up to 1905. In a suit brought in September, 1905, four years after the father's death by the two younger sons for partition of the property which they alleged to be joint and undivided and of which they claimed to be entitled to two one-third shares.

Held (reversing the decision of the High Court) that the document of the 26th of November, 1895, was not a will but was intended to operate from its date, and was in fact a family arrangement contemporaneously made and acted upon by all parties, the effect of which was, under the circumstances of the case, to create a partition of the joint ancestral property. There was nothing in the fact that the document was called a will which invalidated the partition which was undoubtedly made in fact, and which was acted upon for ten years without any dispute or misunderstanding as to the respective rights of the parties under it.

Held also that the provision in the will giving the father power to cancel it in certain events, evidenced a contractual condition which the sons accepted in order to obtain the partition which gave them immediate possession of the property and viewed thus the contractual acceptance of a power of forfeiture in case of bad behaviour would not be sufficient to prevent the partition operating *in praesenti*.

[Ref. 28 I. C. 580=21 C. L. J. 296; 31 M. L. J. 147=(1916) 2 M. W. N 284; 73 I. C. 196=25 Bom. L. R. 293=47 Bom. 597.]

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* *Present* :—Lord SHAW, Lord MOULTON, Sir JOHN EDGE, and Mr. AMEER ALI.

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Two consolidated appeals (86 and 87 of 1912) from two judgments and decrees (17th May, 1910) of the High Court at Allahabad, which partly affirmed and partly reversed a judgment and decree (30th September, 1907) of the court of the Additional Subordinate Judge of Aligarh.

The facts of the case are sufficiently stated in the judgment of their Lordships of the Judicial Committee.

The parties and thair relationship appear from the following genealogical table.

RAO BALWANT SINGH, died 7th April 1901. = Rani Bhagwani Kunwar, died in 1307 Fasli (1899-1900).

- Rao Sultan Singh, died 30th March 1901. = Rani Piari Kunwar, Appellant.
  - Kunwar Brijraj Singh, Appellant.
- Rao Karan Singh, died 20th April 1909.
  - Kunwar Shibraj, Respondent.
- Kunwar Sheodan Singh, Respondent.
  - Kunwar Ranbir Singh, Respondent.

The case of the plaintiffs (now respondents) in the suit for partition out of which these appeals arose was that all the properties in suit were ancestral family properties which were in the [339] joint possession and enjoyment of the members down to the date of the suit, 13th September, 1905, and that they (the plaintiffs) were entitled to equal third shares thereof on partition.

The principal and now the only material defences of the defendants (now appellants) were (1) that the properties in suit were not ancestral but were the self-acquired properties of Rao Balwant Singh, and had been validly disposed of by him by his will; (2) that assuming the properties were ancestral a partition had been effected by Rao Balwant Singh in his life-time to which all his three sons had assented; and (3) that by family custom the eldest son was entitled on partition to a double share equivalent to a moiety of all the properties in suit.

On defence (1) the Subordinate Judge held that all the properties in suit were ancestral, and that holding was not disputed on appeal to the High Court.

The document purporting to be a will was dated the 26th of November, 1895, and was put in evidence by the defendants. It was executed by Rao Balwant Singh and declared, so far as is material to this report, as follows:—

"I have often been ill for the last 3 or 4 years and am unable to move about. The work in connection with my estate &c. is conducted through Chiranji Lal, general attorney, and Rao Sultan Singh, my eldest son. Now, I intend to sever my connection with the world, go on pilgrimages and visit other countries. Life is transient and uncertain. My three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present, while in a sound state of body and mind and of my own free will and accord, divided the property among my sons, heirs, as follows."

Then, after giving certain specific villages to his second and third sons and certain property to "my wife the Rani Sahib," Rao Balwant Singh gave other specific villages to—

"My eldest son, Rao Sultan Singh, and have installed him to the gaddi in my place He shall conduct the business like myself according to the custom of the family, and he being the head of the family was given a greater share than those given to both the sons aforesaid. All three sons and the Rani Sahib shall, after payment of the Government revenue, bring the profits of the villages into their valid use.

They shall have their names recorded in the revenue papers as provided by the will . . . After the death of the Rani Sahib, the wife of Rao Sultan Singh, shall according to the custom of the family be the owner of the entire *sir* lands (except the *sir* land in the village of Badri) belonging to the said Rani Sahib entered in papers, and in possession and enjoyment of the Rani Sahib. The Rani Sahib shall [340] have the *sir* land in the village of Badri recorded in the name of the wife of Kunwar Sheodan Singh because the share of Kunwar Sheodan Singh is less than that of Kunwar Karan Singh, therefore the Rani Sahib is permitted to have the *sir* land aforesaid recorded in the name of the wife of Kunwar Sheodan Singh The property and the village of Harsena " (given to his wife the Rani Sahib) " is divided into three equal shares amongst the grandsons, one of which shares was given to Brijraj Singh, son of Rao Sultan Singh, one to Shibraj Singh, son of Kunwar Karan Singh, and one to the son of Sheodan Singh . . . If I at any time come back from pilgrimages and find mismanagement or character of any one bad then I shall have power to cancel this will which shall be enforced from the date of its execution. All the three sons were put in separate possession of the estate in the beginning of the year 1303 Fasli I have no other heir having a right besides those mentioned in this will. I have therefore executed this will in order that it may serve as evidence."

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The principal question for decision in the present appeal was whether there had been a partition of any part of the family properties binding on the plaintiffs during the life-time of Rao Balwant Singh.

As to this the Subordinate Judge held that a valid partition had been so made of the villages and certain other property of the family, but not of the house properties or movables. He treated the so-called will as a deed of partition, under which a family arrangement had been come to for a division of the properties (except as above) which had been acquiesced in by the plaintiffs who were therefore estopped from impeaching it as being an unequal partition. He found that the books of account on which the plaintiffs relied were fabricated; and that after the execution of the so-called will Rao Balwant Singh had lived the life of an ascetic. He accordingly made a preliminary decree for partition only of the house property and movables (the property he found to be undivided) and referred the matter to commissioners to ascertain how division should be carried out in detail, eventually, after consideration of their report passing a final decree in terms of his judgment then given.

As to the custom alleged by the defendants the only evidence was wajib-ul-arzes of 1873 and the Subordinate Judge said :

"It is stated in some of them that the gaddinashin is entitled to a double share, and in the rest that he is entitled to one share more than the others which means the same thing, that is, he will have two shares whereas the others will have one share each. The plaintiffs' objection to these wajul-ul-arzes is that they were dictated by one man only, namely, Rao Balwant Singh. But he was [341] the best man to know his family custom and his statements are admissible under section 49 (clause 1) of the Evidence Act and no evidence is adduced to the contrary . . . But let it be supposed that every bit of the property, movable as well as immovable, was ancestral and the plaintiffs 1 and 2 and Sultan Singh had absolutely equal rights to share it. Still by the Hindu law Balwant Singh was entitled to a share equal to his sons, and he could give his share to Sultan Singh and the result would be exactly that Sultan Singh would have got double of what each of his two brothers would get."

Both parties appealed from this decision to the High Court, the plaintiffs disputing the partition of the villages and lands under the will and the defendants asserting that a complete partition had been made thereby including the house property and movables.

The appeals were heard by Sir JOHN STANLEY, C. J. and GRIFFIN, J. who held that the document dated the 26th of November, 1895, could not be treated as a deed of partition, but was intended to operate only as the will of Rao Balwant Singh, that the account books relied on by the plaintiffs were genuine and supported the plaintiffs' contentions that no real

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partition of any of the family properties was effected in the life-time of Rao Balwant Singh, that his two younger sons had not assented to any final division of the estate, and that the allocation of the various villages among the different members of the family, and the mutation of names in the revenue records were only intended to provide for the management of the estate the enjoyment of the properties remaining joint until the date of suit. The High Court also held that the defendants had failed to establish that Rao Balwant Singh had retired from the world after the date of the will, or had become an ascetic, that the evidence showed that he continued to superintend the management of the properties until his death and that the family custom alleged by the defendants was not proved. The plaintiffs' appeal was accordingly allowed, a general partition of the family properties was decreed and the cross-appeal of the defendants was dismissed, a separate decree to that effect being passed. In concluding their judgment the High Court said :—

"It is found by the Court below that the arrangement made by Rao Balwant Singh was in the nature of a family settlement which was accepted by the members of the family and acted upon and that the plaintiffs are estopped from impeaching its validity. We cannot agree in this view. Rao [342] Balwant Singh no doubt intended to entrust the management of the estate to his sons and had mutation of names effected in their favour for this purpose ; but, as is evident from the language of his will, he did not intend to part with his control over it during his life. For the purpose of the management of the estate it was necessary that mutation of names should be effected, otherwise his sons would be unable to maintain suits against tenants or make lettings. It was with the object of making their management effective that mutation of names was effected, and the making of a will may have been a device whereby mutation could be obtained. Revenue officers will not effect mutation unless the devolution or transfer of property is proved to their satisfaction. In the orders for mutation before us it will be found that the transfers of the property are described as having taken place under the will of Rao Balwant Singh. It is true that the will was not operative during Rao Balwant Singh's life and ought not to have been acted upon, but this appears to have escaped the notice of the revenue officials. They were misled into believing that it effected a transfer.

"Then it is said that on the death of Sultan Singh his brothers assented to the name of Sultan Singh's son being recorded as owner in his place and it is contended that in view of this and of their acquiescence in the arrangement made by their father, Rao Balwant Singh, the plaintiffs are estopped from setting up the case that there was no binding partition of the family property. The parties were, during the life-time of Rao Balwant Singh, on friendly terms and remained so for about 2½ years after his death, and it was quite natural that on the death of Sultan Singh mutation of names should be effected in favour of his son in respect of the property of which he was the recorded owner. It was also not unnatural that the *sir* land which stood in the name of Bhagwan Kunwar, the widow of Rao Balwant Singh, should upon her death be recorded in the names of her three grandsons and that the village of Harsena should be recorded in the name of Sultan Singh's wife. It was also not unnatural as regards the 280 bighas of land, which are mentioned in the judgment, which stood in the name of Bhagwan Kunwar that upon her death the widow of Sultan Singh should be recorded in the place of Bhagwan Kunwar. In joint Hindu families we constantly find that portions of joint estate are recorded in the names of widows of the family and also in the names of different members of it. Sultan Singh was not prejudiced by any act of the plaintiffs or by their acquiescence in the arrangement devised by Rao Balwant Singh for the management during his life of the joint family property. If a partition had been intended, it is strange that the movable property of the family was not included in the partition. It is also noticeable that some house property of the family was not dealt with in any way in the arrangement made by Rao Balwant Singh.

"There is another matter to which we should refer. The defendants set up the case that according to a custom of the family, the eldest son is entitled to a double share of the joint family. The only evidence in support of this contention are extracts from several wajib-ul-arzes in which it is stated that a son occupying the *gaddi* shall get a share more than any of his brothers. There is no force in this contention. The statement in these wajib-ul-arzes is merely the expression of the view of the proprietor

for the time being and does not establish any such custom as is contended for. This matter was not seriously pressed in argument.

[343] "The conclusion at which we have arrived is that Rao Balwant Singh entrusted the management of the principal part of the immovable property to his son with a view of getting rid of the burden of it during his life and purported by a will to regulate the devolution of the property after his death, thinking no doubt that his sons would acquiesce in any direction which he might during his life give in regard to the future enjoyment of the property. If the property had been self-acquired, his will would have been operative but as has been found and this is not now a matter in dispute, the property is joint ancestral property and the will can have no operation."

On this appeal—

De Gruyther, K. C. and *B. Dube* for the appellants contended that the document of the 26th of November, 1895, was the record of a family arrangement made by Rao Balwant Singh on behalf of his sons under which the entire family property was as divided between them according to the custom of the family and by Hindu law. The respondents had consented to the partition, as was clearly shown on the evidence and by their conduct, after acquiescing in the arrangement and acting under it for more than 10 years they were now estopped from impeaching it as being unequal and invaild under Hindu law. A partition had been created of the family property and the respondents were not, it was submitted, entitled to the reliefs claimed in the suit. Reference was made to *Balkishen Das* v. *Ram Narain Sahu* (1), *Parbati* v. *Naunihal Singh* (2) and *Raghuber Singh* v. *Moti Kunwar* (3). The custom under which the eldest son took a double share had been proved and the fact that he had been allotted a larger share than the other sons would not in any case defeat the family arrangement which had been made. [Mr. AMEER ALI referred to *Umjad Ali Khan* v. *Mohumdee Begum* (4).]

The High Court had, it was contended, taken a wrong view of the object and intention of the deed of the 26th of November, 1895, which from its terms and the action taken under it was clearly meant to come into operation at once and was therefore not strictly speaking a "will," but that it was called a "will," made, it was submitted no alteration in its effect as a document creating a partition.

[344] *Arthur Grey* and *G. R. Lowndes* for the respondents contended that no valid or binding partition of the family properties or any part thereof had been made as alleged by the appellants. In any partition of the ancestral family properties the respondents were entitled in law to claim an equal division; Mayne's Hindu law, 7th edition, page 659, paragraph 488. The allocation of the various villages and lands purporting to have been made by or in accordance with the terms of the "will" amongst the members of the family was not intended to be and was not in fact a final partition of the said properties. The mutation proceedings did not constitute an estoppel on the respondents; if it was an admission it could be withdrawn as there was no obligation on them to make it: *Muhammad Imam Ali Khan* v. *Husain Khan* (5). There was no power in Rao Balwant Singh to make any disposition of the ancestral properties and there was no consent to his doing so on the part of respondents and none of them acquiesced in the division being a final one. Reference was made to *Jugo Bandhoo Tawaree* v. *Karan Singh* (6) as to the nature of the assent

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(1) (1903) I. L. R. 20 Cal. 738; L. R. 30 I. A. 139.
(2) (1909) I. L. R. 31 All. 412 (421); L. R. 36. I. A. 71 (76).
(3) (1912) I. L. R. 35 All. 41.
(4) (1867) 11 Moo. I. A. 517 (544)
(5) (1888) I. L. R. 26 Cal. 81 (100); L. R 25 I. A. 161 (177).
(6) (1874) 22 W. R. 341 (345).

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required and to show that an admission on a point of law was not an admission of a "thing," so as to make it a matter of estoppel within the meaning of section 115 of the Evidence Act (I of 1872). *Jagwant Singh* v. *Silan Singh* (1) was referred to. There was no definite family agreement by which all the members would be bound: it was a scheme to give the eldest son a double share; and no custom to that effect had been proved. The case of *Umjad Ali Khan* v. *Mohumdee Begum* (2) was distinguishable from the present. The respondents, it was submitted, were entitled to the relief claimed and the High Court's decision should be upheld.

De Gruyther K. C. replied referring to and distinguishing the case of *Muhammad Imam Ali Khan* v. *Husain Khan* (3).

1913, *May 5th*:—The judgment of their Lordship was delivered by LORD MOULTON:—

This is a suit brought by two brothers Rao Karan Singh and Kunwar Sheodan Singh (with whom are joined as plaintiffs **[345]** their respective sons Kunwar Shibraj Singh and Kunwar Ranbir Singh), against the widow and son of their eldest brother Rao Sultan Singh, claiming a partition of certain properties which they allege to be the joint and undivided property of the family to which they belong in which they are entitled to a two-thirds share. The defence is that the properties originally belonging to the family were the subject of a division by a family arrangement made and acted upon in 1895 during the life-time of the father of the plaintiffs, and that thenceforward the properties ceased to be held jointly, and that those properties of which the defendants are in possession came to them under that family arrangement and became and still remain their separate property.

The principal subject of dispute is village property. But the suit relates also to certain other property, as to which different considerations arise. It will be convenient in the first instance to determine the questions in issue so far as they relate to the village property only and to consider subsequently the effect of the facts thus found on the rights of the parties in respect to the other property.

It will be seem from the foregoing that the real issue in the case is whether or not the alleged family arrangement was in fact made and assented to by the parties interested. The defendants' contention in this respect is exceptionally clear and precise. It leaves no doubt as to the terms of the arrangement even in their minutest details, and is equally definite as to the date when and the circumstances under which it was made

The father of the three brothers was Rao Balwant Singh. In 1895 he was the head of the family, which was then joint and undivided. The village property under his management, and to which this case relates, has been found by the court of first instance to have been ancestral property, and that finding is acquiesced in by the parties. He was at that date in advanced years and indifferent health, and determined to free himself from the labours of business and devote the remainder of his life to pilgrimages and travel in other countries. Accordingly, on the 26th of November, 1895, he drew up and executed a document (which he calls a will) setting out a division of the family property **[346]** among the members of the family, reserving nothing for himself. This is the family arrangement set up by the defendants.

(1) (1899) I. L. R. 21 All. 287.
(2) (1867) 11 Moo. I. A 517.
(3) (1898) I L. R. 26 Cal. 81 (100); L. R. 25 I. A. 161 (177.)

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Their Lordships incline to the view that the term "will," as applied to this document, was a complete misnomer. It is manifest that it differed from a will in the crucial characteristic that it was intended to speak from the date at which it was written and not from a future date, viz. the death of the writer. It was, in fact, and was intended to be viewed as a record of a family arrangement then and there made and carried into effect partitioning the family estate among those interested. Indeed, in anticipation of this formal partitioning, the sons had been put into possession of their shares some two months previously. All this appears from the concluding passage of the document, which reads as follows :—

"All the three sons were put in separate possession of the estate in the beginning of the year 1303 Fasli (September 1895). I have no other heir having a right besides those mentioned in this will. I have therefore executed this will in order that it may serve as evidence."

There is no doubt whatever as to the authenticity or date of this document. But the property was ancestral and therefore Rao Balwant Singh, although head of the family, had no right to make a partition by will of that property among the various members of the family except with their consent. They had independent rights in it with which he could not interfere. The main question, therefore, is whether there is evidence sufficient to establish the consent of the plaintiffs Rao Karan Singh and Kunwar Sheodan Singh to this family arrangement. If they accepted it, their acceptance would bind not only them but also their sons, who are the remaining plaintiffs, as they would be representing in the transaction their respective branches of the family.

Their Lordships are of opinion that the evidence of their acceptance of the partition is overwhelming. To appreciate it fully it will be necessary to examine in some detail the contents of the document itself and the acts of the parties consequent thereon.

That the document testifies to a partition of the estate taking place then and there cannot be doubted. The sons were all adults at the time, and, before setting out the specific shares which each was to receive, the document reads thus :—

[347] "My three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present, while in a sound state of body and mind and of my own free will and accord, divided the property among my sons. heirs, as follows."

There follows a specific division of the villages by name among the three sons. It then gives certain *sir* lands and other property to his wife for life and proceeds to provide that at her death the *sir* lands (with the exception of that in the village of Badri) shall go to the wife of the eldest according to the custom of the family. The *sir* land in the village of Badri is to go to the wife of the plaintiff Kunwar Sheodan Singh, "because the share of Kunwar Sheodan Singh is less than that of Kunwar Karan Singh," the other plaintiff. The remainder of the property held by the wife for life is at her death to be divided among her three grandsons. There are other minor details set out, but the above are the important provisions of the document and will suffice for the decision of the case.

This document was executed on the 26th of November, 1895. Early in 1896 the plaintiffs and their brother Rao Sultan Singh severally apply for mutation of names in respect of the villages allotted to them by their father in the document. It will suffice to refer to one of these applications, all of which *mutatis mutandis* are substantially identical. For this

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purpose the application of Kunwar Karan Singh in respect of the village Nagla Tula Ram may be taken. It is dated the 25th of February, 1896, and reads as follows :—

"Application for mutation of names in respect of 20 biswas of the zamindari property of the village of Nagla Tula Ram.

"The applicant begs to state as follows :—The applicant's father Rao Balwant Singh partitioned his property among his heirs under a registered will dated the 26th of November, 1895, and in accordance with the partition the 20 biswas of the villages of Bajripur and Nagla Tula Ram and 20 biswas of Khumanpur a hamlet of Jirauli Mahal Rao Balwant Singh fell to the applicant's share. Therefore this application is filed and it is prayed that according to it the name of Rao Balwant Singh may be expunged in respect of the village of Nagla Tula Ram and the applicant's name entered in the khewat. Separate applications have been filed in respect of the remaining villages. The applicant's elder brother Rao Sultan Singh has filed the original will in a case relating to the village of Sahaoli. It is also a proof in this case."

It will be well to follow up the proceeding thus initiated. On the 19th of March, 1896, we have the Tahsildar's record of the [348] hearing of the application and the order made thereon. It reads as follows :—

"Application for mutation of names in respect of 20 biswas of the village of Nagla Tula Ram, pargana Akrabad, according to partition of the property.

"Kunwar Karan Singh, applicant, v. Rao Balwant Singh.

"Under a will, filed with the record of the mutation case relating to the village of Sahaoli, Rao Balwant Singh, a rais of Sahaoli, divided his zamindari property among his sons. The 20 biswa property of the village of Nagla Tula Ram, in respect of which the name of Rao Balwant Singh stands recorded without the participation of anyone else, has fallen to the share of Kunwar Karan Singh. Kunwar Karan Singh prays that his name may be entered in respect of the village aforesaid. Rao Balwant Singh verifies the application and prays for expungement of his name. In spite of the expiry of the time given in the notice, no objection has been taken. From the office report the property is found to be correct. The patwari of the village says that Kunwar Karan Singh made collections and assessments for kharif of 1303 Fasli. As a transfer in possession has taken place, and no objection has been raised, the name of Rao Balwant Singh be expunged in respect of the village and the name of Kunwar Karan Singh entered in place of it. The record be submitted to the pargana officer for approval. A fee of Rs. 7 is deposited and the Treasury tender is filed with the record. No penalty is payable."

No more complete evidence that the family arrangement recorded in the so-called will was understood by all parties to be operative from the first and was acted on by them as such can be imagined than these two records, which are merely specimens of similar records relating to the other villages apportioned to the sons. It will be seen that the patwari of the village testifies to the applicant having made collections in 1303 Fasli (September 1895), thus confirming the truth of the statement in the so-called will that it was at that date that the sons entered into possession of the villages allotted to them. It should be added that direct evidence was given on behalf of the defendants that it was on that occasion that Rao Balwant Singh publicly announced his intention of making a partition of the property among the members of the family and gave the possession of the villages to the respective sons.

There is another set of transactions of a different date, which add strong confirmation to the defendants' case. Rao Sultan Singh died on the 30th of March, 1901, and his father, Rao Balwant Singh died a few days later on the 7th of April, 1901. Thereupon there ensued a situation such that the conduct of the parties must evidence almost conclusively whether the property was regarded as belonging to an undivided family, or whether each son of Rao [349] Balwant Singh held his portion sepa-

rately. The importance of the situation is emphasized by the fact that the main grievance of the plaintiffs is that the share of the eldest brother is much larger than that of either of his brothers.

The conduct of the parties on this occasion was, in their Lordships' opinion, unambiguous and such as to show conclusively the truth of the defendants' contention. We find that application was made in July, 1901, by the widow of Rao Sultan Singh on behalf of her son Rao Brijraj Singh for mutation of names with regard to the property held by her late husband. The following is the record :—

"Amendment of khewat.

"Rao Brijraj Singh, minor, under the guardianship of Musammat Rani Piari Kunwar.

"In the matter of the death of Rao Sultan Singh.

"Village of Sumera *alias* Bijaigarh pargana Akrabad, the 17th July, 1901.

" To-day this case is put up in the presence of Kunwar Karan Singh and Kunwar Sheodan Singh and their statements have been taken down. They admit that the property aforesaid entered as holding No. 2 measuring 280 bighas stands recorded in the papers in the name of Rao Balwant Singh and that the same was declared to be in the share of Rao Sultan Singh under a will. Rao Sultan Singh is dead and his heir is Rao Brijraj Singh, whose name be entered. The patwari bears testimony to possession and others have taken no objection. It is

Ordered :

That the name of Rao Balwant Singh be expunged in respect of holding No. 2 and the name of Rao Brijraj Singh be entered in papers and that the Sadar Munsarim do comply with the order."

There then follows the record of the statement made by Kunwar Karan Singh on that application. It reads as follows : —

"Present : Haji Muhammad Makhdum Husain, Settlement Deputy Collector at Aligarh.

"17th July 1901.

"Rao Brijraj Singh, minor, under the guardianship of Musammat Rani Piari Kunwar in the matter of the death of Rao Sultan Singh.

Village of Kumera(?) *alias* Bijaigarh.

"Statement of Kunwar Karan Singh.

"My father's name is Rao Balwant Singh, age thirty-three years, occupation zamindari, residence Sahaoli pargana Akrabad.

"Statement.

" Two hundred and eighty bighas entered as holding No 2 stands recorded in the name of my ancestor, Rao Balwant Singh, and the same has, under a will fallen to the share of my brother Rao Sultan Singh Rao Sultan Singh is dead, [350] and now his son Brijraj Singh is the owner. His name should be recorded and I have nothing to do with it.

"Signature of Kunwar Karan Singh."

And on the same day the statement of the other plaintiff, Kunwar Sheodan Singh: —

"Rao Brijraj Singh, minor under the guardianship of Musammat Rani Piari Kunwar.

"In the matter of the death of Rao Sultan Singh, village of Sumera *alias* Bijaigarh pargana Akrabad.

"Statement of Kunwar Sheodan Singh, a rais of Sahaoli.

"Statement.

"My statement is the same as has been made by my brother Kunwar Karan Singh.

"(Sd.) Kunwar Sheodan Singh."

It is not necessary to go into the details of the mutation of names with respect to the *sir* lands. They support the contention of the defen-

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dants in substantially the same way as that which has been already given with respect to the village property.

It is now necessary to examine the evidence put forward by the plaintiffs in answer to the case of the defendants, based, as it is on the unbroken evidence of ten years' conduct of all parties. In the first place the plaintiff Kunwar Karan Singh does not give evidence at all, so that his acts as shown by the records remain undenied and unexplained. The plaintiff Kunwar Sheodan Singh, however, gave evidence. He makes no attempt to deny any of the matters above referred to nor does he give any explanation why he took no action until the year 1905, *i.e.*, four years after the death of his father and brother and ten years after he had taken possession of his apportioned share. It is not too much to say that he did not attempt to show that there was a single fact known to him in 1905 when he instituted the suit which had not been known to him throughout. He makes it clear, however, that the family had lived in harmony till shortly before the suit was instituted, and lets it be seen that it was the pleaders whom he consulted who suggested that the claim made in this action should be set up. Taken as a whole his evidence leaves the defendants' case entirley unshaken.

The testimony mainly relied upon for the plaintiffs is that of Chiranji Lal. He had been the general agent or factor of Rao Balwant Singh, and continued to transact the business in respect of the village properties for the sons after 1303 Fasli (September [351] 1895). He was in a position to give most important evidence, for he must have known all the facts of the case, and if his evidence could be relied on, the fact that he gave evidence for the plaintiffs would have great weight. Unfortunately the very fact that he was in a position to know everything makes it impossible to accept his evidence as reliable. He was no more able to explain away the public acts of the plaintiffs to which reference has been made than could they themselves, and the contrast between his evidence and their conduct is enough of itself to throw the gravest doubt on the reliability of that evidence.

But an examination of his evidence shows in other ways that it is unreliable. Separate account books of the villages allotted to Sultan Singh were put to him by the defendants, and he admitted that they were in his own handwriting, and kept by him. One of these books contains the receipts of those villages, in the case of the year 1897. He admits that it contains a statement in his own handwriting that Sultan Singh is the proprietor of the property. He also admits that, so far as entries of expenditure are concerned, they relate only to the expenditure of Sultan Singh. Another relates to the year 1902. It contains the accounts of the same villages with a statement in his own handwriting that Brijraj Singh is the proprietor, and admittedly the items of expenditure relate to him alone. These books demonstrate the falsity of the rest of his evidence. It is true that he produced collective account books for all the villages purporting to show that the property was enjoyed in common in spite of the partition. There are numerous discrepancies between these and the separate account books which he alleges were compiled from them, and he is wholly unable to account for these discrepancies or indeed for the existence of the separate account books at all. The learned Judge of first instance, who saw the witness and examined the books, came to the conclusion that these collective account books were not genuine, and their Lordships have no doubt that this conclusion was correct.

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The claim of the plaintiffs in this action evidently arose from the sugggestion of the pleaders whom they consulted after quarrels arose in the family, and was based on the fact that the document which evidences the partition is termed a will. It is obvious that [352] such a partition could not have been made by Balwant Singh by will strictly so-called. But, as has been already pointed out, the document is much more than a will (if indeed it is in any sense a will at all), for it describes and witnesses to a family arrangement contemporaneously made and acted on by all parties. Everyone treated it as such at the time. The mutations of names show this beyond controversy. There is nothing, therefore, in the fact that the document is called a will which invalidates the partition, which was undoubtedly made in fact, and which was acted on by all parties for ten years without any dispute or misunderstanding as to their respective rights under it.

Counsels for the plaintiffs have endeavoured to support the contention that the partition was not intended to take effect *in praesenti* by reference to a provision to be found in this document. It reads as follows:—

"If I at any time come back from pilgrimages and find 'mismanagement or character of any one bad, then I shall have power to cancel this will, which shall be enforced from the date of its execution."

Their Lordships are of opinion that the highest effect that can be given to such words is that this evidences a contractual condition which the sons accepted in order to obtain the partition which gave them immediate possession of the property, and viewed thus, the contractual acceptance of a power of forfeiture in case of bad behaviour would not, in their Lordships' opinion, be sufficient to prevent the partition operating *in praesenti*. But the true interpretation of the provision is probably that it was merely put in as a threat in order to keep the sons in good behaviour, and that it could not have been enforced specifically, or even at all. It is certainly quite insufficient to outweigh the overwhelming evidence that this was a family arrangement accepted by all parties.

The above considerations relate only to the village property. In addition to this there were two buildings, one in Aligarh and the other at Sahaoli. The disposition in the document relating to these buildings is peculiar and did not in the opinion of the learned Judge of first instance amount to an absolute disposition of them, and their Lordships are not prepared to differ from his views on this point.

There remains the movable property. As to this the family arrangement is absolutely silent. The plaintiffs are therefore [353] entitled to their share of these movables as inherited property.

It will be seen therefore that their Lordships are of opinion that the judgment of the learned Judge of first instance was right on all points. Both plaintiffs and defendants appealed from his decision to the High Court. That Court allowed the plaintiffs' appeal and dismissed that of the defendants. The defendants appealed from both of these decisions. In their Lordships' opinion the High Court ought to have dismissed both appeals. They will accordingly humbly advise His Majesty that the order of the High Court allowing the plaintiffs' appeal should be discharged with costs, and the decree of the Subordinate Judge restored, and that the order of the High Court dismissing the defendants' appeal should be affirmed. The plaintiffs must pay the costs of the defendants' appeal to His Majesty in Council, and the defandants must pay the costs of their unsuccessful appeal.

Solicitors for the appellants:—*Ranken, Ford, Ford and Chester.*

Solictors for the respondents:—*Barrow, Rogers and Nevil.*

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APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

BAKHSHI RAM (*Defendant*) *v.* LILADHAR AND OTHERS (*Plaintiffs*).*

[17th March, 1913.]

Mortgage—Suit for sale against auction purchaser of mortgaged property—Evidence, admissibility of—Recital of receipt of consideration—Estoppel.

Held that an admission made by a mortgagor in a mortgage deed and also before the registering officer as to the receipt of consideration is admissible in evidence against the purchaser of the mortgaged property at an auction sale in execution of a simple money decree. *Behari Lal* v. *Makhdum Bakhsh* (1) followed. *Manohar Singh* v. *Sumirta Kuar* (2) not followed. *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (3) referred to.

Held also that a purchaser at auction of the right, title and interest of the father alone in joint family property, which had been mortgaged by the father was not entitled to raise the plea that the mortgage was made without legal [354] necessity so long as there was yet time for the sons to challenge the purchase *Muhammad Muzamil-ullah Khan* v. *Mithu Lal* (4) distinguished.

[**Ref.** 12 A. L. J. 1114=26 I. C. 84: **Fol.** 76 I. C. 815: **Ref.** 77 I. C. 516; 36 All. 141 (Purchaser in Execution cannot plead want of legal necessity.)]

THE facts of this case were as follows: —

The suit was brought on the basis of three mortgage deeds, of which one only was the subject of dispute when the case came in second appeal before the High Court. This was a mortgage executed by Kallu, on the 15th of March, 1890 in favour of the respondents. The appellant was the purchaser of the equity of redemption at an auction sale held on the 20th of January, 1909, in execution of a simple money decree against Kallu alone. Kallu and his sons and the appellant were made defendants in the suit. The appellant alone contested it. He questioned the execution and the payment of consideration, and stated that Kallu had no necessity to borrow at all. The plaintiffs examined only one attesting witness to the deed in question and he deposed that the mark of the executant Kallu had not been made in his presence. The Court of first instance held the execution and part of the consideration proved and allowed the claim to that extent. On appeal the District Judge decreed the claim in full, holding that the recital of receipt of consideration in the bond and the registration endorsement were sufficient evidence, which was unrebutted, against the appellant. As to the plea of want of legal necessity the District Judge refused to entertain it, on the ground that the plea had not been specifically raised in the court of first instance, which had framed no issue regarding it. The defendant appealed.

Dr. *Satish Chandra Banerji* (for Babu *Durga Charan Banerji*), for the appellant:—

The plaintiffs have not proved that the bond was properly attested within the meaning of section 59 of the Transfer of Property Act. There is no mortgage; *Shamu Patter* v. *Abdul Kadir Ravuthan* (5). Secondly, the recital in the bond is not binding upon the appellant who is an auction

* Second Appeal No. 874 of 1912 from a decree of J. L. Johnston, Second Additional Judge of Aligarh, dated the 28th of March, 1912, modifying a decree of Kunwar Sen, Additional Subordinate Judge of Aligarh, dated the 30th of May, 1911.

(1) (1913) I. L. R. 35 All. 194.
(2) (1895) I. L. R. 17 All. 428.
(3) (1895) I. L. R. 22 Cal. 909.
(4) (1911) I. L. R. 33 All. 793.
(5) (1912) I. L. R. 35 Mad. 607.

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purchaser; *Manohar Singh* v. *Sumirta Kuar* (1), *Bisheswar Dayal* v. *Harbans Sahay* (2). In the recent case of *Bihari Lal* v. *Makhdum Bakhsh* (3) the case of an auction-purchaser was left open. There the purchaser was one who had obtained a private transfer. It has been held in [355] some cases that an estoppel which is operative against the judgment-debtor need not necessarily be operative against the auction-purchaser; *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (4). Thirdly, the District Judge should have entertained the plea of want of legal necessity. The plea was raised in the written statement. A purchaser is entitled to raise the plea; *Muhammad Muzamil-ullah Khan* v. *Mithu Lal* (5).

Babu *Sarat Chandra Chaudhri* (for Babu *Jogindro Nath Chaudhri*,) for the respondents, was heard on the first and the third points:—

The case was decided by the two lower courts previous to the publication of the ruling of the Privy Council cited by the appellant. According to the view which prevailed before that ruling the bond in dispute would be regarded as validly attested and sufficiently proved, as the materials now stand on the record. Under the circumstances an opportunity ought to be given to the respondents to produce the other attesting witnesses and prove the document in the light of that ruling.

Then, the appellant is the auction purchaser of Kallu's interest alone and not of that of the sons. His position is no higher than that of Kallu, and he can not raise any pleas not permissible to Kallu himself. Therefore, he is not entitled to raise the question of want of legal necessity. In the case in I. L. R. 33 All. relied on by the appellant, the purchaser, besides being a transferee from the mortgagor alone, had acquired by adverse posssssion a title to the whole of the family property as against all the members of the family. In the present case the appellant has acquired nothing beyond Kallu's interest.

Dr. *Satish Chandra Banerji*, in reply:—On a sale in execution of a simple money decree against the father alone it is not only the interest of the father that can pass, but the whole family property including the sons' interest can pass, unless the sons prove that the debt was tainted with immorality. In the absence of any such action on the sons' part it must be taken that the appellant purchased the whole family property and is thus entitled to raise the plea of legal necessity.

GRIFFIN and CHAMIER, JJ.:—This was a suit by the respondents on three mortgages, dated the 18th of August, 1878, the 15th of [356] March, 1890, and 13th of November, 1898, but for the purposes of the present appeal we may regard it as a suit on the mortgage of the 15th of March, 1890, only. The first defendant to the suit was Kallu, the executant of the mortgage. Defendants 2, 3 and 4 were the sons of Kallu. Defendant 5 was a lessee of the mortgaged property, and defendant 6, who is the appellant here, is a purchaser of the property in execution of a money decree obtained by him against the defendant Kallu. The appellant put the respondents to proof of the mortgage and of the passing of the consideration and he also pleaded that the mortgage had been made without necessity. The first court held that the execution of the mortgage was proved by the evidence of two witnesses Raghunath Prasad and Bhudeo, but that the passing of a portion of the consideration had not been proved.

(1) (1895) I. L. R. 17 All. 428.
(2) (1907) 6 C. L. J. 659.
(3) (1913) I. L. R. 35 All. 194.
(4) (1895) I. L. R. 22 Cal. 909.
(5) (1911) I. L. R. 33 All. 783.

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That court accordingly gave this respondent a decree for part only of the sum secured by the mortgage. On appeal the District Judge agreed with the court of first instance that the execution of the mortgage had been proved and held that it was not open to the present appellant to challenge the deed on the ground that it was not supported by necessity. On the evidence he came to the conclusion that the passing of the whole of the consideration for the deed had been proved and he varied the decree of the first court accordingly. In second appeal it is contended:—(1) that the District Judge was wrong in holding that an admission as to the receipt of the consideration made by the executant Kallu in the deed and again before the registering officer was admissible in evidence against the appellant, the auction-purchaser of the property, (2) that the appellant was entitled to raise the question of legal necessity, and (3) that the evidence relied on as proof of the execution of the deed did not as a matter of law amount to proof of the execution of the deed.

The question whether admissions such as those made by Kallu in the present case are admissible against a subsequent auction-purchaser of the property was left open by our decision in *Bihari Lal* v. *Makhdum Bakhsh* (1). All that was held in that case was that such admissions are admissible against a subsequent purchaser of the property by a private treaty. But on the authorities we must hold that there is no real ground for distinguishing between [357] the case of an auction-purchaser and the case of a purchaser by private treaty. The decision of this Court in *Manohar Singh* v. *Sumirta Kuar* (2), has been relied on as authority for the proposition that such admissions are not admissible against a subsequent auction-purchaser of the property. The decision in that case was pronounced shortly before the decision of their Lordships of the Privy Council, in *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (3) was received in this country. In that case their Lordships said that " where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing either that he had direct notice or at least constructive notice of the real title " and their Lordships decided that this rule applied to a subsequent auction-purchaser of the property. Their Lordships said :— " This principle applies to Abdul Ali, and the appellants are in the same position, as they purchased only his right, title and interest and are equally bound by it." If such an estoppel is binding upon a subsequent auction-purchaser, there can be no doubt that an admission made with reference to property is admissible in evidence againt a subsequent auction-purchaser of the property. The value of the admission is another matter. The appellant in the present case must be held to be the representative in interest of Kallu and the statements made by Kallu in the deed and before the registering officer are therefore admissible against him. If there is no ground for distinguishing between the case of an auction-purchaser and the case of a purchaser by private treaty, there can be no doubt of the admissibility in evidence of the statements made by Kallu. On this point there are several recent decisions of this Court. The first ground of appeal, therefore, fails.

(1) (1913) I. L. R. 35 All. 194.
(2) (1896) I. L. R. 17 All. 428.
(3) (1895) I. L. R. 22 Cal. 909.

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With regard to the second ground of appeal, the appellant must be regarded as a purchaser of the rights of Kallu only. His purchase was made as recently as 1909 and might yet be challenged by Kallu's son. He is, therefore, in a different position [358] from that occupied by the purchaser in the case of *Muhammad Muzamil-ullah Khan* v. *Mithu Lal* (1). In that case it was held by the majority of the Court that the purchaser was entitled to challenge a mortgage made by one member of a Hindu family, because he had acquired title to the property, by adverse possession against all the members. We must therefore, hold that the appellant is not entitled to raise the question of the validity of the mortgage.

With regard to the third ground of appeal we think there ought to be a further inquiry by the lower appellate Court. It appears that there were three supposed attesting witnesses to the mortgage. One named Raghunath Prasad, who was called, said that Kallu did not sign the deed in his presence, therefore, he was not an attesting witness. There is evidence that another supposed attesting witness named Sundar Lal is dead. Nothing is known about the third attesting witness. The respondent in all probability relied on a decision of this Court according to which the evidence of Raghunath Prasad, if believed, was sufficient evidence of the execution. In view of a recent decision of the Privy Council it must be held on the record as it stands that the bond in suit has not been proved. In the circumstances we think that the respondent should be given a further opportunity of producing evidence. We direct that the record be returned to the court below for a fresh finding on the question whether the mortgage deed of the 15th of March, 1890, has been proved. Further evidence will be taken; and on return of the finding ten days will be allowed for objections.

Issue remitted.

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35 A. 358 (= 11 A. L. J. 442=19 I. C. 332=14 Cr. L. J. 236).

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Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

EMPEROR v. ALLAHDAD KHAN.*

[19th March, 1913.]

Act (Local) No. IV of 1910 (United Provinces Excise Act), section 63—Criminal Procedure Code, section 537—Unlawful possession of excisable article—Search warrant—Conviction not invalidated owing to absence of warrant.

Where the superintendent of police and a sub-inspector searched the house of a person suspected of being in illicit possession of excisable article and such [359] articles were found in the house searched, it was *held* that the conviction of the owner of the house under section 63 of the United Provinces Excise Act 1910, was not rendered invalid by the fact that no warrant had been issued for the search, although it was presumably the intention of the Legislature that in a case under section 63, where it was necessary to search a house, a search warrant should be obtained beforehand.

[Ref. 35 All. 575; 81 I. C. 615=21 A. L. J. 859=46 All. 86=25 Cr. L. J. 967.]

IN this case the house of one Allahadad Khan was searched by the Superintendent of Police and a Sub-Inspector on suspicion that the owner

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* Criminal Appeal No. 123 of 1913 by the Local Government, from an order of R. C. Tute, Additional Sessions Judge of Meerut, dated the 30th of November, 1912.

(1) (1911) I. L. R., 33 All., 783.

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was in illicit possession of excisable articles within the meaning of section 63 of the United Provinces Excise Act, 1910, and a mixture of cocaine with another drug was found in it. No search warrant had been obtained for the search. The finding of the cocaine was established by evidence and the accused was convicted under the Excise Act. On appeal the Sessions Judge held that the search was illegal and that the illegality vitiated the proceedings, and he acquitted the accused. The Local Government appealed.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown :—

The police officers who conducted the search had a right to do so without a search warrant. Section 50 of the United Provinces Excise Act (IV of 1910) authorised them to do so. They had authority to make the search also under the provisions of the Criminal Procedure Code. Secondly the irregularity in conducting the search is covered by the provisions of section 537 of the Code of Criminal Procedure. The words, "other proceedings before or during trial" in clause (*a*) of that section cover the case. Thirdly, an irregular search does not vitiate the trial and render the conviction illegal. It does not affect the question whether the accused was guilty or not. If the facts found establish his guilt the conviction is perfectly legal.

Mr. *Hameed-ullah*, for the accused :—

Section 50 of the Excise Act provides for immediate action only in urgent cases. This appears to have been intended from a consideration of the words "found committing an act, &c." in that section and of the succeeding sections 51, 53 and 54. If there is time to get out a search-warrant then a warrant should be obtained. In the present case there was ample time to get out a warrant. Section 537 is not meant to cure erroneous or illegal proceedings of the police but only of courts.

[360] GRIFFIN and CHAMIER, JJ :—One Allahdad Khan was convicted of an offence punishable under section 63 of the United Provinces Excise Act, No. IV of 1910, which provides as follows :—

"Whoever, without lawful authority, has in his possession any quantity of any excisable article knowing the same to have been unlawfully imported, transported or manufactured, and knowing the prescribed duty not to have been paid thereon, shall be punished with imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees or with both"

The Superintendent of Police and the Sub-Inspector in charge of the City Police station, on information received, searched the house of Allahdad Khan and discovered there a mixture of cocaine and another drug. The accused was convicted by a Magistrate and sentenced to six weeks' rigorous imprisonment and a fine of Rs. 50. On appeal the Additional Sessions Judge held that the search of the accused's house was illegal and that the absence of a search warrant was fatal to the case for the prosecution. He therefore acquitted the accused. The Local Government has appealed against the order of acquittal. It is doubtful whether the case is one which comes under the provisions of section 50 of the Excise Act, and we would have some hesitation in holding that the search was legal. Whether the search was legal or not, we have, however, the evidence of the finding in the accused's house of a certain quantity of cocaine, which is an excisable article under the provisions of the Excise Act, for possession of which the accused had no license. On the facts found we are satisfied that the accused must have known that the cocaine had been unlawfully imported and that no duty had been paid on it. We allow the appeal, set aside the order of acquittal passed by the Additional Sessions Judge and restore the

order of conviction. We reduce the sentence passed on the accused to the term of imprisonment already undergone by him and we set aside the order of fine. We may add that we think that it was the intention of the Legislature that in a case under section 63, where it is necessary to search a house, a search warrant should be obtained beforehand.

Appeal allowed and sentence reduced.

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35 A. 353=11 A. L. J. 442 =19 I. C. 332 =14 Cr. L. J. 236.

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35 A. 361 (=20 I. C. 239=11 A. L. J. 369=14 Cr. L. J. 415).

[361] REVISIONAL CRIMINAL.

Before Mr. Justite Muhammed Rafiq.

EMPEROR *v.* BIMALA CHARAN ROY.*

Act No XLV of 1860 (*Indian Penal Code*), *sections* 406 and 408—*Criminal breach of trust —Water Works Inspector misappropriating water—Money realised as water tax not credited to the municipality.*

Where a Municipal Water Works Inspector, being the lessor of a house within Municipal limits which he had sub-let, had such house connected with a municipal water main and accepted a yearly payment as water tax from his tenants but neither informed the municipal board that the connection had been made nor credited to the board the money which he received as water tax from his tenants, it was *held* that he was properly convicted under sections 406 and 408 of the Indian Penal Code, whether or not he might have been punishable under the United Provinces Water Works Act, 1891.

THE facts of this case were as follows :—

One Bimala Charan Roy was a water-works inspector in the service of the Municipality of Cawnpore on Rs. 140 per mensem. He rented two houses situated in one compound No. 67/23 in Mohalla Patkapur in the city of Cawnpore. He himself lived in the larger house and let the other house to two brothers Surendra Nath and Birendra Nath Banerji at a rent of Rs. 3 per mensem. Water was laid on to the larger house, but not to the smaller one. The tenants of the smaller house wanted the water to be laid on to their house and spoke about it to the applicant. The latter tapped the principal main which ran on the east side of the compound No. 67/23 and connected it by means of an old pipe to the smaller house and to his garden on the west. The work was done under the orders of the applicant by the plumbers and fitters of the municipality, who were his subordinates. No report of the new connection was made to the municipality. The applicant represented to his tenants that the municipal tax for the two pipes, namely one in the smaller house, and the other in the garden, came to Rs. 9, and that he and they, the tenants, should pay the tax in equal shares. The tenants agreed to the proposal of the applicant and paid him Rs. 9 for two years. Some time in 1911 the applicant was either dismissed by the municipality or left their service. It was after the severance of his connection with the municipality that it was discovered that water was laid [362] on to the smaller house and the garden for which no tax had been paid to the municipality. After a careful investigation a prosecution was started against the applicant which resulted in his conviction under sections 406 and 408 of the Indian Penal Code, and on appeal his conviction and sentence were upheld by the Sessions Judge. Bimala Charan Roy applied in revision to the High Court.

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*Criminal Revision No. 147 of 1913 from an order of Austin Kendall, Sessions Judge of Cawnpore, dated the 28th of January, 1913.

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35 A. 361=20 I. C. 239=11 A. L. J. 369 =14 Cr. L. J. 415.

Mr. *W. Wallach*, Babu *Satya Chandra Mukerji* and Babu *Sital Prasad Ghose* for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

MUHAMMAD RAFIQ J.—This is an application in revision under section 435 of the Criminal Procedure Code from an appellate order of the learned Sessions Judge of Cawnpore maintaining the convictions and sentences passed on the applicant under sections 406 and 408 of the Indian Penal Code. The facts which led to the conviction of the appellant are as follows. The applicant Bimala Charan Roy was the water-works inspector in the service of the municipality of Cawnpore on Rs. 140 per mensem. He rented two houses situated in one compound No. 67/23 in mohalla Patkapur in the city of Cawnpore. He himself lived in the larger house and let the other house to two brothers Surendra Nath and Birendra Nath Banerji at a rent of Rs. 3 per mensem. It seems that water was laid on to the larger house but not to the smaller one. The tenants of the smaller house wanted the water to be laid on to their house and spoke about it to the applicant. The latter tapped the principal main which ran on the east side of the compound No. 67/23 and connected it by means of an old pipe to the smaller house and to his garden on the west. The work was done under the orders of the applicant by the plumbers and fitters of the municipality, who were his subordinates. No report of the new connection was made to the municipality. The applicant represented to his tenants that the municipal tax for the two pipes, namely one in the smaller house, and the other in the garden, came to Rs. 9, and that he and they, the tenants, should pay the tax in equal shares. The tenants agreed to the proposal of the applicant and paid him Rs 9 for two years. Some time in 1911 the applicant was either dismissed by the municipality or left their service. It was after the severance of his connection [363] with the municipality that it was discovered that water was laid on to the smaller house and the garden, for which no tax had been paid to the municipality. After a careful investigation a prosecution was started against the applicant which resulted in his conviction. The facts just related have been found by the two lower courts against the applicant. The learned counsel for the applicant has advanced two contentions in support of the applicant that the offence deducible from the facts found by the lower courts is one that falls under section 45 of the Water Works Act, or one of theft, or cheating. No offence under section 406, or 408 of the Indian Penal Code, it is said, has been made out. I do not agree with the contention of the learned counsel for the applicant. The applicant was a member of the municipality at Cawnpore and one of his duties was to supervise and check the distribution of water from the municipal water-works. In other words he had dominion over the water belonging to the municipality. He deliberately misappropriated that water for his own use and for the use of his tenants, for which he paid no tax and about which he laid no information to his employers nor obtained permission for tapping the main. In this misappropriating municipal water the applicant clearly committed the offence described in section 408 of the Indian Penal Code. The conduct of the applicant in realizing money from his tenants on account of water tax and misappropriating that money to himself clearly falls under the offence described in section 406 of the Indian Penal Code. There was a distinct contract between himself and his tenants that the money which the latter were paying was paid on account of water tax, and the applicant in keeping

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that money committed criminal breach of trust. It may be that the offences of applicant may be punishable under the Water Works Act also, but that does not vitiate the conviction under sections 406 and 408 of the Indian Penal Code.

The second point urged on his behalf and urged with great force is that he being a literate respectable man should not have been dealt with so severely as he has been by the lower court. The learned counsel for the applicant urges strongly the claim of his client for the reduction of the sentence. I do not think that because the applicant is literate he should be dealt with less [364] severely than an ignorant man. In fact his position as a servant of the municipality and as a literate person calls for a more severe sentence than if he were an ignorant man unconnected with the municipality. The application fails and is rejected. The applicant must surrender to his bail before the Magistrate.

Application rejected.

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35 A. 364 (=11 A. L. J. 379=19 I. C. 121).

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

GOBARDHAN DAS AND OTHERS (*Defendants*) *v.* HORI LAL (*Plaintiff*) AND LEKHA SINGH AND OTHERS (*Defendants*).*

[20th March 1913.[

Act No. I of 1872 *(Indian Evidence Act), sections* 69 *and* 70—*Evidence—Mortgage—Proof of execution of mortgage—Mortgagors illiterate, and both they and the attesting witnesses dead before suit brought.*

A mortgage deed was on the face of it executed in 1889 by three illiterate mortgagors, who affixed their marks, and was attested by more than two witnesses At the time of the institution of a suit for sale thereon, all the executants and the attesting witnesses were dead, and the evidence tendered in proof of the mortgage consisted of (1) the statement of a witness who professed to be acquainted with the handwriting of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executants of the mortgage in suit and by the representative of the two other executants, which referred to and recognized the genuineness of the mortgage in suit, and (3) a deed of sale executed in 1902 by the representatives or some of the representatives of the executants of the deed in suit, which recognized the genuineness of the usufructuary mortgage mentioned above.

Held that, having regard to sections 69 and 70 of the Indian Evidence Act, 1872, this evidence was not sufficient to prove the mortgage in suit.

[Ref. 4 Pat. L. J. 511=53 I. C. 79.]

THIS was suit for sale on a mortgage purporting to be executed in 1899 by three persons—Khushal Singh, Moti Singh and Baljit Singh. The executants, being illiterate, had merely made their marks on the document. The deed was also attested by several witnesses. At the time of suit all the executants and the attesting witnesses were dead, and the evidence tendered in proof of the mortgage consisted of (1) the statement of a witness who professed to be acquainted with the handwriting of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executants of the mortgage in suit and by the representative of the two other executants, which referred to and

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*Second Appeal No. 846 of 1912, from a decree of F. E Taylor, District Judge of Bareilly, dated the 14th of March, 1913, confirming a decree of Baijnath Das, Officiating Subordinate Judge of Bareily, dated the 8th of May, 1911.

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[365] recognized the genuineness of the mortgage in suit, and (3) a deed of sale executed in 1902 by the representatives or some of the representatives of the executants of the deed in suit, which recognized the genuineness of the usufrutuary mortgage mentioned above. Both the courts below accepted this evidence as sufficient to prove the mortgage and gave the plaintiff a decree accordingly. Some of the defendants appealed to the High Court and contended that the lower court was wrong in holding that execution of the mortgage in suit had been proved within the meaning of section 69 of the Indian Evidence Act, 1872.

Babu *Lalit Mohan Banerji*, for the appellants :—

The mortgage-deed in suit has not been proved as required by section 68 and section 69 of the Evidence Act. There is no proof that the signatures of the executants are in their handwriting. The provisions of section 69 are imperative and are not satisfied by proving a later deed of usufructuary mortgage in which the deed in suit has been recited. Secondly, some of the representatives in interest of the executants of the deed in suit did not join in executing the usufructuary mortgage or the sale deed. They are, therefore, not bound by any admissions contained in those two documents.

Mr. *B. E. O'Conor*, for the respondents :—

The plaintiff produced the best evidence that could possibly be given under the circumstances in proof of the mortgage in suit. Section 69 does not say that direct evidence alone must be given in proof of the signature of the executant. Where direct evidence is not available, the execution may be proved by indirect evidence. Accordingly, proof of the later deed which recites the deed in suit is sufficient proof of the latter. The Indian law of evidence is founded on the English law. Section 69 should, therefore, be supplemented by the English rules of evidence which provide that in cases like the present the document can be proved by secondary evidence of handwriting, or by presumption or by any other evidence ; *Phipson* : Evidence (5th Edition), page 494, *Taylor* : Evidence (9th Edition), page 1214.

Babu *Lalit Mohan Banerji* was not heard in reply.

GRIFFIN and CHAMIER, JJ. :—This appeal arises out of a suit brought by the respondent Hori Lal on a mortgage made in his [366] favour on the 22nd of November, 1889, by three persons, Khushal Singh, Moti Singh and Baljit Singh. Both the courts below have found that the mortgage in suit has been proved and have decreed the claim. This is a second appeal some of the defendants, who contend, and have throughout contended, that the mortgage deed has not been proved. Other points are taken in the appeal to this Court. But, in the view we take of the question of the proof of the deed in suit, it is unnecessary to refer to them. The three executants of the deed, being unable to write, made their marks. All three of them and all the attesting witnesses to the deed died before this suit was brought. The evidence adduced to prove the document consists of (1) the statement of a witness named Lalta Prasad, who claimed to be acquainted with the handwriting of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executants of the mortgage in suit and by the representative of the two other executants, which refers to and recognizes the genuineness of the mortgage in suit, and (3) a deed of sale executed in 1902 by the representatives or some of the representatives of the executants of the deed in suit, which recognizes the genuineness of the usufructuary mortgage mentioned above. This

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evidence leaves little doubt in our mind that the mortgage in suit is genuine, and it has been accepted by both the courts below as sufficient. But it is contended that the evidence, other than the statement of the witness Lalta Prasad, is not evidence of the kind required by law. The appellants rely on section 69 of the Evidence Act, which provides that "if no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom it must be proved that the attestation of one attesting witness, at least, is in his handwriting and that the signature of the person executing the document is in the handwriting of that person." The evidence of Lalta Prasad proves that the attestation of two of the attesting witnesses is in their handwriting. But it appears to us that the two deeds relied upon are not evidence that the signatures of the persons executing the document are in their hand-writing. In was contended on behalf of the plaintiff respondent that the usufructuary mortgage and the deed of sale prove indirectly that the signatures of the three executants are [367] in their handwriting. Section 69 of the Evidence Act reproduces, as regards attesting witnesses, part of a rule of the English law. According to that law where a document is required by law to be attested one attesting witness at least must be called. But there are several exceptions to this rule, one being that if the attesting witnesses are dead, insane, out of the jurisdiction or cannot be found, secondary evidence of the execution may be given by proof of the hand-writing of the witnesses *or, if this is not obtainable, by presumptive or any other available evidence.* (See the cases cited at page 494 of Phipson on Evidence, fifth edition; and paragraph 1851 on page 1214 of the 9th edition of Taylor on Evidence). It is quite clear that in England it is recognized that there is a distinction between proof of the handwriting of a person and presumptive or other evidence that a document has been executed. The Indian law does not in a case of this kind appear to allow a party to rely on presumptive or other evidence of execution, where he is unable to comply with the provisions of section 69, either as regards the attestation of the attesting witnesses or as regards the signatures of the executants. In our opinion the evidence adduced by the plaintiff respondent in the present case, to prove the signatures of the deed in suit, does not comply with section 69 and we must, therefore, hold that the deed has not been proved. It was pointed out that one of the executants of the deed admitted execution by himself in one of the later deeds and section 70 was referred to, but that does not avail the plaintiff respondent, for it is not sufficient for his purpose to prove the admission of execution by only one party to the document. It appears to be a hard case, but the plaintiff respondent has himself to thank for the result. He deferred instituting the suit until all the attesting witnesses had died, knowing that the executants, who could only make marks, had made their marks on the deed. In any case he had considerable difficulty in producing proper evidence of execution. We allow the appeal, set aside the decrees of the courts below and dismiss the plaintiff's claim with costs in all courts.

Appeal allowed.

35 A. 363 (=19 I. C. 785=11 A. L. J. 411).

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35 A. 363=19 I. C. 785=11 A. L. J. 411.

[368] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

BASANT BIHARI GHOSHAL (*Petitioner*) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Opposite party*).*

[20th March, 1913.]

Civil Procedure Code (1908), *order XX, rule 2—Judgment—Judgment written by the Judge who heard the case after his transfer from the division and pronounced by his successor in office.*

A Judge may pronounce a judgment written but not pronounced by his predecessor in office, and this notwithstanding that at the time the judgment was written the Judge who wrote it had ceased to be the Judge of the court in which the case was tried. *Satyendra Nath Ray Chaudhuri* v. *Kastura Kumari Ghatwalin* (1) followed.

[Ref. 42 All. 362=18 A. L. J. 386=61 I. C. 932.]

THIS was a claim for compensation under the Land Acquisition Act. The claimant had been allowed Rs. 7,900 out of a much larger sum demanded and appealed as to the balance. The only point in the case material for the purposes of this report was that the judgment had been written by the Judge who tried the case after he had made over charge as judge of the particular judicial division, and was pronounced by his successor in office. On these grounds it was contended in appeal that the judgment was invalid.

Dr. *Satish Chandra Banerji*, for the appellant.

Mr. *A. E. Ryves*, for the respondent.

RICHARDS, C. J. and BANERJI, J.—This appeal arises out of a suit under the Land Acquisition Act. The property in respect of which the claim arises is situate in Allahabad, not far from the Muir Central College, for which institution it was acquired. The appellant has been awarded the sum of Rs. 7,900. In his appeal he claims a further sum of Rs. 32,000. There can be no doubt that if the appellant was the absolute owner of the property in dispute or even if he had a permanent interest therein subject only to the payment of Rs. 48-8-0 per annum to Government, he would be entitled to a considerably larger sum than has been awarded to him by the court below. We have considered the evidence, and we entirely agree with the court below that the appellant has not shown that he had any permanent interest in the plot. In our opinion his tenure amounted to no more than a tenancy from year to year.

We have been referred to *Naba Kumari Debi* v. *Behari Lal Sen* (2), *Nanda Lal Goswami* v. *Atarmani Dasee* (3), [369] *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (4) and *Nilratan Mandal* v. *Ismail Khan Mahomed* (5). All these cases were decided upon their own facts and circumstances and are quite different from the present case.

In the view we take of the nature of the appellant's tenure, we cannot say that the compensation awarded him by the court below was erroneous. It has been contended that the judgment of the court below and the decree founded thereon are bad because the judgment was written

* First Appeal No. 388 of 1911 from decree of R. C. Tute, Officiating District Judge of Allahabad, dated the 9th of September, 1911.

(1) (1908) I. L. R 35 Cal. 756.
(2) (1907) I. L. R. 34 Cal. 902.
(3) (1908) I. L. R. 35 Cal. 763.
(4) (1904) I. L. R. 32 Cal. 41.
(5) (1904) I. L. R. 32 Cal. 51.

by Mr. Tute after he had ceased to be the District Judge of Allahabad. The judgment, no doubt, was so written and it was delivered by his successor. We think the mere fact that Mr. Tute had ceased to be the District Judge, when he wrote the judgment, is not sufficient to vitiate the judgment. Order XX, rule 2, provides that a Judge may pronounce a judgment written but not pronounced by his predecessor. In the Full Bench case of *Satyendra Nath Ray Chaudhuri* v. *Kastura Kumari Ghatwalin* (1) the Calcutta High Court held that a judgment written ten months after the Judge had ceased to have jurisdiction in the particular division was good and fulfilled the conditions of the corresponding section of the Code of Civil Procedure then in force.

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35 A. 368=19 I. C. 785=11 A. L. J. 511.

It has been further argued that the award is without jurisdiction because Government claimed an interest in the property as well as the appellant. We do not think that there is any force in this contention. It can hardly be said that if land was in the occupation of a lessee under a lease from Government for fifty years, ten years of which had expired when the property was wanted for some public purpose, the property could not be acquired upon payment of compensation to the lessee for his interest in the unexpired term. If this be so, there is no difference in principle in the present case. If the appellant's interest is that of a tenant from year to year, he is entitled to compensation for the period that could elapse before he could be turned out and also for reasonable compensation for the buildings which are situate on the land.

In our opinion the appeal fails, and we accordingly dismiss it with costs.

Appeal dismissed.

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35 A. 370 (=19 I. C. 610=11 A. L. J. 512.)

[370] APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr Justice Ryves.

WALIDAD KHAN AND OTHERS (*Pliantiffs*) *v.* JANAK SINGH (*Defendant*).*

[1st April, 1913.]

Act No. IX of 1872 (Indian Contract Act,) section 11—Minor—Sale—Minor vendee subsequently dispossessed by third party—Right of vendee to recover purchase money from vendor.

Where certain zamindari property was sold to persons who were minors at the time of sale, and the purchasers were subsequently ousted on suit by third parties, it was *held* that the purchasers were at any rate entitled to recover from the vendors the sum which they had paid as purchase money *Mir Sarwarjan* v. *Fakhruddin Muhomed Chowdhuri* (1) and *Mohori Bibee* v. *Dharmodas Ghose* (2) distinguished.

THE facts of this case were as follows :—

The respondent sold certain zamindari property to the plaintiffs appellants and received Rs. 800, the sale price. The vendees were minors at the time. At the date of the sale, the respondent had no subsisting title to the property. The true owners of the property brought a suit for

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* Second Appeal No. 764 of 1912 from a decree of H. E. L. P. Dupernex, District Judge of Farrukhabad, dated the 15th of March, 1912 reversing a decree of Jotindra Mohan Basu, Munsif, dated the 2nd of September, 1911.

(1) (1911) 9 A. L. J. 33 ; L. R. 39 I. A. 1 ; I. L. R. 39 Cal. 232.

(2) (1908) I. L. R. 30 Cal. 539.

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cancellation of the sale deed and for recovery of possession. The suit was decreed, and the property thus passed out of the plaintiff's possession. The plaintiffs then brought the present suit against the respondent for refund, " under the terms of the sale-deed and also under the law," of Rs. 800, together with interest, and for the costs incurred by them in defending the former suit. The Munsif decreed the suit in full, except for a reduction of the amount claimed as interest. On appeal the District Judge, holding that the sale transaction was void on account of the vendees' minority, dismissed the suit entirely. The plaintiffs appealed to the High Court.

Dr. *Surendra Nath Sen*, for the appellants :—

The lower appellate court has dismissed the suit on the authority of the ruling in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1). That case is distinguishable. There, the suit was for specific performance of the contract to sell. Here the sale had taken place, consideration had passed and possession had been delivered. The contract has been executed and the matter has passed beyond the domain of mere agreement. There is a fundamental distinction between a contract and a conveyance, and the [371] rights of parties to the two transcations are quite different; *Kashik Lal* v. *Ram Narain* (2). A transfer in favour of a minor was upheld in the case of *Meghan Dube* v. *Pran Singh* (3). In that case, no doubt, the minor was not the sole mortgagee; but he was at least one of the mortgagees. After the sale had taken place the plaintiffs were deprived of the property by reason of defect in their vendor's title. They are entitled to refund by the vendor of the puchase money. I rely on the principle of the ruling in *Dattaram Govindbhai* v. *Vinayak Balakrishna* (4). The plaintiffs are seeking a refund of the purchase money, not on the ground that they were minors at the date of the sale, but on the ground that the puchased property has passed out of their hands through the fault of their vendor. The vendor fraudulently respresented himself to be the owner of the property to which he had no subsisting title. He cannot be allowed to take advantage of his own fraud. Therefore, apart from the warranty of title contained in the sale-deed, the plaintiffs are entitled to a refund on grounds of equity.

Munshi *Gulzari Lal* (with him Babu *Satya Chandra Mukerji*), for the respondent :—

The suit is based on a covenant of title contained in the sale deed. The ground of the suit is either this express contract or an implied contract of covenant of title. The plaintiffs were minors when this contract was made and the question is whether they can enforce it. As has been laid down in the case of *Mohori Bibee* v. *Dharmodas Ghose* (5), a contract with a minor is absoultely void and unenforceable. Even if it be assumed that the minors were represented by a guardian during the negotiation relating to the sale, still, under the ruling of the Privy Council in 9 A.L.J., cited above, the minors cannot enforce the contract. Then, a sale necessarily involves the idea of a contract. It presupposes a previous mutual agreement and consequently a sale to a minor is void; *Navakoti Narayana Chetti* v. *Loyalinga Chetty* (6). As to the contention that the respondent's conduct amounted to a fraud, there was neither any allegation of fraud nor have the [372] courts arrived at any finding on this point. The suit is not based on tort but upon the agreement in the sale deed.

(1) (1911) 9 A. L. J. 33; L. R. 39. A. 1; I. L. R. 39 Cal. 232.
(2) (1912) I. L. R. 34 All. 273.
(3) (1907) I. L R. 30 All. 63.
(4) (1903) I. L. R. 28 Bom. 181.
(5) (1903) I. L. R. 30 Cal. 539.
(6) (1900) 19 M. L. J. 752.

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Dr. *Surendra Nath Sen*, replied.

GRIFFIN and RYVES, JJ.—On the 17th of November, 1905, the defendant Janak Singh sold certain zamindari property to the plaintiffs, who were then minors. On a suit by third parties the plaintiffs were dispossessed. The plaintiffs, having been unable to obtain a refund of the purchase money from the defendant, brought this suit for its recovery and also for the costs incurred in the litigation with the third parties. In defence it was pleaded *inter alia*, that the contract was null and void, the plaintiffs having been minors at the date of the execution of the sale deed. The first court decreed the suit in part, namely, for the principal of the sale consideration Rs. 800; Rs. 119 in respect of the costs in the former litigation, and Rs. 260 as interest on the purchase money at 8 annas per cent. per mensem. The defendant appealed, eight grounds being taken in the memorandum of appeal. The lower appellate court disposed of the appeal on one ground only. In the opinion of that court the case was concluded by the decision of their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*(1). We think it desirable to set out exactly what was decided by their Lordships in that case, inasmuch as the report of the case, as it appears in the Allahabad Law Journal, is not quite correct (2). Their Lordships state:—" Without some authority their Lordships are unable to accept the view of the learned Judges of the Division Bench that there is no difference between the position and powers of a manager and those of a guardian. They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of guardian of a minor to bind the minor or of the minor's estate by a contract for the purchase of immovable property, and they are further of opinion that as the minor in the present case was not bound by the contract there was no mutuality, and that the minor, who has now reached his majority, cannot obtain specific performance of the contract " The lower appellate court dismissed the plaintiffs' suit. The **[373]** plaintiffs come here in second appeal. Various grounds have been pressed before us. It appears to us that the decision of the Privy Council referred to above, and the decision in *Mohori Bibee* v. *Dharmodas Ghose* (3) do not support the decision arrived by the court below. In the latter case it was decided that a money-lender, who had advanced money to a minor on the security of a mortgage, could not enforce the mortgage against the minor, and their Lordships held that justice did not require an order for the return of the money advanced to him with full knowledge of his infancy. We must draw a distinction between the facts which were before their Lordships in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1) and the facts of the present case. In the case before their Lordships, they had to deal with an agreement to sell. Here we have before us a contract which has been executed. The sale has actually taken place. The plaintiffs have paid the consideration money. They obtained possession of the property, but were subsequently dispossessed. It cannot be said that in the altered state of affairs which has arisen since the deed of sale, the plaintiffs have not acquired a good cause of action for recovery of the purchase money. So far as the case has been argued before us, we are unable to see any reason why the plaintiffs should be debarred from recovering from the defendant the purchase money which the latter received

(1) (1911) L. R. 39 I. A. 1; 9 A. L. J. (36); I. L. R. 39 Cal. 232.

(2) But *cf.* errata slip attached to A. L. J. No. 19 of 1911—Ed).

(3) (1903) I. L. R. 30 Cal. 539.

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from them as consideration for the property to which, it has been found, he had no title. It would, it appears to us, be highly inequitable to allow the defendant to retain the plaintiffs' money in his possession, and to hold that the plaintiffs could not recover from the defendant simply because they happened to be minors at the date of the sale. It is quite possible that the transaction might have been of such a nature that the defendant made himself liable under the criminal law for cheating, and it would be strange indeed that a vendor, who might have been held guilty of an offence of cheating, should not be held liable to refund to the plaintiffs the money out of which they have been defrauded. The court below decided the case on a preliminary point, and, as we are unable to agree with the decision, we allow this appeal, set aside the decree of the lower appellate court and remand the case to that court with directions to readmit the [374] appeal to its original number in the register and dispose of it according to law. Costs of this appeal will be costs in the cause.

Appeal decreed and cause remanded.

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35 A. 374 (=20 I. C. 1006=11 A. L. J. 452=14 Cr. L. J. 526.)

REVISIONAL CRIMINAL.

Before Mr. Justice Ryves.

EMPEROR *v.* AZMAT SHAH KHAN AND OTHERS.*

[13th April, 1913.]

Criminal Procedure Code, sections 517 and 520—Appeal—Jurisdiction—Power of appellate Court to pass orders regarding property in respect of which an offence has been committed.

Held that section 520 of the Code of Criminal Procedure gives to an appellate Court the same power as the court which originally tried a case to pass orders under section 517 of the Code. *Baloram Gogai* v. *Chintaram Kohta* (1) followed. *In re Devidin Durgaprasad* (2) distinguished.

IN this case two persons named Azmat Shah and Krishnanand were given licences to manufacture *katha* (catechu) in a village and both of them put down pits for that purpose. There was a dispute between the two as regards the *katha* manufactured and Azmat Shah forcibly took possession of it from Krishnanand and in doing so caused wrongful restraint to certain persons who were opposed to his doing so. Azmat Shah and some others were convicted by the court of Assistant Sessions Judge of Bareilly and sentenced to three years' rigorous imprisonment each. On appeal to the Court of the Sessions Judge the conviction was upheld but the sentences passed were reduced. The appellate court further ordered that as it was not satisfied that the whole of the *katha* recovered was that taken from Krishnanand, the parties were to be left to establish their claims to it in the Civil Court. The accused applied to the High Court in revision.

Mr. *C. Ross Alston*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown; Mr. *A. H. C Hamilton*, for the opposite party.

RYVES, J:—On the facts found in this case I cannot interfere with the conviction. But I think that the sentence, even as modified by the

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* Criminal Revision No. 192 of 1913 from an order of H. N. Wright, Sessions Judge of Bareilly dated the 10th of February, 1913.

(1) (1904) 9 C. W. N. 519.

(2) (1897) I. L. R. 22 Bom. 844.

learned Sessions Judge, is under the circumstances of the case unnecessarily severe. I accordingly maintain the [375] conviction, but reduce the sentence on Azmat Shah to one of six months' rigorous imprisonment and on Abdul Hakim, Najibullah, Asghar Husain, Wahidyar Khan, and Abdulla to one of three months' rigorous imprisonment each.

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35 A. 374=20 I. C. 1006=11 A. L. J. 462 =14 Cr. L. J. 526.

Mr. Hamilton has argued that the concluding words of the appellate court's order are *ultra vires*. The learned Sessions Judge says:—"I am not satisfied that the whole of the *katha* (catechu) recovered was that taken from Krishnanand and the parties will be left to establish their claim to it in the Civil Court." It is argued that under section 517 of the Criminal Procedure Code the only court that could pass orders under that section was the court trying the case, and reliance is placed on *In re Devidin Durgaprasad* (1). This decision, however, was passed before the present Code of Criminal Procedure came into force. It seems to me that section 520 gives an appellate court full power to pass such an order. The same view was taken by the Calcutta High Court in *Baloram Gogai* v. *Chintaram Kohta* (2).

Application rejected.

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35 A. 375 (=20 I. C. 405=11 A. L. J. 436=14 Cr. L. J. 521).

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* NANNA MAL.*

[11th April, 1913.]

Act (Local) No. I of 1900 (*United Provinces Municipalities Act*), *section* 88—*Municipal Board—Power of Board to order demolition of structure overhanging a public road—Compensation—Offer to pay compensation not a condition precedent to order for demolition.*

The owner of a house to which was attached a balcony overhanging a public road repaired the balcony, which had become dilapidated, and made it serviceable, but without obtaining the permission of the Municipal Board thereto.

The board thereupon issued notice to the house-owner under section 88 of the Municipalities Act, 1900, to remove the balcony, and, in default of compliance prosecuted him.

Held that the board had power, under section 88, clause (2) of the said Act, to order the removal of the balcony without assigning any reason, and that it was not necessary for the board, in the case of a notice issued under section 88, to tender or express its willingness to pay compensation in respect of the structure the demolition of which was ordered.

[Ref. 73 I. C. 813=4 Lah. 158.]

THE facts of this case were as follows :—

One Nanna Mal was the owner of a house in the town of Hathras. There was a balcony attached to this house overhanging a [376] public road. It fell into disrepair and the applicant reconstructed it and made it serviceable. He also had a privy in this house, the upper portion of the screening wall of which fell down. He accordingly rebuilt this wall so as to screen the privy from the public gaze. He acted, in both instances, without any sanction from the Municipal Board. On the 22nd of July, 1911, the Board issued a notice to the applicant, as the heading of the

*Criminal Revision No. 804 of 1912 from an order of Muhammad 'Nur-ul-Hasan Khan, Magistrate, first class, of Aligarh dated the 11th of June, 1912.

(1) (1897) I. L. R. 22 Bom. 844.

(2) (1904) 9 C. W. N. 549.

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35 A. 375=20 I. C. 405=11 A. L. J. 486 =15 Cr. L. J. 421.

notice shows, under section 91, clause (1), and section 88 of the Municipalities Act, and ordered him to remove both the privy and the verandah. He did not comply with the order, and was prosecuted and convicted of an offence under section 147 of the Municipalities Act, and has been fined Rs. 20. In the meantime he also brought a civil suit for a declaration that the notice issued by the Municipal Board was *ultra vires* and that he was not bound by it. The suit partly succeeded and partly failed. In so far as the notice under section 91 is concerned, which relates to the privy, the suit was decreed. In so far as the balcony was concerned, the suit was dismissed.

Against his conviction and sentence Nanna Mal applied in revision to the High Court.

Babu *Piari Lal Banerji*, for the appellant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

TUDBALL, J:—The facts out of which this revision has arisen are as follows. The applicant is the owner of a house in the town of Hathras. There was a balcony attached to this house overhanging a public road. It fell into disrepair and the applicant reconstructed it and made it serviceable. He also had a privy in this house, the upper portion of the screening wall of which fell down. He accordingly rebuilt this wall so as to screen the privy from the public gaze. He acted, in both instances, without any sanction from the Municipal Board. On the 22nd of July, 1911, the Board issued a notice to the applicant, as the heading of the notice shows, under section 91, clause (1), and section 88 of the Municipalities Act and ordered him to remove both the privy and the balcony. He did not comply with the order and was prosecuted and convicted of an offence under section 147 of the Municipalities Act and has been fined Rs. 20. In the meantime he also brought a civil suit for a declaration that the notice issued by the Municipal Board [377] was *ultra vires* and that he was not bound by it. The suit partly succeeded and partly failed. In so far as the notice under section 91 is concerned, which relates to the privy, the suit was decreed. In so far as the balcony was concerned the suit was dismissed. The question now before me is whether the applicant should have been found guilty of an offence under section 147 of the Act.

Taking first the case of the privy, it is quite clear that section 91, clause (1) or (2), could not apply to the facts of the present case. Under clause (1) the notice contemplated is one requiring the owner or occupier of any building or land to repair, alter, cleanse, disinfect or put in good order or to close any drain, privy or cess-pool. Clause (2) of the section relates really to a new privy built without permission or contrary to directions or regulations or the provisions of the Act or the rebuilding of any privy which the Board had ordered to be demolished or closed or not to be made. It is, therefore, quite clear that section 91 has really no application to the fact of this case and has wrongly been applied by the Board.

As regards the balcony, section 88 is the section under which the Board issued the notice. It must also be noted here that the Board took no action under section 87 of the Act. The notice was issued under section 88. Clause (1) of that section lays down that it shall not be lawful without the written permission of the Board to add to or place against or in front of any building any projection or structure overhanging,

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projecting into or encroaching on any street. Clause (2) then goes on to say that the Board may, by notice, require the owner or occupier of any building to remove or alter any projection or structure. To this clause there was a proviso that in the case of any such projection which was lawfully in existence at the commencement of the Act, the Board shall make reasonable compensation for any damage caused by the removal. There is nothing in the section limiting the right of the Board to issue the notice contemplated in clause (2) to cases in which the structure is dangerous to the public or insanitary or to cases of a similar nature. Apparently the Board has unlimited power, without assigning any reason, to issue the notice contemplated in clause (2). The proviso merely lays down that in certain cases the Board shall compensate the owner of the structure. [378] It is urged on behalf of the applicant that the Board should, in its notice, either tender compensation or at least express its willingness to pay compensation. It seems to me impossible to hold that the Board must do this. It is only in cases of projections lawfully in existence at the commencement of the Act that the Board is bound to pay compensation. It might be, in a special case, that the Board denied that the structure was one such as to entitle the owner to the compensation mentioned in the proviso. It would be absurd to hold that the Board in such a case could not order the removal of a structure until the question of compensation had been settled. In the circumstances of the present case it was the duty of the present applicant to comply with the order of the Board, at the same time putting forward his claim for compensation. If the Board wrongly refused to pay what was due to him it would have been open to him to recover the amount in a legal manner. Under the notice issued, therefore, in so far as the balcony was concerned, the present applicant was wrong in not complying with the order. He has, therefore, been guilty of an offence under section 147 of the Act, and the conviction was according to law. The application, therefore, fails and is rejected.

Application rejected.

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35 A. 378 (=20 I. C. 258=11 A. L. J. 477.)

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Lyle.

ABDUL AHAD AND OTHERS (*Plaintiffs*) *v.* MAHTAB BIBI AND OTHERS (*Defendants.*)*

[14th, April, 1913.]

Act No. IX of 1908 (*Indian Limitation Act,*) *section* 20—*Limitation—Interest—Payment of part of interest due—Suit for foreclosure.*

The word "interest" in section 20 of the limitation Act means interest or any part of the interest due. *Kallu* v. *Halki* (1) and *Anwar Husain* v. *Lalmir Khan* (2) distinguished.

THIS was a suit for foreclosure of a mortgage, dated the 4th of December, 1874. The mortgagee was in possession and received periodically profits in *part* satisfaction of the interest agreed upon in the deed. The Court of first instance held that these payments [379] extended the period of

*Second Appeal No. 1070 of 1912 from a decree of Sri Lal, District Judge of Ghazipur, dated the 20th of April, 1912, reversing a decree of Kashi Nath, Munsif of Saidpur, dated the 19th of February, 1912.

(1) (1896) I. L. R. 18 All. 295. (2) (1903) I. L. R. 26 All. 167.

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20 I. C. 258=
11 A. L. J.
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limitation, applying the second paragraph of section 20 of the Indian Limitation Act, 1908. On appeal the District Judge came to the conclusion that the word "interest" in section 20 meant the whole of the interest due on a debt, and that, therefore, as only part of the interest was paid on any particular date, section 20 could not be prayed in aid. The suit was accordingly dismissed as barred by limitation. The plaintiffs appealed to the High Court.

Maulvi *Muhammad Rahmat-ullah*, for the appellants.

Maulvi *Muhammad Ishaq*, for the respondents.

RYVES and LYLE, JJ:—The only point in this case is as to whether the suit is barred by limitation. The suit is one for foreclosure of a mortgage, dated the 4th of December, 1874. The mortgagee, was in possession and received periodically profits in part satisfaction of the interest agreed upon in the deed. The first court held that these payments extended the period of limitation, applying the second paragraph of section 20 of the Indian Limitation Act. On appeal, the learned District Judge came to the conclusion that the word "interest" in section 20 means the whole of the interest due on a debt and that, therefore, as only part of the interest was paid on any particular date, held that section 20 had no application, and dismissed the suit as barred by limitation. In our opinion "interest" in that section means the interest or any part of the interest due, and we agree with the first court that the suit is not barred by limitation. The rulings to which we have been referred [*Kallu* v. *Halki* (1) *Anwar Husain* v. *Lalmir Khan* (2)] are cases of redemption of a mortgage. The latter case expressly distinguishes a suit for redemption from a suit brought by a mortgagee to enforce his remedy. We, therefore, allow the appeal, and, setting aside the decree of the lower appellate court, remand the appeal to that court with directions to readmit it on its original number in the register and dispose of the remaining issues according to law. The costs of this appeal will be costs in the cause.

Appeal decreed and cause remanded.

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35 A. 380(=19 I. C. 645 =11 A.L.J. 463).

[380] APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Lyle.

ACHHAIBAR SINGH, AND OTHERS (*Plaintiffs*) *v.* RAM SARUP SAHU, AND OTHERS (*Defendants*).*

[16th April, 1913.]

Hindu Law—Joint Hindu family—Execution of decree—Power of managing member to enter up satisfaction of decree on behalf of the family.

Held that the managing member of a joint Hindu family can execute decrees on behalf of the family, and can receive payment and give good receipts on behalf of the family, which will be binding on the family. *Hori Lal* v. *Munman Kunwar* (3) followed. *Ganga Dayal* v. *Mani Ram* (4) distinguished.

[Ref. 80 I. C. 12; 79 I. C. 296.]

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* Second Appeal No. 1114 of 1912 from a decree of F. D Simpson, District Judge of Gorakhpur, dated the 17th of June, 1912, reversing a decree of Kesri Narain Chand, Munsif of Bansgaon, dated the 30th of April 1912.

(1) (1896) I. L. R. 18 All., 295.
(2) (1903) I. L. R. 26 All. 167.
(3) (1912) I. L. R. 34 All. 519.
(4) (1909) I. L. R. 31 All. 156.

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THE facts of this case were as follows:—

On the 9th of October, 1890, Bisheshar Sahu, father of defendants Nos. 1, 2 and 3, got a decree against one Bhawani Din for sale of certain share in certain properties, Bhawani Din (after the decree had been passed) sold the property to the plaintiffs and left Rs. 770, the amount due on the above decree, in the plaintiffs' hands for payment to the decree-holder.

Bisheshar died in 1892, leaving three sons Ram Sarup, Beni Madho and Chunni. Ram Sarup the eldest son, defendant No. 1, applied for execution of the decree, in 1893, and again in 1896. Both applications were struck off for want of prosecution, the second on the 31st of March, 1897, on which date the decretal money was paid to Ram Sarup, and he applied, under section 258 of the Civil Procedure Code of 1882, and the full satisfaction of the decree was accordingly certified. After this, 13 years passed, and then Beni Madho and Chunni, brothers of Ram Sarup, defendants 2 and 3, applied to execute the same decree by sale of the property. They did not make the plaintiffs parties to these execution proceedings, but brought on the record Somai Ahir, defendant No. 4, as representative of Bhawani Din, judgment-debtor. Somai Ahir made an objection that the application was time-barred and that the decree had been satisfied. The plaintiffs also put in an application to the same effect, but it was rejected. Somai Ahir's objection was also dismissed, without the court going into the question as to whether the decree had been satisfied, and the property was ordered to be sold.

[381] The plaintiffs then brought the present suit for a declaration that the property could not be sold in execution of the decree. The Munsiff held:—

(1) that the defendants 1, 2 and 3 formed a joint Hindu family and Ram Sarup defendant No. 1 was the manager;

(2) that the entire joint family was as much benefited by the realization of the decretal amount as defendant No. 1;

(3) that it was neither proved nor alleged that defendant No. 1 misappropriated the sum;

(4) that there had been collusion between the decree-holders and the judgment-debtor;

(5) that defendants 2 and 3 were 33 and 25 years of age respectively. The application for execution made in 1910, was made three years after their attaining majority.

He accordingly decreed the suit.

On appeal, the District Judge observed:—"There is no question of fact but there are several difficult points of law," and he found as follows:—

(1) that the payment to Ram Sarup did not discharge the decree;

(2) that section 47 of the Civil Procedure Code barred the suit;

(3) that the decision of the question of limitation was barred by the principle of *res judicata*;

(4) that the decision of the Munsif, dated the 30th of May, 1911, was binding on the plaintiffs.

He therefore reversed the Munsif's decision and dismissed the suit. The plaintiffs appealed to the High Court.

Munshi *Iswar Saran*, on behalf of the plaintiffs appellants, submitted that the position of the manager of a joint Hindu family was peculiar and he enjoyed extensive rights. He represented the entire family in transactions with the outside world. He could make and receive payments

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on behalf of the whole family. He relied on the Full Bench case of *Hori Lal* v. *Munman Kunwar* (1). He contended that section 47 of the Code of Civil Procedure did not bar the suit as the decree had been fully satisfied. He referred to *Har Prasad* v. *Sheo Ram* (2). He further submitted [382] that, according to section 47, the court had full discretion to treat the plaint as an application in execution. As regards the questions of limitation and *res judicata*, he contended that no order passed in any proceedings to which the plaintiffs were no parties, against the original judgment-debtor, would be binding on his clients, as the original judgment-debtor's interest in the matter completely ceased after the sale to the plaintiffs and the latter could not be said to be the representatives of the former.

Babu *Sarat Chandra Chaudhri*, (for Dr. *Satish Chandra Banerji*) for the respondents, contended that the District Judge had not distinctly found that Ram Sarup was the manager of the family. He pressed for a finding on the point. If Ram Sarup was not the manager, he could not give a valid discharge without the concurrence of his other brothers. He submitted that the discretion mentioned in section 47 of the Civil Procedure Code could only be exercised in favour of a decree-holder who instituted the suit. He further submitted that all orders passed against the original judgment-debtors were binding on the appellants as they purchased the property after the decree. He referred to section 52 of the Transfer of Property Act. He also relied on *Ganga Dayal* v. *Mani Ram* (3) and *Bhagwanta* v. *Sukhi* (4).

Munshi *Iswar Saran* was heard in reply.

RYVES and LYLE JJ.:—Bisheshar Sahu, father of defendants Nos. 1 to 3 obtained a decree for sale on a mortgage of certain property on the 9th of October, 1890. Bhawani Din, the mortgagor, judgment-debtor, after the decree, sold his equity of redemption to the plaintiff and left Rs. 770 with him out of the consideration money to pay off the mortgage decree. Bisheshar Sahu died, leaving three sons, namely, Ram Sarup, Beni Madho and Chunni. Ram Sarup was an adult and the two younger brothers were minors. After two infructuous applications to execute the decree, the plaintiff paid off the amount of the mortgage to Ram Sarup, and Ram Sarup applied, under section 258 of the old Civil Procedure Code, to have the satisfaction of the decree certified by the court, and this was done on the 31st of March, 1897.

Thirteen years afterwards Beni Madho and Chunni applied to execute the same decree by sale of the property. The plaintiff, [383] who alone had any interest in the property, was not made a party to these proceedings.

One Somai Ahir was brought on the record as a legal representative of Bhawani Din, the mortgagor judgment-debtor. The court executing the decree found that Beni Madho and Chunni had made their application within three years of attaining majority, and ordered the property to be sold, and sent the papers to the Collector for compliance. When the sale notification was issued, the plaintiff first became aware of what had been done. He applied to the Collector, objecting to the sale on the ground that the decree had been already executed; his application, however, was dismissed, on the ground that he was no party to the decree. Hence this suit.

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(1) (1912) I. L. R. 34 All. 549
(2) (1898) I. L. R. 20 All. 506.
(3) (1909) I. L. R. 31 All. 156.
(4) (1899) I. L. R. 22 All. 33 (46).

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The Munsif found (1) that the three brothers, Ram Sarup, Beni Madho and Chunni, formed a joint Hindu family and that Ram Sarup was the manager, (2) that the joint family was benefited by the payment of the mortgage money, (3) that it was neither alleged nor proved that Ram Sarup had misappropriated the money. He also held that Ram Sarup, as manager of the family, was legally entitled to accept payment and enter satisfaction of the decree, and that his act bound the joint family. He decreed the suit.

On appeal before the learned District Judge no question of fact was raised. Various legal pleas were taken, only one of which, however, is now in question in this appeal, and that is, whether the managing member of a joint Hindu family can have satisfaction of a decree recorded, so as to bind the other members of the joint family. The learned Judge says :— "I accept the finding of the lower court that Ram Sarup and defendants Nos. 2 and 3 were members of a joint Hindu family. The lower court has found that the head of Hindu family can enter satisfaction of a decree against himself and other members of the family. I am unable to agree." This decision of the learned District Judge was given on the 17th of June, 1912, *i.e.*, before the judgment of the Full Bench in *Hori Lal* v. *Munman Kunwar* (1) had been published.

It seems to us that that decision concludes the question and is full authority for holding that the managing member of a joint [384] Hindu family can execute decrees, on behalf of the family, and can receive payment and give good receipts, on behalf of the family, which are binding on the family. It is argued before us that the three brothers were joint decree-holders and that satisfaction entered by one could not bind the others, and reliance was placed on the case of *Ganga Dayal* v. *Mani Ram*(1). That case was decided before the Full Bench case, and in any event is distinguishable from the present case, because it is stated on page 160 of the report :—" It is further argued in the present case that plaintiff No. 1 must be deemed to be the managing member of the family, who would have a right to give a discharge. The powers of the manager of a Hindu family are undoubtedly very extensive, but there is nothing in the present case to show that the plaintiff No. 1 ever acted as the manager."

It is conceded by the learned vakil for the respondent, that if in our opinion the lower court has come to a definite finding that Ram Sarup was the managing member of the family then the reasons given by the learned District Judge for dismissing the suit could not be supported, and this is obviously so, for if Ram Sarup was the manager of the family and as such received payment in full of the decree held by the joint family, and had satisfaction of the decree certified by the court executing it, then the decree was completely discharged and could not possibly be executed again. We have no hesitation in holding that the District Judge concurred with the Munsif and did find that Ram Sarup was the manager of the joint family of which he and his two brothers were the members.

In the court of the Munsif, Beni Madho and Chunni had denied that Ram Sarup was the manager of the family. They alleged that he had separated from them. On the evidence before him the learned Munsif came to a very distinct finding, as mentioned in the beginning of our judgment. In the grounds of appeal before the District Judge, no specific objection was taken to this finding, and the Judge himself states that no question of fact was raised before him, and he accepted the findings of

(1) (1912) I. L. R. 34 All. 549. (2) (1908) I. L. R. 31 All. 156.

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35 A. 380=19 I. C. 645=11 A. L. J. 463.

the lower court. This must include the finding as to the status of Ram Sarup, because the whole of his argument presupposes that Ram Sarup was the manager and acted as such.

[385] We, therefore, allow the appeal, and, setting aside the decree of the District Judge with costs, restore that of the Munsif.

Appeal allowed.

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35 A. 385 (=20 I. C. 424=11 A. L. J. 527).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

KHETTAR CHANDRA BASU MALLIK (*Defendant*) *v.* NABIN KALI DEVI (*Plaintiff*) AND GOSHAIN RAMPURI (*Defendant*).*

[22nd April, 1913.]

Pre-emption—Subject matter of suit re-sold at advanced price—Second sale subject to right of pre-emption in respect of the first.

A house in the city of Benares subject to a customary right of pre-emption was sold for Rs. 1,150. The vendee resold it shortly afterwards to the defendant for Rs. 4,000. *Held* on suit brought to pre-empt the property at the original price of Rs. 1,150, that the second sale was subject to the right of pre-emption and the pre-emptor was only bound to pre-empt the first sale, making the subsequent vendee a party to the suit so as to bind him by the proceedings. *Kamta Prasad* v. *Mohan Bhagat* (1) referred to.

[Ref. 79 I. C. 1053=22 A. L. J. 817.]

THIS was a suit for possession by right of pre-emption of a house in the city of Benares. The sale sought to be pre-empted was for Rs. 1,150. The purchaser (defendant No. 2) sold the same property subsequently for Rs. 4,000 to defendant No. 3. The plaintiff offered to pay only Rs. 1,150. The court of first instance decreed the claim. On appeal the District Judge confirmed the decree. The defendant appealed.

Munshi *Purshottam Das Tandan*, for the appellant.

Babu *Sital Prasad Ghosh*, for the respondents.

RICHARDS, C. J. and TUDBALL, J.—This appeal arises out of a suit for pre-emption. The premises are situate in the city of Benares. A number of issues were framed in the court below; amongst others, one as to whether the custom prevailed in the particular muhalla where the premises were situate. Another issue was whether the demands were made in accordance with the Muhammadan Law. On the first question, it has not been shown to us that the decision of the court below was wrong. There was undoubtedly evidence of the existence of the custom and in conjunction with that evidence the court was clearly entitled to take into consideration that pre-emption is common in a number of the [386] muhallas into which the city Benares is divided. On the whole, we see no reason to differ from the view of both the courts below on this point.

With regard to the making of the demands, this is really a question of fact in the present case. It is not alleged that the demands were made in any improper form, or that the words used were not sufficient. The only question which has been urged here is whether or not the plaintiff

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* Second Appeal No. 856 of 1912, from a decree of G. A. Paterson, District Judge of Benares, dated the 29th of March, 1912, confirming a decree of Srish Chandra Basu, Subordinate Judge of Benares, dated the 18th of July, 1911.

(1) (1909) I. L. R. 32 All. 45.

made the demand immediately after hearing of the sale. This is a pure question of fact and is concluded by the finding of the courts below.

The last question which has been argued in the present appeal is the question of price. It appears that the property was first sold in September 1908. At that time registration had to be obtained compulsorily and the court below found that the vendee did not obtain actual possession until a period which rendered the present suit not barred by limitation. But it appears that after the last vendee had obtained possession and cut down a *peepul* tree, the property was resold to the present appellant at about four times the original price. The court of first instance threw some doubt upon the *bona fides* of this sale, but the lower appellate court considered this question immaterial and dealt with the case upon the assumption that the sale was *bona fide*. In our opinion, the second sale must be taken to have been made subject to the right of pre-emption and the plaintiff was only bound to pre-empt the first sale, making, of course, the subsequent vendee a party to the suit so as to bind him by the proceedings. This was the view taken by a Bench of this Court in *Kamta Prasad* v. *Mohan Bhagat* (1).

The result is that the appeal fails on all points and is dismissed with costs.

Appeal dismissed.

1913
APRIL 22.

APPELLATE CIVIL.

35 A. 385=20 I. C. 424=11 A. L. J. 527.

35 A. 387 (=19 I. C. 651=11 A. L. J. 534).

[387] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Ryves.

BANKE LAL AND ANOTHER (*Defendants*) *v.* SHANTI PRASAD AND OTHERS (*Plaintiffs*) AND BIRJ LAL AND OTHERS (*Defendants*).*

[25th April, 1913.]

Act No. IV of 1893 (*Partition Act*), *sections* 1, 2 *and* 3—*Partition—Mortgagee rights in a revenue paying mahal—Application for sale by owners of less than a moiety—Act* (*Local*) *No. III of* 1901 (*United Provinces Land Revenue Act*), *section* 107.

Mortgagee rights merely in a revenue-paying mahal do not fall within the purview of the United Provinces Land Revenue Act, 1901, for the purposes of partition : consequently the provisions of the Partition Act, 1893, apply to the partition amongst co-owners of such rights. But an order for sale of the mortgagee rights under section 2 of the Partition Act will not be valid unless based upon the request of a party or parties interested to the extent of one moiety or upwards.

THE facts of this case were as follows :—

In a suit for partition a preliminary decree was passed, and for the purpose of preparing a final decee the court appointed a commissioner and a receiver. Amongst the properties the subject of the partition were the mortgagee rights in one half of a village called Sundhawra. One of the defendants in the partition suit applied to the court apparently under section 2 of the Partition Act, 1893, praying that the mortgagee rights might be sold by auction to the highest bidder among the parties. The interest of the applicant however, amounted to only one-quarter of the said rights. The application was opposed by other parties to the partition proceedings: but after calling for a report from the receiver, the court passed an order directing the sale of the mortgagee rights to the highest bidder amongst the

* First Appeal No. 842 of 1912 from a decree of Pirthvi Nath, Subordinate Judge of Bareilly, dated the 16th of May, 1912.

(1) (1909) I. L. R. 32 All. 45.

1913
APRIL 25.

APPELLATE CIVIL.

35 A. 387=19 I. C. 651=11 A. L. J. 534.

co-sharers. Against this order the two opposing defendants appealed to the High Court.

Munushi *Haribans Sahai*, for the appellants.

Mr. *M. L. Agarwala*, for the respondents.

BANERJI and RYVES, JJ:—Banwari Lal, Parsotam Das and Ramrich Pal brought a suit for partition of their shares in certain joint property. A preliminary decree was passed in that suit, and for the purpose of preparing a final decree the court appointed a commissioner and receiver. Among the properties ordered to be partitioned are mortgagee rights in one half of the village Sundhawra. On the 15th of May, 1912, Shanti Prasad, who was one of the defendants, and the extent of whose share, as also the share of his minor brother Ram Kunwar, is one quarter, applied to [388] the court, apparently under Act IV of 1893, praying that the motgagee rights be sold by auction to the highest bidder among the parties. This application was opposed by Banke Lal and Ratan Lal. On reference by the court to the receiver and on obtaining a report from him, the court made an order directing the sale of the mortgagee rights to the highest bidder among the co-sharers. The present appeal has been preferred against this order and it is contended that the partition Act (No. IV of 1893) does not apply to a case like this, inasmuch as the property in question is property paying revenue to Government. Clause (4) of section 1 of the Act is referred to in support of this contention. That clause provides that nothing contained in the Act shall be deemed to affect any local law providing for the partition of immovable property paying revenue to Government. Partition of immovable property paying revenue to Government in these provinces is to be effected under the provisions of the Land Revenue Act, No. III of 1901. Under that Act, separate mahals cannot be formed of mortgagee rights as between the holders of a mortgage. The partition contemplated by that Act is a partition of zamindari rights, and if partition is sougut of zamindari rights in respect of property which is under a mortgage, as against other co-sharers of the zamindari rights, the application for partition should, as required by section 107 of the Act, be made by the mortgagor and the mortgagee jointly. In our opinion that Act has no application to a case like this. Under Act IV of 1893, at the request of share-holders interested individually or collectively to the extent of one moiety or upwards, the Court may direct a sale of the property ordered to be partitioned and distribution of the proceeds, and where such an order is made, any of the parties other than the applicant may apply for leave to buy at a valuation the share or shares of the party or parties asking for sale. In the present case Shanti Prasad and his brother who applied for sale of the mortgagee rights were share-holders only of one-fourth and not of a moiety. Therefore they alone could not ask the court to sell the mortgagee rights. Other share-holders may have expressed their consent to the sale of the mortgagee rights. But they made no request to the court in that behalf. Therefore, it seems to us, that the court was not competent to take action under section 2 of the Act. If action has been taken under that section, and the court had decided [389] that the property ought to be sold, the share-holders other than the applicant could under section 3, have applied for a valuation and the court in that case should have ordered a valuation to be made. Neither of these proceedings appears to have been taken. There being no application either under section 2 or under section 3, the court was not competent to

make the order passed by it. We must, therefore, set aside its order of the 16th of May, 1912. It will be open to the parties or such of them as may choose to do so, to ask the court to take action under section 2, and in that case, it will be open to other share-holders to apply under section 3, and if such applications be made, it will be the duty of the court to proceed under the provisions of sections 2 and 3. The order complained of is an illegal order. We accordingly allow the appeal, and set aside that order. Under the circumstances we direct the parties to pay their own costs in both courts.

Appeal allowed.

1913
APRIL 25.
APPELLATE CIVIL.
35 A. 387=19 I. C. 661=11 A. L. J 534.

35 A. 389 (=19 I. C. 664=11 A. L. J. 533).

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Ryves.

TODAR MAL AND OTHERS (*Judgment-Debtors*) *v.* PHOLA KUNWAR (*Decree-Holder*).*

[29th April, 1913.]

Act No. IX of 1908 (*Indian Limitation Act*), *schedule I, article* 128—*Execution of decree—Limitation—Step in aid of execution—Application for transfer of decree—Civil Procedure Code* (1882), *section*, 223.

Held, that an application made to the court passing a decree to transfer it for execution to another court is an application to take a step in aid of execution within the meaning of article 182 of the first schedule to the Indian Limitation Act, 1908. *Chanaru Nath Gossami* v. *Gurroo Prosunno Ghose* (1) followed.

The facts of this case were as follows :—

A preliminary decree for sale was passed on the 1st of September 1897, and it was made absolute on the 17th of November, 1900. The last application for execution, admittedly within time, was made on the 11th of May, 1906. On the 5th of September, 1908, the decree-holder applied to the court at Bareilly, which had passed the decree, to transfer it for execution to the court at Shahjahanpur. This application was made under section 223 of the Code of Civil Procedure, 1882. The certificate asked for was granted, and thereupon an application for execution was made in the court at Shahjahanpur on the 8th of February, 1910.

[390] The judgment-debtors took objection that execution of the decree was time-barred. This objection was disallowed by the executing court, and the judgment-debtors thereupon appealed to the High Court.

Munshi *Gobind Prasad*, for the appellant.

Babu *Sital Prasad Ghosh* and Babu *Benode Bihari*, for the respondents.

BANERJI and RYVES JJ. :—This appeal arises out of an application for the execution of a decree, and the question to be determined is whether the application is time-barred. A preliminary decree for sale was passed on the 1st of September, 1897, and it was made absolute on the 17th of November, 1900. The last application for execution, admittedly within time, was made on the 11th of May, 1906. On the 5th of September, 1908, the decree-holder applied to the court at Bareilly, which had passed the decree, to transfer it for execution to the court at Shahjahanpur. This application was made under section 223 of the Code of Civil Procedure, 1882. The certificate asked for was granted, and thereupon an application

* First Appeal No. 43 of 1913, from a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 12th of September, 1912.

(1) (1895) I. L. R. 22 Cal. 875.

1913
APRIL 29.

APPELLATE CIVIL.

35 A. 389=19 I. C. 664=11 A. L. J. 533.

for execution was made in the court at Shahjahanpur on the 8th of February, 1910. It is this application which the appellants contend is time-barred. The court below has held against the appellants, and in our judgment its decision is right. The present application for execution would be within time if the application of the 5th of September, 1908, was one to take a step in aid of execution, within the meaning of article 182, schedule I of the Limitation Act. No application for execution could be made in a district outside the jurisdiction of the court which passed the decree unless that court made an order transferring the decree for execution. An application for transfer of the decree is, therefore, an essential and necessary step preliminary to the making of an application for execution in a court which is not the court which passed the decree. Such an application is clearly an application to take a step in aid of execution. This was so held by the Calcutta High Court in *Chundra Nath Gossami* v. *Gurroo Prosunno Ghose* (1), and we agree with that ruling. We dismiss the appeal with costs.

Appeal dismissed.

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35 A. 391 (=20 I. C. 73=17 C. W. N. 1029=25 M. L. J. 34=1913 M. W. N. 630=14 M. L. T. 110=18 C. L. J. 200=18 Bom. L. R. 853=11 A. L. J. 518=40 I. A. 170).

[391] PRIVY COUNCIL.

JANKI PRASAD SINGH (*Defendant*) *v.* DWARKA PRASAD SINGH (*Plaintiff*).*

Appeal and cross appeal consolidated.

[15th and 16th April and 10th June, 1913.]

[*On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.*]

Act No. I of 1869 (*Oudh Estates Act*), *sections* 2, 3, 8, 10 *and* 22—*Summary and regular settlements of Oudh—Villages settled on grantee whose name was entered as owner in Lists* 1 *and* 2 *of those prepared under section* 8—"*Taluqdar*"—"*Estate*" *under section* 2—*Impartible property*—Kabuliat *executed by grantee after the time limit specified in section* 3—*Suit for partition—After-acquired properties held to be partible, there being no intention shown to incorporate them with the impartible property.*

At the summary settlement of Oudh an order was made on the 5th of October, 1859, for the settlement of certain villages with the ancestor of the parties to these appeals, who, however, did not execute his *kabuliat* until the 13th of October, 1859, and so not within the time limit specified in section 3 of the Oudh Estates Act (I of 1869), namely "between the 1st of April, 1858, and the 10th of October, 1859." At the regular settlement, shortly afterwards, the grantee recovered decrees for possession of other villages; and subsequently acquired other properties by purchase. In respect of all the settled villages his name was entered in Lists 1 and 2 prepared under the statutory provisions of section 8 of the Act. In a suit for partition to which the defence was that all the property was impartible,

Held (affirming the decisions of the Courts in India) that the grantee (the defendant) was, on the construction of the provisions of Act I of 1869 relating thereto, a "taluqdar," and the villages so settled with him formed, within the meaning of the Act, an "estate" which was impartible and descendible to a single heir.

On a question whether the delay in executing the *kabuliat* deprived the taluqa of the character of an "estate" defined in section 2 of the Act, the Judges of the Judicial Commissioner's Court differed in opinion.

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* *Present* :—Lord SHAW, Lord MOULTON, Sir JOHN EDGE, and Mr. AMEER ALI.

(1) (1895) I. L. R. 22 Cal. 375.

Held, in the absence of an express declaration that non-execution within the time specified would be fatal to the right given to the grantee by section 3, that no such construction could be put on that section; but the execution of the *kabuliat* related back to the date of the settlement, namely the 5th of October, 1859.

As to the after-acquired properties the defendant contended that by the custom of the family they became part of the original estate and were therefore not subject to the ordinary Hindu law of inheritance.

Held (affirming the decisions of both courts below) that the evidence was insufficient to establish that custom; that no intention of the taluqdar was shown to incorporate the subsequently acquired properties with the taluqa, as [392] was necessary on the authority of the case of *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal* (1); and that the plaintiff was therefore entitled to a decree for his share (one half) of such properties as being partible.

[Ref. 38 I. C. 627=40 Mad. 1016; Fol 44 Mad. 1=39 M. L. J. 520=1920 M. W. N. 660=61 I. C. 242; Ref: 80 I. C. 333; 77 I. C. 1041=44 M. L. J. 503=37 C. L. J. 287=4 P. L. T. 319=18 L. W. 555=28 C. W. N. 98=1923 M. W. N. 460 (P. C.)]

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APPEAL (116 of 1911) and cross appeal (117 of 1911) consolidated, from a judgment and decree (8th September, 1909) of the Court of the Judicial Commissioner of Oudh, which affirmed with slight variation the decree (15th September, 1908) of the Court of the Subordinate Judge of Bara Banki.

The suit which gave rise to these appeals was instituted by Dwarka Prasad Singh for partition of certain properties in the possession of his brother the first defendant Janki Prasad Singh, claiming that such properties constituted ancestral estate of the family partible between them. The defence of Janki Prasad Singh was that the "properties in suit were impartible, and that no partition can be or ever has been made in this family in accordance with the prevailing custom" which obtained from ancient times. The first defendant had died and was now represented by Dharaband Singh his minor son, who appeared by his guardian the Deputy Commissioner of Bara Banki as representing the Court of Wards. The second defendant Marjad Kuar (the mother of the plaintiff and of the first defendant) was also dead, and no question now remained as to her interest in the properties in suit.

The following extract from the family pedigree shows the relationship of the parties, and explains the history of the litigation which is stated in their Lordships' judgment, together with the relevant sections of the Oudh Estates Act (I of 1869).

SHEO DAT SINGH.

- Autar Singh (died childless in 1879).
- Bisheshar Singh.
  - Thakur Jang Bahadur Singh (died 8th June, 1889, leaving his widow Marjad Kuar, defendant No. 2).
    - Janki Prasad Singh, defendant No. 1.
      - Bhaiya Dharaband Singh (the ward of the Court of Wards).
    - Sitla Prasad Singh, (died childless on 29th October, 1905).
    - Dwarka Prasad Singh, plaintiff.
  - Baldeo Singh. (died childless).

(1) (1902) I. L. R. 29 Cal. 433 (453) : L. R. 29 I. A. 82 (98).

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[393] The main questions for determination in these appeals were whether the properties in suit were impartible, and whether, they devolved on a single heir under the provisions of the Oudh Estates Act (I of 1869).

The history of the family showed that certain of the villages of which the properties in suit consisted had been settled upon Autar Singh, an ancestor of the parties, at the Summary Settlement in 1859, and at the Regular Settlement shortly afterwards; and that other properties had been subsequently acquired by him. As to the properties which had been settled, the Subordinate Judge held that they constituted an "estate" within the meaning of section 2 of Act I of 1869, and were consequently impartible and devolved by family custom on a single heir; but as to the after-acquired properties he held that they were joint and partible; and he gave the plaintiff a decree for partition, and delivery of possession of a one-third share in them, dismissing the suit as to the settled portion of the properties.

From that decision both parties appealed to the Court of the Judicial Commissioner, the plaintiff asking for a half-share, as the second defendant had died.

The Appellate Court consisted of Pandit SUNDAR LAL (1st Additional Judicial Commissioner) and Mr. PIGGOTT (2nd Additional Judicial Commissioner), who affirmed the decree of the Subordinate Judge, except that they gave the plaintiff a half share instead of a one-third share in the after-acquired properties. On the question whether the settled properties did or did not form a taluqdari estate within the meaning of Act I of 1869, the Judges differed in opinion, Pandit SUNDAR LAL holding that the Summary Settlement of the villages in 1859 not having been concluded before the 10th of October (certain formalities being only carried out on the 13th of October, 1859, those villages did not form part of an "estate" as defined in section 2 of Act I of 1869, and that the succession to them was consequently not governed by the provisions of that Act: and Mr. PIGGOTT holding that the settlement ought to be presumed to have been made on the 5th of October, 1859, when the Commissioner had made an order that the villages should be "settled."

[394] Both appeals were dismissed with costs by the Court of the Judicial Commissioner: and both parties appealed to His Majesty in Council, the defendant's appeal being 116 of 1911 and the plaintiff's 117 of 1911.

On these appeals—

Sir H. Erle Richards, K. C., and *Kenworthy Brown* for the defendant contended that the villages originally settled at the summary and regular settlements formed an estate within the meaning of the Oudh Estates Act (I of 1869), and did not lose the character of an "estate" under that Act, by reason of the execution of the *kabuliat* not having been made by Autar Singh within the period mentioned in section 3, and reference was made to sections 2, 3, 8 and 10 of that Act, and Sykes' Talqudari Law, pages 378, 389 and 392 with regard to the Lists of Talqudars whose estates descended according to the custom of impartibility. That custom, it was contended, had been established by the evidence and governed the succession of all the property in dispute; Act XVII of 1876 (Oudh Land Revenue Act), section 17, was referred to. If a custom of impartibility was shown to govern the originally settled property, as, it was submitted, had been done, the *onus* rested on those who alleged it to show with regard to the after-acquired property that it was partible, and not impar-

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tible like the original property. When such a custom has been established as to certain family land, anyone who alleges that others of the family lands are not impartible must prove his allegation. The authorities, it was submitted, showed that. Reference was made to *Thakur Ishri Singh* v. *Thakur Baldeo Singh* (1), *Jagdish Bahadur* v. *Sheo Partab Singh* (2), *Ibrahim Ali Khan* v. *Muhammad Ahsan-ullah Khan* (3) and *Rajendra Bahadur Singh* v. *Raghubans Kuar* (4).

The Courts in India had erred in allowing the plaintiff to set up a new case not originally pleaded, namely, that all the properties in suit were not governed by the same law, and in giving him a decree for some of them on the footing that they were partible; and by reason of the fact that that case was not set up in the plaint, the defendant had no opportunity of showing that [395] the intention of the taluqdar was that the lands subsequently acquired should form part of the originally settled lands, and be governed by the same custom of impartibility. The plaintiff, it was submitted, was not entitled to any of the property as being partible, but his suit should have been wholly dismissed.

De Gruyther, K. C, and *B. Dube* for the plaintiff contended that the summary settlement in 1859 had not been made before the 13th of October 1859, when Autar Singh signed the *kabuliat*, which was not within the time limited by section 3 of Act I of 1869; and that the provisions of that Act were therefore not applicable. The property then settled was consequently not an "estate" under that Act, but was governed by the ordinary Hindu law of the Mitakshara, and was therefore partible. With respect to the after-acquired property, the Courts in India had found that it was not to be treated as being governed by the custom of impartibility set up by the defendant; and there was no condition in the grant which prohibited the partition of that property. There was moreover no intention by the taluqdar shown to incorporate the acquired property with that originally settled. [Lord SHAW referred a passage from the case of *Parbati Kumari Debi* v. *Jagdis Chunder Dhabal* (5) from page 453 of I. L. R. 29 Cal. lines 32 to 36]. Both Courts below had concurrently held to that effect. Reference was made to Act. I of 1869, sections 2, 3, 8, 10, 22 and schedule I: Sykes' Taluqdari Law, pages 13, 28 and 285 Mayne's Hindu Law, 7th ed. page 61 para. 54 and page 633, para. 469. Judgments in fact ought not to be disturbed unless shown to be substantially wrong; *Hyder Hossain* v. *Mahomed Hossain* (6); and as to proof of custom *Bhau Nanaji Utput* v. *Sundrabai* (7): also Parliamentary Papers relating to Oudh, Chief Commissioner's letter of the 28th of January, 1859.

Sir H. Erle Richards, K. C. replied.

1913 *June 13th*:—The judgment of their Lordships was delivered by

Mr. AMEER ALI.—

These are two consolidated appeals from a judgment and decree of the Court of the Judicial Commissioner of Oudh, dated the 8th of September, 1909, and arise out of a suit brought by the plaintiff [396] Dwarka Prasad in the Court of the Subordinate Judge of Bara Banki, for partition of certain properties known as taluqa Ranimau, in which he claimed a

(1) (1884) I. L. R. 10 Cal. 792. (807): L. R. 11 I. A. 135 (139, 140).
(2) (1901) I. L. R. 23 All. 369; L. R. 28 I. A. 100.
(3) (1912) I. L. R. 39 Cal. 711: L. R. 39 I. A. 85.
(4) (1908) 11 Oudh Cases, 256 (258, 260).
(5) (1902) I. L. R. 29 Cal. 433; L. R. 29 I. A. 82.
(6) (1872) 14 Moo. I. A. 401 (407).
(7) (1874) 11 Bom. H. C. 249 (269).

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share as a member of a joint Hindu family governed by the Mitakshara Law.

The two defendants to this action were the plaintiff's elder brother Janki Prasad and their mother Marjad Kuar, and as the mother, under ths Mitakshara Law, is entitled on the partition of ancestral property to an equal share with the sons for her life, the plaintiff asked for a decree in respect of a third share in the entire property included in the list attached to the plaint.

The defendant Janki Prasad alone contested the suit, the ground of his defence being that the taluqa sued for was, under the provisions of Act I of 1869, as also by custom governing the family, an impartible estate descendible to a single heir, to which the ordinary rules of the Hindu law of inheritance did not apply. The parties thus went to trial on two distinct issues, *viz.*, whether the properties in suit belonged to a joint Hindu family and were subject to the incidents ordinarily attached to such properties, or whether they formed in whole or in part, under Act I of 1869 or by custom, an impartible estate.

A short history of the family will explain the reasons on which the Courts in India have proceeded in arriving at their conclusions. The nucleus of the taluqa in dispute is said to have been formed by one Suk Shah. He owned nine villages, but the number increased to sixteen in the hands of his son and successor, Sakat Singh, who lived about the close of the 18th century. In 1856, when the British first occupied the kingdom of Oudh, the taluqa included 21 villages, and was held by Autar Singh, eighth in descent from Gulal Shah, the original ancestor of the parties and the grand father of Suk Shah. On the outbreak of the Mutiny Autar is said to have disappeared. Nor did he make his appearance on Lord Canning's famous Proclamation issued in March, 1858. The British authorities accordingly proceeded to make a settlement of his confiscated villages with third parties. But some time in July, 1859 Autar appeared before the authorities explained the reason of his non-appearance before, and applied for a settlement of his villages. They were apparently satisfied with his explanation, and on the 5th of October, 1859, an order was passed [397] on his application, sanctioning the summary settlement with him of the remaining nine villages which had not been finally settled with others. The *Kabuliat*, however, was not signed by him until the 13th of that month.

In the course of the Regular Settlement which followed shortly after, Autar recovered decrees for possession of six more villages. He was thus in possession of some 15 villages when Act I of 1869 was passed into law. Later on he acquired by purchase several other properties.

Autar died in 1879 without issue and was succeeded in the possession of the properties by his nephew Jang Bahadur, the eldest son of his brother Bisheshur. Jang Bahadur died in 1889, leaving him surviving two sons, *viz.*, the plaintiff and the defendant Janki Prasad, the latter being the eldest. On Jang Bahadur's death, Janki Prasad came into the possession of the entire property.

The Subordinate Judge has held that the properties which were settled with Autar in 1859, together with those decreed to him in the course of the regular settelement, form an "estate" within the meaning of Act I of 1869 and are descendible to a single heir and are consequently impartible. But as regards the several properties Autar Singh acquired by purchase subsequent to the regular settlement the Trial Judge was of

opinion that in the absence of evidence establishing an intention on his part to incorporate the subsequent acquistions with the "estate," they must be held to be governed by the ordinary Hindu law of inheritance. He accordingly decreed the plaintiff's claim in respect of a one-third share in what he calls the " acquired " properties and dismissed the suit as regards the rest.

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Both parties appealed to the Court of the Judicial Commissioner of Oudh which affirmed the decree of the Subordinate Judge with a modification in respect of the parties' shares necessitated by the death of their mother Marjad Kuar, which became one-half each instead of one-third.

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The plaintiff and the defendant have both appealed to His Majesty in Council against the judgment and decree of the appellate court. The plaintiff contends that the lower courts are wrong in holding that the properties in respect of which his suit has been dismissed, form an "estate" within the meaning of [398] the Act, and are, consequently, impartible; whilst the defendant urges that the properties, a half share of which has been decreed to the plaintiff, being accretions to the " estate " or taluqa are equally impartible.

As regards the contention of the plaintiff, the first point to determine is the meaning which the Legislature has attached to the word " estate " with reference to properties coming within the purview of Act I of 1869, and that meaning must be gathered so far as possible from the enactment itself.

The term " estate " is defined in section 2 to mean " the taluqa or immovable property acquired or held by a taluqdar or grantee in the manner mentioned in section 3, section 4 or section 5, or the immovable property conferred by a special grant of the British Government upon a grantee." And " taluqdar " is declared to mean a person whose name is entered in the first of the lists mentioned in section 8.

Section 3 declares that :—

" Every taluqdar with whom a summary settlement of the Government revenue was made between the first day of April, 1858, and the tenth day of October, 1859, or to whom, before the passing of this Act and subsequently to the first day of April 1858 a taluqdari sanad has been granted, shall be deemed to have thereby acquired a permanent, heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement of *kabuliyat* executed by such taluqdar when such settlement was made, or which may have been or may be decreed to him by the Court of an officer engaged in making the first regular settlement of the province of Oudh, such decree not having been appealed from within the time limited for appealing against it, or, if appealed from, having been affirmed."

Section 8 provides that :—

"Within six months after the passing of this Act, the Chief Commissioner of Oudh . . . shall cause to be prepared six lists, namely:—

" *First.*—A list of all persons who are to be considered tauqdars within the meaning of this Act.

"*Second* —A list of the taluqdars whose estates, according to the custom of the family on and before the thirteenth day of February, 1856, ordinarily, devolved upon a single heir."

The rest of the section is immaterial for the purposes of this case. Section 22 lays down the rules relating to intestate succession to the estates of taluqdars whose names have been entered in the second, third or fifth of the lists mentioned in section 8. In the first instance it declares that if any taluqdar whose name is so entered were to die intestate as to his estate, such estate shall [399] descend " to the eldest son of such taluqdar or grantee, heir or legatee, and his male lineal descendants, subject to the

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same conditions and in the same manner as the estate was held by the deceased."

It is common ground that "a summary settlement of the Government revenue" was made with Autar Singh in respect of nine villages "between the 1st day of April, 1858, and the 10th day of October, 1859." Their Lordships are not omitting from consideration the fact that the *kabuliat* was not executed until the 13th of October. To this they will advert later. It is also admitted that he obtained decrees in respect of six other villages in the first regular settlement of the Province, and that his name was entered in the Lists prepared under the statutory provisions of section 8. It is clear, therefore, that Autar was not only a taluqdar, but that his taluqa acquired by virtue of the above recited proceedings, was an "estate" within the meaning of the Act.

One of the learned Judges in the Court below has considered that the execution of the *kabuliat* after the time-limit mentioned in section 3, deprived Autar Singh's taluqa of the chararter of an estate defined in the Statute, although in his conclusion he agreed with the Subordinate Judge in holding that it was impartible property. His view may shortly be summarized as follows: as the principal villages included in the taluqa were not acquired either under a grant or a summary settlement made between the two dates mentioned in section 3, the property did not constitute an "estate" defined in section 2; but as it appeared in the evidence that the taluqa had ordinarily devolved upon a single heir on and before the 13th of February, 1856, it must be treated as an impartible estate descendible under the rules of devolution provided in section 22.

The other learned Judge held in substance that under the circumstances of the case it may fairly be assumed that the summary settlement with Autar was made before the 10th of October, 1859.

In their Lordships' judgment the less technical construction seems more in accord with the true intent of the enactment. It is easily conceivable that a settlement might be made within the [400] time-limit, and yet the formal document connected therewith might not, owing to causes beyond the control of the person with whom the settlement is made, be executed until later. The law must be absolutely explicit that non-execution within the time is fatal to the right which it expressly gives before it can be so construed. Section 3, which declares the right a taluqdar acquires in villages and lands settled with him, states that "he shall be deemed to have acquired thereby," (that is by the summary settlement), "a permanent heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or *kabuliat* executed by such taluqdar when such settlement was made." The right the taluqdar is declared to have acquired comes into existence with the settlement, the rest of the clause merely describes the properties with respect to which it takes effect. If the settlement was directed, on the 5th of October, to be made with Autar Singh, the delay in the signing of the formal documents would not affect the right he acquired thereby, as the execution of the agreement would relate back to the time when the settlement was in fact made. The authorities charged with the execution of the duties imposed by section 8 of the Act do not appear to have considered that the delay which had occurred in the signing of the *kabuliat* affected Autar Singh's rights in the properties settled with him in 1859, or differentiated him from the other taluqdars; and although the settlement had been made with him as *malguzar*, he was, in fact, included as a

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taluqdar in the general lists prepared under the section, and the property of Ranimau was entered against his name as the estate in his possession. Section 10 of the Act provides that "the courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are such taluqdars or grantees."

Their Lordships have no hesitation in holding that the properties settled with Autar Singh in 1859, together with those of which he obtained possession under decrees passed in his favour in the course of the regular settlement, constitute an "estate" within the meaning of the Act, and are consequently impartible.

The defendant's appeal relates to that portion of the lower court's decree which, affirming the order of the Subordinate [401] Judge, awarded to the plaintiff a half share in the properties subsequently acquired by Autar Singh. Janki Prasad has died since the institution of this appeal, and he is now represented by his minor son Dharaband Singh. It is contended on his behalf that by the custom of the family these acquisitions became part of the original estate, and are, therefore, not subject to the ordinary rules of inheritance.

Both the courts in India have come to the conclusion that the evidence is insufficient to establish the alleged custom. And no adequate reason has been shown to induce their Lordships to take a different view. The only other point that remains to be considered is whether the lands subsequently acquired were as a matter of fact incorporated with the taluqa. As has been pointed out by this Board in the case of *Parbati Kumari Debi* v. *Jayadis Chunder Dhabal* (1), the question whether properties acquired by an owner become part of "the ancestral estate for the purpose of his succession," depends on his intention to incorporate the acquisitions with the original estate.

The courts in India have concurrently found against the defendant, on this point, and their Lordships see no reason to differ from their conclusion. Both courts appear, however, to have fallen into an error in respect of one property, Kamrauli, for a half share of which they have made a decree in favour of the plaintiff. It is admitted on his behalf that Kamrauli is one of the villages for which Autar Singh obtained a decree in the regular settlement proceedings. The decree of the lower court must, therefore, be varied by the elimination of Kamrauli.

Subject to this variation both appeals will be dismissed, each party bearing his own costs.

And their Lordships will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitor for Janki Prasad Singh :—*The Solicitor, India Office.*

Solicitors for Dwarka Prasad Singh :—*Barrow, Rogers & Nevill.*

(1) (1912) I. L. R., 29 Cal., 438 ; L. R., 29 I. A., 82.

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35 A. 402=20 I. C. 316=11 A. L. J. 559.

35 A. 402 (=20 I. C. 316=11 A. L. J. 559).

[402] APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

AMIN-UD-DIN HAIDAR (*Judgment-debtor*) *v.* SHEORAJ SINGH (*Decree-holder.*)*

[1st May, 1913.]

Civil Procedure Code (1882), *Chapter XX—Insolvency—Insolvent discharged without a schedule of debts being framed—Attempt on the part of creditor to proceed against after-acquired property.*

Where an insolvent had taken advantage of the provisions of chapter XX of the Code of Civil Procedure, 1882, and had been discharged under section 351, but no schedule of debts had been framed, it was *held* that a judgment-creditor of the insolvent could not thereafter have recourse against property which had come into the hands of the insolvent subsequently to his discharge.

THE facts of this case were as follows :—

One Amin-ud-din Haidar was declared a discharged insolvent in 1904. In his application for insolvency, among others, a debt due to Sheoraj Singh was mentioned, but no schedule of creditors was prepared, nor were any objections taken to his discharge. Another debtor, Ratan Lal, had applied to prove his debt and the District Judge had ordered his debt to be entered in a schedule and his name to be recorded as that of a creditor who had proved his claim ; but that order was reversed in appeal to the High Court (1). Some time after his discharge, Amin-ud-din Haider inherited certain property, and thereupon Sheoraj Singh applied to proceed against this property by way of execution. His claim was dismissed, and he was directed to take proceedings under the Provincial Insolvency Act. He then applied to prove his debt and have the property distributed among the creditors through a receiver who, it seems, had been appointed in the interval. The Judge dismissed the objections of Amin-ud-din Haidar, and allowed the application, on the ground that, although the High Court had reversed the order including Ratan Lal's claim, the order of appointment of the receiver had not been appealed against and had become final. The insolvent appealed to the High Court.

Mr. *S. N. Mushran* (The Hon'ble Dr. *Tej Bahadur Sapru* with him), for the appellant :

[403] This was an attempt to get behind the order of the High Court disallowing the claim of Ratan Lal. No schedule of creditors was prepared and no steps could be taken against the discharged insolvent. Proceedings had been taken under section 351 of Act XIV of 1882. It was not material whether the debt was admitted or not. It had to be proved by the creditor to the satisfaction of the court. It was a matter between the creditors *inter se* as well as between creditor and debtor. The preparation of the schedule was imperative. Otherwise any fictitious claim could be admitted and the right of creditors defeated. Section 357 also spoke of "scheduled creditors" only. These proceedings were taken under section 24 of the Provincial Insolvency Act, but that provided for steps before the discharge and not after. The applicant could not now proceed against the property of the discharged insolvent.

* First Appeal No. 4 of 1913, from an order of G. C. Badhwar, District Judge of Shahjahanpur, dated the 21st of September, 1912.

(1) F. A. F. O. 105 of 1910, decided by Knox and Piggott, JJ., on the 5th of May, 1911.

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APPELLATE CIVIL.

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Mr. *Nihal Chand* (for Mr. *B. E. O'Conor*), for the respondent :

It appeared that Amin-ud-din Haidar was declared discharged at the same time as he was declared insolvent. He had no property and it was not necessary to appoint a receiver. The debt of Sheoraj Singh was admitted by the appellant in his application for insolvency. The order appointing a receiver and vesting property in him had not been appealed against and had become final. Property was with the receiver and under section 24 applicant could prove his debt. The insolvent could not be said to have been properly discharged.

KNOX and MUHAMMAD RAFIQ, JJ :—Hakim Amin-ud-din is a judgment-debtor of one Kunwar Sheoraj Singh. There were proceedings in the court of Shahjahanpur prior to the proceedings out of which these proceedings have risen and with regard to those proceedings it is sufficient to say that Hakim Amin-ud-din did apply to be declared an insolvent. He was declared an insolvent and he was discharged under section 351 of the Code of Civil Procedure of 1882. These proceedings relating to his discharge have been laid before us and we have examined them. We find that in one of them, i.e. an order by the District Judge, dated the 27th of January, 1904, it is set out, "no other creditor except Ratan Lal proves his claim to-day, though called upon." It was doubtless for this reason that no schedule was prepared and [404] very properly so ; for schedule cannot be prepared by a court until the creditors have proved their claims. This was the law under the procedure prevailing up to the passing of the Provincial Insolvency Act of 1907.

In 1912 Sheoraj Singh applied to the court of the District Judge and he asked that certain property which had come into the possession of the judgment-debtor might be placed at the disposal of the Collector of Budaun, so that he might arrange for the payment of the debt due to Sheoraj.

The application was opposed by Hakim Amin-ud-din, the judgment-debtor, who said that he had been discharged from all debts and the court had no power to make the property which he had since acquired liable. The District Judge granted the application of Sheoraj and directed that one Saiyid Janab Ahmad who had been appointed receiver in 1910 should realize the assets of the insolvent and divide them between the two scheduled creditors, Ratan Lal and Sheoraj Singh.

It is this order which forms the subject of the present appeal.

We have looked at the record ourselves. We cannot find, and neither of the learned counsel for the parties can point to, any schedule of creditors. Amin-ud-din in his memorandum of appeal himself says that as no schedule of creditors was prepared before the discharge of the insolvent the applicant cannot be allowed to proceed against the appellant. There being no schedule of creditors to this case Kunwar Sheoraj Singh cannot now enforce his decree as though he were a scheduled creditor.

The appeal prevails, the order of the court below is set aside, but we do not think this is a case in which the judgment-debtor is entitled to his costs.

Appeal allowed.

35 A. 405 (=19 I. C. 745).

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[405] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Lyle.

BALGOBIND BHAGAT AND ANOTHER (*Plaintiffs*) *v.* NAGINA MISIR AND ANOTHER (*Defendants*).*

[1st May, 1913.]

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 20—*Occupancy holding—Mortgage—Sub-mortgage by mortgagee of occupancy holding—Rights of sub-mortgagees.*

Where the usufructuary mortgagee of an occupancy holding purported to sub-mortgage his mortgagee rights, it was *held* that the sub-mortgagees were entitled to a money decree against their sub-mortgagor for the money advanced by them.

THE facts of this case were as follows:—

Certain property, consisting partly of a fixed rate holding and partly of an occupancy holding, was transferred by way of usufructuary mortgage to one Nagina Misir in 1906.. In 1909 Nagina Misir purported to make a sub-mortgage of the same property in favour of Balgobind Bhagat and Mahabir Ram. The sub-mortgagees sued for the amount of the mortgage money, principal and interest, or in the alternative for possession of certain property. The court of first instance gave the plaintiffs a money decree. On appeal, however, the lower appellate court reversed this decree and dismissed the suit. The plaintiffs thereupon appealed to the High Court.

Mr. *M. L. Agarwala* and Babu *Benode Behari*, for the appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

RICHARDS, C. J. and LYLE, J.—This appeal arises out of a suit in which the plaintiffs claimed the sum of Rs. 499-15-0 principal and Rs. 270 interest. In the alternative they claimed that they might be put into possession of certain property. The court of first instance gave a simple money decree. The lower appellate court reversed the decree of the court of first instance and dismissed the plaintiff's suit; hence this appeal.

It appears that certain property, consisting partly of a fixed rate holding and partly of an occupancy holding was transferred by way of usufructuary mortgage to Nagina Misir in 1906. In 1909 Nagina Misir purported to make a sub-mortgage of the same property in favour of the plaintiffs. There can be [406] no doubt that the mortgage of 1906, in so far as it purported to mortgage an occupancy holding, was absolutely void. Indeed we think, though it is not essential for the decision of the present case to decide the point, that the whole mortgage of 1906 was invalid. The defendants contend that the very same doctrine ought to be applied to the sub-mortgage, and that, the contract being an illegal one, the plaintiffs should not be allowed to get even a simple money decree. If the mortgagees under the mortgage of 1906 were unable to recover either the property or to get a separate money decree for the amount lent (and it is admitted they did not get possession) it would be on the ground that the contract was an illegal contract. We have therefore to see whether the contract which was made in 1909 between the plaintiffs and the defendants was also illegal. S. 20 of the Agra Tenancy Act provides that the interest of an occupancy tenant is not transferable save as therein

* Second Appeal No. 1069 of 1912 from a decree of Kalika Singh, District Judge of Ghazipur, dated the 21st of June, 1912, reversing a decree of Ganga Nath, Munsif of Ballia, dated the 22nd of March, 1912.

mentioned. But in 1909 Nagina Misir was not an occupancy tenant nor had he any of the rights of an occupancy tenant vested in him. The transfer to him by the occupancy tenant was absolutely void, at least in respect of the occupancy holding. Therefore it seems to us that Nagina Misir, not being an occupancy tenant, did nothing in contravention of s. 20 of the Tenancy Act when he executed the sub-mortgage. He really did nothing worse than if he had purported to make a mortgage of property which did not belong to him. In the absence of fraud there would be no illegality in this. We therefore think that under the circumstances of the present case the plaintiffs were entitled to a simple money decree. We accordingly allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs.

Appeal allowed.

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35 A. 407 (=21 I. C. 666=11 A. L. J. 596=14 Cr. L. J. 618).

[407] REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR v. NEPAL AND OTHERS.*

[1st May, 1913.]

Crminal Procedure Code, sections 55, 56 and 110—Arrest of suspected person—Warrant —Procedure.

Section 55 of the Code of Crimlnal Procedure is independent of Charter VIII of the Code, although proceedings under that chapter may follow an arrest under section 55 as a natural sequence. An officer in charge of a police station can, therefore, arrest or cause to be arrested, without a warrant or an order of a Magistrate, any person who is by repute an habitual robber, house-breaker or thief, or otherwise comes within the scope of section 110.

In this case a police Sub-Inspector, one Har Prasad, deputed certain police officers subordinate to himself to arrest a person named Nepal, against whom the police were about to take proceedings under section 110 of the Code of Criminal Procedure with a view to his being bound over to be of good behaviour, and gave them a written order to carry out the arrest. Nepal and others resisted the police who were sent to arrest Nepal, and ultimately thirteen persons were sent up for trial and were convicted on charges under sections 147, 225B and 332 of the Indian Penal Code. The persons so convicted appealed to the Sessions Judge, who, however, dismissed their appeals. They then applied in revision to the High Court, raising two pleas, one, that the arrest of Nepal was illegal, and the other that the sentences were too severe.

Mr. *C. Ross Alston* and Mr. *A. H. C. Hamilton*, for the appellants.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

TUDBALL, J.—The thirteen applicants have been convicted of offences under sections 147, 225B and 332 of the Indian Penal Code. Their convictions and sentences were upheld on appeal. The present application for revision raises two points—(1) That the arrest without a warrant of Nepal by the police was illegal and therefore the resistance offered to the police constituted no offence, and (2) that the sentences are too severe. According to the evidence on the record, the Sub-Inspector, Har Prasad, deputed certain police officers subordinate to himself to arrest

* Criminal Revision No. 319 of 1913 from an order or A. Sabonadiere Sessions Judge of Aligarh, dated the 22nd of February, 1913.

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[408] Nepal against whom the police were about to take proceedings under section 110 of the Code of Criminal Procedure with a view to his being bound over to be of good behaviour. According to the evidence, the police officer in question gave a written order to his subordinate officer to carry out this arrest. The plea in revision is that in the absence of the authority under chapter VIII of the Code of Criminal Procedure, the police cannot arrest without a warrant a person against whom proceedings under section 110 are contemplated. Under section 55, clause (*c*), an officer in charge of a police station may arrest or cause to be arrested any person who is by repute an habitual robber, house-breaker, or thief or habitual receiver of stolen property knowing it to be stolen or who by repute habitually commits extortion, or in order to the committing of extortion, habitually puts or attempts to put persons in fear of injury. This is a section which is independent of Chapter VIII, although proceedings under Chapter VIII may follow such arrest as a natural sequence. Such a police officer may arrest without an order from a magistrate and without a warrant.

Section 55 says: "He may in 'like manner' arrest" and 'like manner' refers to section 54, which gives a police officer power to arrest without an order from a magistrate and without a warrant in certain specified cases. Section 56 points out that where any officer in charge of a police station requires any officer subordinate to him to arrest without a warrant any person, he may deliver to the officer required to make arrest an order in writing. So far as the evidence on the record goes, all the provisions of these sections were fully complied with, and the police were justified in making the arrest or attempting to make the arrest. Moreover, according to the evidence of the Sub-Inspector, the action he was taking was in pursuance of the permission of the Sub-divisional officer. Even that was not necessary under section 55. The plea as, therefore, no force in the circumstances of the present case.

There remains the question of sentence. The only portions of the sentences which need any comment, are the fines. Nepal has received a sentence of two and a half years' rigorous imprisonment and a fine of Rs. 100. Moti Ram has been sentenced to one [409] year's rigorous imprisonment and a fine of Rs. 300. Musammat Ram Kunwar, the wife of Nepal, to four weeks' imprisonment and Rs. 30 fine. The three youths Har Lal, Jagram and Kamal Singh, have been bound over under section 562 and have been fined Rs. 75, Rs. 20 and Rs. 20. The other applicants have been sentenced to imprisonment only. In some cases, where fines are imposed in lieu of terms of imprisonment, it may be necessary to impose heavy fines. But, in the present case, the accused have received substantial sentences of imprisonment and the extra fines imposed will transfer a part of their punishment to their dependants also. In the case of Nepal, I set aside the fine completely. His sentence under section 225 B. will remain six months without fine. In the case of Moti Ram his sentence is a fine of Rs. 300 under section 225B *plus* one year's rigorous imprisonment under section 332 of the Indian Penal Code and six months under section 147 of the Indian Penal Code. In his case, as the fine is the only sentence imposed under section 225B, I reduce it to one of Rs. 30 or in default six weeks' imprisonment. In the case of Ram Kunwar, she was sentenced to a fine of Rs. 30 under section 225B. No term of imprisonment was imposed for this offence. For offences under sections 147 and 332 of the Indian Penal Code, she has received two

weeks' imprisonment in each. In her case, I reduce the fine to Rs. 5 or in default to imprisonment for two weeks. In the case of the three youths, Har Lal, Jagram and Kamal Singh, I reduce the fine in each case to a nominal sum of Re. 1 or in default to two weeks' imprisonment. In all other respects the sentences will stand. The fines or the balances of the fines, as the case may be, if paid, will be refunded.

Order modified.

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35 A. 407=21 I. C. 696=11 A. L. J. 696 =14 Cr. L. J. 618.

35 A. 410 (=11 A. L. J. 603=20 I. C. 673).

[410] APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

THAKUR PRASAD (*Applicant*) *v.* PANNO LAL AND OTHERS (*Opposite parties*).*

[7th May, 1913.]

Act No. III of 1907 (*Provincial Insolvency Act*), *sections* 22, 46 *and* 52—*Act No. IX of* 1908 (*Indian Limitation Act*), *section* 5—*Insolvency—Application to Court to reverse act of receiver—Limitation.*

Held that section 5 of the Indian Limitaion Act, 1908, does not apply to application, contemplated by section 22 of the Provincial Insolvency Act, 1907. *Dropadi* v. *Hira Lal* (1) distinguished.

[Ref: 1914 M. W. N. 831=25 I. C. 610.]

ONE Thakur Prasad was a secured creditor of an insolvent being a mortgagee in possession. A receiver was appointed by the court, and it appears that on the 20th of September, 1911, the receiver took possession of the mortgaged property. On the 31st of October, 1911, Thakur Prasad applied to the court under section 22 of the Provincial Insolvency Act, 1907, praying that the act of the receiver might be reversed and the applicant restored to possession. The District Judge held that as the application had been made more than twenty-one days after the act complained of, it was time-barred, and accordingly rejected it. The applicant thereupon appealed to the High Court.

Munshi *Govind Prasad*, for the appellant.

The respondents were not represented.

TUDBALL and MUHAMMAD RAFIQ, JJ:—The facts of the case, out of which this appeal arises, are as follows :—The appellant is a secured creditor of an insolvent. He was a mortgagee in possession. A receiver was appointed by the court, and it appears that on the 20th of September, 1911, he took possession of the property in question. On the 31st of October, 1911, the present appellant made an application under section 22 of the Provincial Insolvency Act to the court asking it to reverse the act of the receiver and to restore him to possession, he being a secured creditor. The learned District Judge held that as the application was made more than twenty-one days after the act complained of had been done, it was time-barred. He accordingly rejected the application. On appeal before us it is urged that the act complained of did not come to the [411] notice of the appellant on the date when it was done or soon after it and the appellant went to the court without delay, and therefore the court ought to have applied section 5 of the Limitation Act and admitted

* First Appeal No. 83 of 1912 from an order of H. E. Holme, District Judge of Allahabad, dated the 9th of March, 1912.

(1) (1912) I. L. R. 34 All. 496.

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35 A. 410=11 A. L. J. 603 =20 I C. 673.

the application. The appellant did not ask the court to admit his application out of time and there is therefore on the record no evidence whatsoever to show that there was sufficient cause for so doing. We therefore remit the following issue to the court below :—"When did the act of the receiver first come to the knowledge of the appellant?" The court will take any evidence offered on the issue by the parties and remit its finding. On receipt of the finding ten days will be allowed for objections.

On the return of the findings the following judgment was delivered :—

The return made by the court below to the issue remitted is that the appellant came to know of the act of the receiver on the 27th of October, 1911, i. e. four days prior to his filing the application of 31st of October, 1911. If section 5 of the Limitation Act (IX of 1908), could apply to the application made by the appellant to the court below, then we should be of opinion that the appellant was entitled to ask the court to exercise the power granted by that section. But, in our opinion, section 5 of the Limitation Act does not apply to applications contemplated by section 22 of the Insolvency Act. Section 5 of the Limitation Act runs as follows:—"Any appeal or application for a review of judgment or for leave to appeal or *any other application to which this section may be made applicable by any enactment or rule for the time being in force* may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period." An application under section 22 of the Insolvency Act to the District Judge is not an appeal, application for review of judgment or for leave to appeal, and it is admitted that there is no rule or enactment under which this section was made applicable to section 22 of the Insolvency Act. Our attention is called to the Full Bench ruling in *Dropadi* v. *Hira Lal* (1). But that ruling does not help [412] the appellant. Granting that the general provisions of the Limitation Act apply to the Insolvency Act, the very wording of section 5 limits the applicability of that section to *appeals* and *applications* of a certain character. An application under section 22 of the Insolvency Act does not come in any way within the category of such applications. It is urged that the application to the District Judge against the act of the receiver is really an appeal as is contemplated by section 5 of the Limitation Act. Clause (2) of section 52 of the Insolvency Act is quoted, which runs as follows':—"Subject to the appeal to the court provided for by section 22, any order made or act done by the Official Receiver in the exercise of the said powers shall be deemed the order or act of the court." It seems to us clear that the word 'appeal' in this clause is not used in the strict legal meaning of the word. The very wording of the section shows this. Section 22 is perfectly clear. The proviso says :—"Provided that no application under this section shall be entertained after the expiration of twenty-one days from the date of the order or decision complained of." The right of appeal is given in section 46 of the Act. In our opinion an application under section 22 of the Act against an "*act*" of the receiver is not and cannot be an "appeal" such as is contemplated by section 5 of the Limitation Act. It is clear, therefore, that section 5 of the Limitation Act does not apply and the court below

(1) (1912) I. L. R. 34 All. 496.

was, therefore, bound to reject the application made to it and this appeal must fail. It is dismissed. We make no order as to costs, as the other side is not represented.

Appeal dismissed.

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MAY 7.

APPELLATE CIVIL.

35 A. 412 (=19 I. C. 990=11 A. L. J. 463).

35 A. 410=11 A. L. J. 603 =20 I. C. 673.

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Lyle.

SONA DEI AND ANOTHER (*Plaintiffs*) *v.* FAKIR CHAND AND OTHERS (*Defendants*).*

[9th May, 1913].

Maha-Brahmans—Agreement as to distribution of offerings—Construction of agreement.

The members of a family of Maha-Brahmans entered into an agreement amongst themselves whereby certain members of the family were to take the [413] offerings made on certain days of the month, and the other members of the family the offerings made on the other days.

Held by BANERJI and LYLE, JJ. (RICHARDS, C. J., dissenting) that such an agreement as above described would not prevent a person who wished to do so from making a special individual gift to a member of one branch of the family, even on a day which was appropriated by the agreement to the other branch, and that a claim for such gift by a member of the other branch was not maintainable.

Per RICHARDS, C. J. If the offering was of a nature which was included in agreement between the parties, the wishes of the donor could not regulate the rights of the parties, but the recipient of such an offering on a day which did not belong to his branch of the family was bound to account for it to the branch to which the day belonged. *Doorga Pershad* v. *Budree* (1) and *Oochi* v. *Ulfat* (2) referred to.

The facts of this case were as follows:—

THE parties belonged to a family of Maha-Brahmans. By an arrangement made between the members of the family, the offerings made on certain days in the month were to go to one Nanda, the husband of the plaintiff Sona Dei, while those made on other days were to go to the defendants. Nanda died, leaving the plaintiff as his heir. On the day which fell to the share of the plaintiff one Debi Singh died. Debi Singh's son refused to make the offerings to the widow, as she was a female, and gave property of some value to Fakir Chand, defendant. The plaintiff, thereupon, brought this suit for recovery of the offerings or their value. The defendant pleaded that the gift was a personal gift to Fakir Chand and no suit lay for recovery of such offerings. The courts below sustained this contention and dismissed the suit. The plaintiff appealed to the High Court.

The appeal was argued on the 7th of May, 1913, before RICHARDS, C. J., and LYLE, J., and then, upon an order made by the Chief Justice, was re-argued before the present Bench.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Pandit *Rama Kant Malaviya*) for the appellant:—

The members of the family had made an arrangement by which certain members were to receive the offerings on certain days, and others on

*Second Appeal No. 1173 of 1912 from a decree of L. Johnston, District Judge of Meerut, dated the 30th of July, 1912, affirming a decree of Mohan Lal Hukku, Subordinate Judge of Meerut, dated the 10th of May, 1912.

(1) (1874) 6 N. W. P. H. C. Rep. 189, (191). (2) (1898) I. L. R. 20 All. 231.

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35 A. 412=19
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A. L. J. 463.

other days. The defendant received offerings on the day which was the plaintiff's day. The donor admits that he knew that it was the plaintiff's day and made the gift to the defendant; but the defendant was under an obligation not to accept that gift or, if he did, to make it over to the plaintiff. Having accepted the gift, he must be deemed to have received it for the use and [414] benefit of the plaintiff. The donor could not be compelled to make the gift to the plaintiff, but the defendant, having entered into a contract not to receive the gift on that day, must be deemed to have acted as a trustee for the plaintiff and is bound to make it over to her, who would be in the position of a *cestui qui trust*. The present case is similar to a case where two doctors entered into an agreement that one of them would not treat patients within a certain area. If a patient goes to the doctor who has agreed to refrain from so practising, he will be bound to make over any fee that he may receive to the other doctor. In this case a trust was created, inasmuch as the gift was made (1) on a day which belonged to the plaintiff, (2) in connection with funeral ceremonies by which the family would have been entitled to benefit, (3) to a man who was bound by the contract. He relied on *Doorga Pershad* v. *Budree* (1), *Oochi* v. *Ulfat* (2) Godefroi on Trust, 221, 226.

Dr. *Satish Chandra Banerji*, for the respondents:—

There can be no doubt that the gifts made by Raghubir Narain were voluntary gifts. The plaintiffs could not bring a suit for an injunction to restrain the making or receiving of such gifts, against either the donor or the donee. It has been held that there is no legal cause of action to recover such offerings even as against the donee. The other side contends that the defendant, having received the gift on the plaintiff's day, in good conscience ought to make it over to the plaintiff, but there would be no such equity, unless the original contract was that even in cases where the gift was made personally to one individual, the gift would go to the person whose turn it would be to take it. The gift would be *personal*, not because it was handed over to the donee *physically*, but because it was so handed to him *intentionally* by the donor with the object that he alone should take it and nobody else. The object of the partition was, no doubt, to put an end to disputes, but all that the parties had in contemplation was to divide that property only that would or might be divisible. Where the property was given to one member individually it would not be divisible among the parties to [415] the arrangement. All would be in the same position, equally entitled to appropriate wholly personal gifts and divide those only which were not personal. Upon any other view, the members would be placed under a disability and disqualified from acquiring any separate property.

The Hon'ble Dr. *Tej Bahadur Sapru* replied.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiff claimed to recover from the defendants certain offerings which had been made on the occasion of the death of one Rai Bahadur Debi Singh. It appears that the plaintiff and the defendant are both members of the same family of Maha-Brahmans, the common ancestor of which was one Dhan Singh. Both the courts below have found that an arrangement had been come to between the members of the family with a view to the division of the offerings. Certain members of the family were to have certain days of the month and certain other members, other days. Both

(1) (1874) N. W. P. H. C. Rep. 189 (191). (2) (1898) I. L. R. 20 All. 234.

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the courts below have found that the offerings in question were made on a day which belonged to the plaintff. But the plaintiff's suit was dismissed upon the ground that the offerings in question were personal offerings, made to Fakir Chand, the defendant.

It is admitted that so far as the donor of these efferings is concerned, no court could interfere to compel him to make the offerings to any particular individual. On the other hand, it has been admitted that an arrangement between the Maha-Brahmans as to the division of the offerings between themselves is perfectly legal. This has been decided in two cases [see *Doorga Pershed* v. *Budree* (1) and *Oochi* v. *Ulfat* (2)]. It seems to me that the whole case turns upon the nature of the agreement and the nature of the gift. There cannot be the least doubt that unless the gift in question was within the scope of the arrangement which the courts below have found existed between the parties, the plaintiff cannot succeed. The agreement was not in writing. It is stated in somewhat general terms in the plaint and evidently the court below accepted the statement in the plaint as being the terms of the agreement. The object of the agreement was beyond doubt to prevent disputes as to the division of the offerings. As the family [416] increased, some such agreement was obviously very necessary. In my opinion the only fair interpretation to give to the agreement is that the descendants of Dhan Singh agreed amongst themselves that all the offerings that were made upon the occasions of death to any members or member of the family should be divided in accordance with the agreement. As the learned advocate for the plaintiff said in the course of the arguments, the agreement amounted to this, namely, that each member or branch of the family agreed to refrain from taking the offerings on the days assigned to the other member or branch. It is said that this agreement could only apply to offerings that were made to the family as such. This seems to me to be rather a restricted view to take. If it was open to the members of the family to exclude from the scope of the arrangement all gifts which any individual might prevail on the donor to say was to be his, it would mean that the agreement would be practically futile. While, on the other hand, if the agreement is interpreted to include all gifts that were made to any of the members of the family of Dhan Singh, it might reasonably carry out the object of the arrangement, namely, to avoid disputes.

I next come to the nature of the gift. It must at once be admitted that if this gift was made for a purpose disconnected with cremation ceremonies, the plaintiff would have no right. But reading the evidence of Raghubir Narain Singh it seems to me perfectly clear that this gift was a gift directly in connection with cremation ceremonies, that it was made to one of the members of the family of Dhan Singh, and that the only reason why it was made to Fakir Chand instead of the plaintiff was because the donor has been informed that it would be more efficacious if the gift was not divided and if it was not given to a female. It seems to me that if the offering was of a nature which was included in the agreement between the parties the wishes of the donor could not regulate the rights of the parties to the present suit. Fakir Chand might have refused to take the gift if the donor coupled the donation with the condition that he must keep it entirely for himself. I think that so long as the agreement continued to exist, Fakir Chand having taken the gift was bound to

(1) (1874) 6 N. W. P. H. C. Rep. 189, (191).

(2) (1898) I. L. R. 20 All. 234.

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make it over to the plaintiff in accordance with the agreement. For these reasons I think the [417] decision of the court below was erroneous and I would allow the appeal.

BANERJI, J.—I regret I cannot agree with the learned Chief Justice in the conclusion at which he has arrived. I fully agree with him that the whole case turns upon the nature of the contract, a breach of which is the foundation of the plaintiff's suit, and also on the nature of the gift made by Raghubir Narain Singh on the occasion of his father's death. It is alleged in the plaint that Dhan Singh, the ancestor of the family, was the Maha-Brahman of the particular village in question and that offerings made to this family of Maha-Brahmans were offerings to the members of the family as such. In order to prevent disputes between the members of the family as to the division of the offerings, they entered into an arrangement by which individual members of the family were to take offerings given on certain dates, but it seems to me from the nature of the offerings which, according to the plaintiff's own case, were agreed to be divided, that the offerings which were to be divided were the offerings made to individual members of the family as such members and not offerings made personally to individual Maha-Brahmans who were members of the family. If the contract between the parties was that they were to divide the offerings given on a particular date to any member of the family, whether as representing the family, or in his individual capacity as a Maha-Brahman, the plaintiff would of course be entitled to the offerings received on the particular day which was the day on which her turn for receiving offerings accrued. In the present case neither of the courts below has found that the contract between the parties was of the wide nature just now mentioned, and as I have already said, it was not the plaintiff's own case, as laid in the plaint.

If then the contract related to offerings made to the family as such, any present made to an individual member of the family in his personal capacity would not fall within the scope of the contract. In the present case, according to the evidence af Raghubir Narain Singh and according to the findings of both the courts below, the present made by him was a present individually to Fakir, defendant, and the donor distinctly stated at the time of the gift, that the offerings were not to be divided among the Maha-Brahmans and they were [418] not to go to a female member of the family. It is clear from his evidence, which I think has been rightly interpreted by the court below, that the offerings in question were made to Fakir in his individual capacity, and not as representing the Maha-Brahman family of which the parties were members. That being so, I think the plaintiff is not entitled to the offerings claimed and her suit has been rightly dismissed. I would dismiss the appeal.

LYLE, J.—I concur with the judgment of Mr. Justice Banerji. There can be no doubt that where there is an agreement among Maha-Brahmans, that offerings shall be taken by a particular man on a particular day, the agreement is one which will be enforced in law. But in the absence of any special stipulation, such an agreement can only refer to offerings made to the general body or to the whole family, as the case may be, of Maha-Brahmans. Where a client wishes to benefit a particular Maha-Brahman by making him a special gift, there is nothing to prevent his doing so, and in such a case no other Maha-Brahman can claim any share in the gift. It seems to me as clear as possible in this case that it was the deliberate wish of the donor not only to benefit the defendant but

to exclude the plaintiff. I do not think it is necessary to consider what the motives were that animated him. It is sufficient to say that he knew that if the gift were made to the whole family the plaintiff might get a share of it. Not wishing that she should, he deliberately elected to make the gift, not to the whole family, but to the defendant individually. No doubt the gift was what might be called a funeral gift, but it was open to anyone to make a funeral gift either to a family of Maha-Brahmans, or to an individual Maha-Brahman as he might wish. In this case, I think, he made his offering to an individual Maha-Brahman, and the plaintiff is, therefore, not entitled to any share. I would, therefore, affirm the decrees of the lower courts and dismiss the appeal.

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35 A. 412=19 I. C. 990=11 A. L. J. 463.

BY THE COURT.—The order of the court is that the appeal is dismissed with costs.

Appeal dismissed.

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35 A. 419 (=11 A. L. J. 606=19 I. C. 986).

[419] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Lyle.

SIDHESWARI PRASAD NARAIN SINGH AND ANOTHER (*Plaintiffs*)
v. GOSHAIN MAYANAND AND OTHERS (*Defendants.*)*
[13th May, 1913.]

Civil Procedure Code (1882), *section* 315—*Execution of decree—Sale in execution—Auction purchaser deprived of property purchased owing to failure of judgment-debtor's title—Suit to recover purchase money—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, articles* 62 *and* 120.

Held (1) that an auction purchaser seeking to recover the purchase money paid by him upon the ground that he has been deprived of the property purchased owing to failure of the judgment-debtor's title thereto has no right outside the Code of Civil Procedure, and (2) that the remedy given by the Code of Civil Procedure is not a suit for money had and received, to which article 62 of the first schedule of the Indian Limitation Act, 1908, would apply but is a suit falling within the purview of article 120. *Munna Singh* v. *Gajadhar Singh* (1), and *Mohiudeen Ibrahim* v. *Mahomed Mura Lewai* (2) followed. *Ram Kumar Shaha* v. *Ram Gour Shaha* (3) not followed. *Hanuman Kamat* v. *Hanuman Mandur* (4) distinguished.

[Not Fol. 36 All. 529; Ref. 18 A. L. J. 905=58 I. C. 105; 70 I. C. 606=36 C. L. J. 132 =50 Cal. 115; cf. 37 Bom 538; 44 I. C. 719; 40 Cal. 187; 46 I. C 26; 38 Mad. 62 =1 L. W. 952=27 M. L. J. 640; 17 I. C. 437=1912 M. W. N. 1130=23 M. L. J. 487.]

THE facts of this case were as follows :—

In execution of a decree passed against certain persons the house property of the judgment-debtors was sold on the 18th of March, 1907. The plaintiffs purchased the property for Rs. 15,200. There being other decrees against the same judgment-debtors, the decree holders in those cases applied for rateable distribution of the assets, which consisted of Rs. 15,200 paid by the plaintiffs. The money was distributed as prayed. One Ram Prasad Singh brought a suit against the plaintiffs for a declaration that the property sold was his and the judgment-debtors had no saleable interest in it and he prayed for setting aside the sale. The sale was set

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*First Appeal No. 41 of 1912 from a decree of Srish Chandra Basu, Subordinate Judge of Benares, dated the 16th of November, 1911.

(1) (1883) I. L. R. 5 All. 577.
(2) (1912) 23 M. L. J. 487.
(3) (1909) 13 C. W. N. 1080.
(4) (1891) I. L. R. 19 Cal. 123.

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aside on the 11th of September, 1907. The High Court on appeal affirmed that decree on the 22nd of November, 1909. The plaintiffs brought the present suit on the 12th of September, 1910, for a refund of the purchase money against the defendant who had received shares in the distribution of the Rs. 15,200. The court below held that the suit was filed beyond three years from the date of the distribution of assets and was barred by limitation. The plaintiffs appealed to the High Court.

[420] The Hon'ble Dr. *Sundar Lal* (with him Pandit *Braj Nath Vyas*), for the appellant :—

Section 313 and 315 of the Code of Civil Procedure, 1882 lay down that if the judgement-debtor has no saleable interest, the auction-purchaser is entitled to a refund of his purchase money. This right is expressly given by statute, but the question at one time was whether that remedy was the only remedy or the auction-purchaser could get a refund by means of a regular suit too. There is no doubt that the money can be recovered by suit—*Munna Singh* v. *Gajadhar Singh* (1)—and that from the persons who have received shares in the distribution of assets ; *Kishun Lal* v. *Muhammad Safdar Ali Khan* (2). The case of *Gurshidawa* v. *Gangaya* (3) settles the point as to when the cause of action arose. The judgment-debtor had no saleable interest, and the purchaser had a right to recover what he had paid. The Act of 1859 gave no guarantee to the purchaser. He took everything or nothing. The Act of 1882 guaranteed the existence of some saleable interest at least of the judgment-debtor in the property, the failure of which guarantee gives a right of action. No period is provided for suits like these by any special article of the Limitation Act. So article 120 of the Limitation Act would apply.

[The Hon'ble Pandit *Moti Lal Nehru*, for the respondents, mentioned that the sections 313 to 315 were not in force at the date of this suit, the law in force being the Act of 1908, order XXI, rule 92.]

The sale took place under the Code of 1882 on the 18th of March, 1907, and the sale proceeds were divided in July, 1907. The relations were created when the Code of 1882 was in force. Under the General Clauses Act (X of 1897), section 6 (c), the right acquired while the old Act was in force is not affected by the new Code. As to limitation. There are cases supporting both views one set of cases holds that the omnibus article 120 applies to a suit like this, while others hold that article 97 applies. I submit that article 120 is applicable, but even if article 97 applies the suit has been brought within three years of the failure of consideration ; [421] *Mohiudeen Ibrahim* v. *Mahomed Mura Lewai* (4) and *Nilakanta* v. *Imam Sahib* (5) hold article 120 to be applicable. *Gurshidawa* v. *Gangaya* (3) mentions no article, but holds that the cause of action arises when the purchaser is deprived of the property sold.

The Hon'ble Pandit *Moti Lal Nehru* (with him The Hon'ble Dr. *Tej Bahadur Sapru*, Maulvi *Ghulam Mujtaba*, The Hon'ble Munshi *Gokul Prasad*, Munshi *Gulzari Lal*, Maulvi *Muhammad Ishaq* and Munshi *Kalindi Prasad*), for the respondents :—

The right to bring a suit like this is a right which is independent of section 315. If you take the right to be the creation of statute, then the remedy given by the statute should be applied. The Code contemplates an application to the Court executing the decree. The suit is therefore

(1) (1883) I. L. R. 5 All. 577.
(2) (1891) I. L. R. 13 All. 383.
(3) (1897) I. L. R. 22 Bom. 783.
(4) (1912) 28 M. L. J. 487.
(5) (1892) I. L. R. 16 Mad. 361.

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not maintainable under the Code. I submit that the right to bring the suit is a right independent of section 315, a general right, and under section 11 of the Code of 1882 a suit is maintainable. I rely on *Hari Doyal* v. *Sheikh Samsuddin* (1), *Nityanund Roy* v. *Juggat Chandra Guha* (2) and *Dorab Ally Khan* v. *Abdool Azeez* (3). Section 315 only provides a summary remedy: *Kishun Lal* v. *Muhammad Safdar Ali* (4). This is a suit for relief on the ground of total failure of consideration from the beginning, and article 62 of the Limitation Act will apply. He further cited *Bhawani Kuar* v. *Rikhi Ram* (5) and *Hanuman Kamat* v. *Hanuman Mandur* (6). The last case was of a sale of a member's interest in a joint family which could not be sold. The case is in point. There too the sale failed as the vendor had no saleable interest. The same principle applies here; *Ram Kumar Shaha* v. *Ram Gour Shaha* (7). If the judgment-debtor had no saleable interest, there was a failure of consideration from the beginning. It is, however, a suit for money had and received. The right arises out of the Statute, but the form is not prescribed by it.

My second point is that the remedy is not available against my clients, who have only received shares in the distribution of assets. They are neither the judgment-debtors nor were they parties to the suit to set aside the sale. The first essential for a suit under [422] section 315 is that it must be "found" that the judgment-debtor had no saleable interest. I submit that it must be found by the Court against those against whom the claim is made; *Vithoba* v. *Esat* (8).

RICHARDS, C. J. and LYLE, J.—This appeal arises out of a suit in which the plaintiffs claimed to recover a sum of Rs. 15,200 in certain proportionate shares from the several defendants. The suit has been dismissed by the court below as being barred by limitation. The facts, for the purposes of the present appeal, may be taken as admitted. A decree-holder of the name of Mayanand Gir caused certain property to be put to sale in order to realize the amount of a decree. The property was sold and purchased by the plaintiffs. An objection was taken on the part of a claimant to the property in the execution proceedings, but the objection was disallowed with the result that the purchase in favour of the present plaintiff was confirmed on the 20th of May, 1907. The proceeds of the sale were paid into court and were distributed amongst the persons who held decrees against the judgment-debtor of Mayanand Gir. Its distribution took place on the 1st of July, 1907. Subsequently the claimant to the property brought a regular suit to which he made the present plaintiffs parties and also Mayanand Gir. That suit was decreed by the court of first instance on the 11th of September, 1907, and after various hearings was confirmed by the High Court on the 22nd of November, 1909. The plaintiffs instituted the present suit on the 12th of September, 1910, claiming to get back the purchase money as already mentioned. The court below, holding that the suit was one for "money had and received" by the defendants for the use of the plaintiffs, dismissed the plaintiffs' suit as being barred by limitation on the ground that article 62 applied and that time began to run from the 1st of July, 1907, when the decree-holders received the money.

(1) (1900) 5 C. W. N. 240.
(2) (1902) 7 C. W. N. 105, 107.
(3) (1878) L. R. 5 I. A. 116.
(4) (1891) I. L. R. 13 All. 383.
(5) (1879) I. L. R. 2 All. 354.
(6) (1891) I. L. R. 19 Cal. 123.
(7) (1909) 13 C. W. N. 1080.
(8) (1893) I. L. R. 18 Bom. 594.

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The plaintiffs come here in appeal contending that the decision of the court below was wrong. It seems to us that, apart from the Code of Civil Procedure, the plaintiffs in the present case would have no right to recover back the purchase money they paid merely on the ground that the judgment-debtor's title had [423] proved defective. This seems to have been the view taken by STRAIGHT, J., when referring a question to the Full Bench in the case of *Munna Singh* v. *Gajadhar Singh* (1). The learned Judge, after referring to a number of rulings, says:—"By all these decisions it seems to have been recognized as an established principle of law, that a purchaser at a sale in execution of decree cannot recover his purchase money, if it turns out that the judgment-debtors, whose immovable property he has purchased, had no saleable interest." When the case came before the Full Bench this view of the law seems to have been accepted. The learned Chief Justice refers to section 315 of the Code of Civil Procedure, then in force, as being the foundation of the plaintiffs' right, in that case, to get a return of his purchase-money. This also seems to have been the view taken by NAPIER, J., in the case of *Mohiudeen Ibrahim* v. *Mahomed Mura Lewai* (2). At page 489 the learned Judge says:—"It has been laid down by the Privy Council in *Dorab Ali Khan* v. *The Executors of Khaju Moheeoodeen*, that as in India movable and immovable property are alike capable of being seized and sold under the writ of *fieri facias*, the responsibility of the sheriff in respect of sales here is governed by the law relating to chattels rather than by that relating to the sale of real property. It is clear that where the property seized was personal estate and it was sold by the sheriff, no suit lay either against the sheriff or the judgment-creditor, who had received the purchase money, to recover it when the property had been recovered from the purchaser by a person claiming title, the principle being that a sale by the sheriff was not a sale in market overt, the purchaser acquiring thereby only what the judgment-creditor had a right to sell, namely, the precise interest, and no more, which the judgment-debtor possessed in the goods, and that there was no warranty of title implied in a sale by the sheriff." We agree that outside the provisions of the Code of Civil Procedure, to which we shall presently refer, an auction-purchaser has no right to recover back the purchase money merely by showing that the judgment-debtor had no saleable interest.

The real reason is that in a sale by the court or its officer, there is no warranty of title, and the money which the purchaser pays [424] cannot, either in law or equity, be said to have been received by the court, its officer, or the creditors for the use of the auction-purchaser. We, therefore, think that, assuming that the plaintiffs had any cause of action, their cause of action was to enforce the right which was given to them by sections 313 to 316 of the Code of Civil Procedure of 1882 (which admittedly was in force at the time of the sale and distribution of the purchase money in the present case). Section 315 provides, amongst other things, that when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the purchaser, shall be entitled to receive back his purchase money from any person to whom the purchase money has been paid.

(1) (1883) I. L. R. 5 All. 577.

(2) (1912) 23 M. L. J. 487.

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There is an alteration in the present Code which we need not consider for the reason mentioned above. The plaintiffs' right is regulated in the present suit by the provisions of the Code of 1882.

In the Full Bench case to which we have already referred, *viz.* *Munna Singh* v. *Gajadhar Singh* (1), it was unanimously decided that an auction-purchaser was entitled to bring a suit to recover back his purchase money, when it was found that the judgment-debtor had no saleable interest. It seems to us quite clear that this is a form of suit for which there is no special provision in the Limitation Act. We have already pointed out how, in our opinion, it cannot be said to be a suit for money had and received. We, therefore, think that article 120 applies and it is admitted that if this is the proper article the suit is within time. The learned advocate on behalf of the respondents urges that even if it be held that the plaintiffs' right in the present case is a right under the statutory provisions of the Code of Civil Procedure of 1882, the suit is nevertheless a suit for money had and received by the defendants for the use of the plaintiffs, and he quotes, in support of this contention, the case of *Ram Kumar Shaha* v. *Ram Gour Shaha* (2). The learned Judges, in deciding that case referred to the case of *Hanuman Kamat* v. *Hanuman Mandur* (3), and say as follows, at page 1083 :—" We are unable to distinguish this case in principle from the case before us." With [425] great respect to the learned Judges we think that the cases were distinguishable. In *Hanuman Kamat* v. *Hanuman Mandur* (3) the money was sought to be recovered on the ground that there had been a failure of consideration in the case of a private sale, whilst the case before the learned Judges in *Ram Kumar Shaha* v. *Ram Gour Shaha* (2) was a case, like the present one, in which an auction-purchaser sought to recover his purchase money on the ground that the judgment-debtor had no saleable interest. As against the authority of this case we have the case, already referred to, of *Mohiudeen Ibrahim* v. *Mahomed Mura Lewai* (4), in which the learned Judges expressly decided that article 120 was the article applicable to a suit in which an auction-purchaser sought to recover the purchase money on the ground that the judgment-debtor had no saleable interest.

Under these circumstances, we think that the appeal should be allowed and the case remanded : We accordingly allow the appeal, set aside the decree of the court below and remand the case with directions to readmit the suit under its original number in the file and proceed to determine the same according to law. Costs heretofore will be in the discretion of the court disposing of the suit.

Appeal allowed and case remanded.

(1) (1883) I. L. R. 5 All. 577.
(2) (1909) 13 C. W. N. 1080.
(3) (1891) I. L. R. 19 Cal. 123.
(4) (1912) 23 M. L. J. 487.

35 A. 425 (=11 A. L. J. 613=20 I. C. 653).

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35 A. 425=11 A. L. J. 618 =20 I. C. 653.

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Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

LACHMI NARAIN ALIAS MUNNUJI (*Plaintiff*) *v.* RAM CHARAN DAS AND OTHERS (*Defendants*).*

[15th May, 1913.]

Civil Procedure Code (1908), *order XXXIX, rule* 1 ; *order XLIII, rule* 1—*Injunction—Order refusing injunction—Appeal.*

Held that an appeal lies from an order refusing, as well as from one granting, a temporary injunction.

[Ref. 43 All. 383; Rel. 83 I. C. 48; Dist. 27 I. C. 131; Ref. 1924 Pat. 169.]

THE facts of this case were as follows :—

Two decrees were obtained against one Musammat Dropadi, in execution of which certain property was attached. Lachmi Narain objected to the attachment and sale of that property on the ground that it belonged to him and not to the judgment-debtor. His objection was disallowed and he then brought a suit to establish his right. In the course of that suit he applied for a temporary [426] injunction to restrain the defendant decree-holder from putting the property to sale. The lower court refused the application, merely remarking that the applicant could deposit the decree money. The plaintiff appealed to the High Court, where a preliminary objection was raised by the respondents that the appeal did not lie.

Mr. *M. L. Agarwala*, for the appellant.

The Hon'ble Dr. *Sundar Lal*, for the respondents.

TUDBALL AND MUHAMMAD RAFIQ, JJ :—This is an appeal from an order passed by the court below under order XXXIX, rule 1, of the Code of Civil Procedure. Two decrees were obtained against one Musammat Dropadi, in execution of which certain property was attached. Lachmi Narain objected to the attachment and sale of that property on the ground that it belonged to him and not to the judgment-debtor. His objection was disallowed and he then brought a suit to establish his right. In the course of that suit he applied for a temporary injunction to restrain the defendant decree-holder from putting the property to sale. The lower court has refused the application, merely remarking that the applicant can deposit the decree money. A preliminary objection is taken that no appeal lies from the order. It is contended that order XLIII, rule 1, clause (*r*), merely relates to an order granting an injunction, but not to an order refusing to grant an injunction. In our opinion, an order refusing as well as one granting an injunction is an order passed under that rule and the language of that rule covers both classes of orders. There is no force in the preliminary objection. As regards the merits, the application is not strongly opposed and, in the circumstances of the case, the injunction ought to have been granted by the court below. We allow the appeal, set aside the order of the court below and grant a temporary injunction restraining the sale pending the final decision of the suit. Costs in the present matter will abide the event.

Appeal allowed.

* First Appeal No. 25 of 1913, from an order of Guru Prasad Dube, Subordinate Judge of Allahabad dated the 19th of November, 1912.

35 A. 427 (=20 I. C. 145=11 A. L. J. 615).

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[427] APPELLATE CIVIL.

Before Mr. Justise Tudball and Mr. Justice Muhammad Rafiq.

WAHID-UN-NISSA AND OTHERS (*Defendants*) *v.* KUNDAN LAL AND ANOTHER (*Plaintiffs*).*

[15th May, 1913.]

Civil Procedure Code (1908), *order XLI, rule* 23; *order XLIII, r.* 1 (*u*)—*Suit dismissed for default of appearance, but restored by appellate court—Remand—Appeal.*

Held that no appeal would lie from an appellate order directing that a suit, which had been dismissed because neither party had appeared, should be restored to the file of pending cases and heard.

In this case the plaintiffs' suit was dismissed because neither party appeared. The plaintiff, without applying for the restoration of the case, appealed against the decree to the District Judge. The District Judge allowed the appeal and remanded the case for decision on the merits. Against this order the defendants appealed to the High Court, and at the hearing a preliminary objection was taken that no appeal lay.

Pandit *Baldeo Ram Dave* (for The Hon'ble Dr. *Sundar Lal*), for the respondents, raised a preliminary objection to the hearing of the appeal on the ground that no appeal lay from the order. The appeal purports to have been filed under clause (*u*) of order XLIII, rule 1, from an order supposed to have been made under order XLI, rule 23. The order appealed against has not been made under rule 23, order XLI. Rule 23 contemplates a case in which the court of first instance disposes of a suit upon a preliminary point and passes a "decree" and the "decree" is reversed on appeal. No "decree" has been made in this case by the court of first instance and the case has not been decided on a preliminary point. The "order" made by the court of first instance is not a "decree." In such cases there is no appeal from the appellate decree of the court. If the appeal had been dismissed by the District Judge, no second appeal would have lain to this Court. The law did not contemplate an appeal where the appeal was allowed by the District Judge.

Mr. *Nihal Chand* (for Dr. *S. M. Suleman*), for the appellant: An appeal is allowed from an order of remand. Here an order of remand was passed and an appeal can be entertained. The court below had no jurisdiction to pass the order that it did.

[428] Even if no appeal lies, the court below having acted without jurisdiction, I submit, the case should be entertained under the provisions of section 115 of the Code of Civil Procedure.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—A preliminary objection is taken that no appeal lies. The suit was dismissed by the court of first instance as neither of the parties appeared. One party went up in appeal to the court below, which entertained the appeal, set aside the order of dismissal and directed that the first court should hear the case. The opposite party has come up in second appeal, and it is urged that no appeal lies. On behalf of the appellants it is urged that an appeal lies under order XLIII, rule 1, clause (*u*), of the Code of Civil Procedure. This order relates to orders passed by appellate courts under order XLI, rule 23. In the present case the order passed by the court below is clearly not an order under order XLI, rule 23, and therefore under order XLIII,

* First Appeal No. 23 of 1913, from an order of Austin Kendall, District Judge of Cawnpore, dated the 2nd of January, 1913.

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rule 1, the appellants have no right of appeal. It is, therefore, clear that the preliminary objection must prevail. We are asked to treat this appeal as an application for revision. We decline to do so in the circumstances of the present case. The appellants, if they care do so, must file an application for revision which will be decided on the merits. The appeal fails and is dismissed with costs.

Appeal dismissed.

35 A. 428 (=11 A. L. J. 645=20 I. C. 44).

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Lyle.

RAM KUBER PANDE AND OTHERS (*Defendants*) *v.* RAM DASI (*Plaintiff*).*

[23rd May, 1913.]

Hindu law—Joint Hindu family—Mortgage—Suit for cancellation of mortgage executed by managing member—Compromise—Liability of sons.

One *K*, as head of a joint Hindu family, executed in 1905 a usufructuary mortgage of the family property, in which the widow of his deceased brother joined as a co-mortgagor. In 1907 the mortgagors sued for cancellation of this deed, but entered into a compromise with the mortgagee, upon which a decree was passed maintaining the mortgage, but in a modified form. The mortgagee thereafter instituted a suit for enforcement of the mortgage as settled by the compromise decree.

[429] *Held* that, in view of the fact that the courts below found that the compromise was genuine and for the benefit of the family, it was not open to the defendants to raise the question of the genuineness of the original mortgage, and that, whether or not the original mortgage was a genuine transaction, the compromise decree gave rise to a debt which was binding on the descendants of the original mortgagor *K. Madan Lal* v. *Kishan Singh* (1) referred to.

[Fol. 24 I. C. 491.]

THE facts of this case were as follows :—

One Karya Pande and his brother's widow mortgaged the entire family property to the plaintiff. Two years later, the mortgagors brought a suit to set aside the mortgage on the ground that it was fraudulent, but compromised the suit with the plaintiff. The compromise provided :—

(*a*) that the mortgagors should be entitled to redeem on payment of Rs. 1,200 in any *Jeth* ;

(*b*) that the mortgagee was to remain in possession until redemption, and that if the mortgagors interfered, they would be liable in damages.

The defendants, who are the grandsons of Karya Pande, brought a suit for maintenance of their possession, alleging that the mortgage was fraudulent and collusive, but their suit was dismissed for default of appearance.

The plaintiff brought this suit alleging that she was wrongfully dispossessed in 1907. The suit was defended on the ground that the mortgage was fraudulent and collusive and that there was no necessity to borrow and the widow had no right to mortgage. The Subordinate Judge dismissed the suit, giving effect to the defendants' pleas. The Judge in

* Second Appeal No. 1151 of 1912, from a decree of E. E. P. Rose, Additional Judge of Gorakhpur, dated the 18th of July, 1912, reversing a decree of Hidayat Ali, Officiating Second Additional Subordinate Judge of Gorakhpur, dated the 11th of March, 1912.

(1) (1912) I. L. R. 34 All. 572.

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appeal reversed the decree and decreed the suit. The defendants appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* (for whom Munshi *Iswar Saran*) for the appellant :—

The court has found that the original mortgage was fictitious. There was no money advanced by the plaintiff on foot of that mortgage. The sons, therefore, were not bound to pay anything on account of the fictitious mortgage. The compromise in the suit made by the father by which he undertook a liability, was not in the interest of the sons. It was not a transaction for the benefit of the family and the father had no right to burden the family property with a liability for which no consideration had passed. The members of the family are not bound by the [430] transaction. A fraud was effected by the executant on the family, and the members of the family could not be bound by the fraud of the ancestor. They are bound by his acts only so far as they are family transactions.

The Hon'ble Dr. *Sundar Lal*, for the respondent :—

The suit of Karya Pande, to set aside the mortgage, was a suit on behalf of the family, and although the other members of the family were not parties to it in name, to all intents and purposes, they must be taken to be parties to it. The court below having found that the father was suing on behalf of the family as its head, it must be presumed that every member of the family was suing and that therefore the compromise was entered into on behalf of the family. There is no suggestion that there is anything fraudulent in the entering into the compromise. It was a compromise of doubtful rights. The question is not as to the liability of the sons to pay their father's debt but of paying debts under the compromise to which the defendants were themselves parties.

Munshi *Iswar Saran* was heard in reply.

RYVES and LYLE JJ. :—Karya Pande and Musammat Aureha Parain, his sister-in-law, executed an usufructuary mortgage of the zamindari share entered in their names, on the 13th of May, 1905, in favour of the plaintiff, for Rs. 1,799. It was agreed that the mortgagee should take the usufruct in lieu of interest and that the mortgage should be redeemed on payment of the mortgage money after a period of four years in any *Baisakh*. It is unnecessary to recapitulate the further covenants in the bond. In 1907, the mortgagors brought a suit against the mortgagee to cancel this mortgage on the ground that it was merely a paper transaction and no consideration passed. Karya Pande expressly brought this suit in his capacity of manager of a joint Hindu family. It is unnecessary to consider whether such a suit could have been maintained. The parties, however, arrived at a compromise the terms of which were that the amount then due on the mortgage, which was about Rs. 2,500, should be reduced to Rs. 1,200 and that the mortgage be redeemable in two years. A decree was passed in terms of the compromise, dated the 23rd of May, 1907. The plaintiff now sues to recover Rs. 1,200 due on the mortgage, as modified by the decree and for damages as stipulated in the [431] mortgage and decree, on the ground that she had been wrongly dispossessed by the defendants. Karya Pande is dead and the defendants are his grandsons and great grandsons and Musammat Aureha Parain. The main defence to the suit was that the mortgage of 1905 was a fraudulent transaction entered into to defeat creditors, and in particular, one Harpal Pande. Harpal Pande held a mortgage on some other property of Karya Pande, and in execution of a decree on his mortgage he sold the

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mortgaged property. As the proceeds of the sale were insufficient to satisfy the decree, he applied on the 28th of March, 1900, for a decree under section 90 of the Transfer of Property Act, to recover the balance of the decretal money. This mortgage in suit, it is alleged, was executed on the 13th of May, 1905, to defeat his claims. It was also pleaded that the suit and compromise of the 23rd of May, 1907, were collusive and therefor ineffectual, and, in any event, could not bind the defendants other than Musammat Aureha Parain, because they were not parties to it. The first court dismissed the suit on the ground that the mortgage of 1905 was entirely fictitious and was a mere paper transaction fraudlently entered into to defeat the creditors of the estate. On appeal the lower appellate court upheld this finding, but came to the conclusion that the compromise in 1907 was perfectly genuine and was entered into because Karya Pande was afraid that his suit would be dismissed. As the suit was instituted by him in a representative capacity as head of the family, the whole family, including minors, were bound by his act. It further found that the compromise was for the benefit of the family, and decreed the suit. In second appeal it has been argued on behalf of the defendants appellants that on the finding that the original mortgage was made without consideration no money passed and consequently there was no debt due from Karya Pande, and that, therefore, there was no pious duty on the part of the sons and grandsons involved in the matter, and, secondly, a compromise, which purported to modify a mere paper transaction, could create no liability.

In our opinion, this ingenious argument has no force, and we think that on the finding that the compromise was not collusive, but was geninue and made to benefit the family, the courts were [432] not entitled to go into the question as to whether the original mortgage was or was not fictitious.

According to the Full Bench ruling in *Madan Lal* v. *Kishan Singh* (1), the whole family, including the minors, were bound by the decree. But even assuming that it was open to the defendants appellants to reopen the question as to the validity of the original mortgage, and even assuming that the finding of the lower courts as to its nature is correct, the original mortgagors sued in 1907 to get rid of the danger to the family which their own fraudulent conduct had created. It is true that the mortgagee was equally fraudulent, but she was nevertheless entitled to maintain her possession. *In pari delicto melior est positio defendentis.* If the court had decided the case on this principle, the suit would have been dismissed and it would have been *res judicata* between the parties that there was a mortgage legally enforcible against the defendants appellants for an amount, then approximately, Rs. 2,500. In order to minimize the liability of the family, the mortgagors were probably well advised to make the best terms they could and compromise the case. Even if there was no loan nor debt in the beginning this decree created a debt for which there was good consideration, which the sons and grandsons are bound to discharge. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) (1912) I. L. R. 34 All, 572.

35 A. 432 (=18 I. C. 465=11 A. L. J. 642).

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APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

35 A. 432=18 I. C. 465=11 A. L. J. 642.

BHAGWANT SINGH (*Plaintiff*) *v.* BHOLI SINGH (*Defendant*)*.
[23rd May, 1913.]

Act No. IX of 1908 (*Indian Limitation Act*), *schedule I, articles* 138 *and* 144—*Execution of decree—Successive purchasers of same property—Suit by subsequent purchaser to recover from earlier purchaser.*

Article 138 of the Limitation Act only applies to suits in which the auction purchaser is the plaintiff and the judgment-debtor, or some one claiming through him, is the defendant.

Ram Lakhan Rai v. *Gajadhar Rai* (1) and *Khiroda Kanta Roy* v. *Krishna Das Laha* (2) referred to.

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single judge of the Court. The facts of the [433] case are stated in the judgment under appeal, which was as follows:—

"This was a suit for recovery of possession over certain immoveable property, and the only question for determination before me is one of limitation. In stating this question, I think it reasonable to accept everything which the court below have found against the conduct of the defendant upon the facts of the case. It appears that the defendant, holding three distinct mortgages on the property in suit, brought three distinct suits, one upon each mortgage. He obtained decrees and put the property up for sale three times, once upon each decree. He purchased himself at auction under two of his decrees on the 21st of February, 1898, and obtained formal possession on the 7th of September, 1898, and again on the 30th of January, 1899. In the mean time the same property had been put up for sale a third time on the 21st of April, 1898. The defendant appeared at that auction sale, said nothing about his previous purchase but actually bid for the property as if it still belonged to his judgment-debtor. He was out-bid by the plaintiff, who thus became auction-purchaser at this third sale held on the 21st of April, 1898. This sale was confirmed by the court on 30th of May, 1898 and the plaintiff obtained formal delivery of possession on the 15th of May, 1899. It must be remembered, therefore, that his judgment-debtor was still in possession at the date of the auction sale, but the decree-holder (the present defendant, as auction purchaser under his first two decrees, had himself obtained formal delivery of possession before the plaintiff did so. The present suit was brought on the first of June, 1910 and I have to determine which is the article of the first schedule to the Indian Limitation Act (Act IX of 1908), by which that suit is governed. The suit as brought is one to which article 142 of the said schedule would apply, provided the plaintiff succeeded in establishing the necessary facts. What the plaintiff says is that he obtained actual and not merely formal possession on the 15th of May, 1899, but lost that possession some time in the month of July, 1899, owing to an adverse decision of the Revenue Courts. If these facts were established, the suit would be one for possession of immovable property when the plaintiff while in possession of the property, had been dispossessed; article 142 of the Indian Limitation Act would apply; the date of the origin of the cause of action would be the month of July, 1899, and the suit would be within time. In such a suit, however, the burden of proof is on the plaintiff to satisfy the court that he was actually in possession within limitation. There is no finding in favour of the plaintiff by either of the courts below on this point, nor has either of them applied article 142 of the schedule, nor has either of them calculated the origin of the cause of action from the month of July, 1899. Both the courts below have held that the plaintiff has a cause of action dating from the 15th of May, 1899, the date on which formal delivery of possession to him took place under orders of the court. The learned Munsif himself does not expressly state what article of the limitation Act he proposes to apply; but the learned Subordinate Judge on first appeal has expressly applied article 144. This article cannot be applied unless the court is prepared to find that the suit is one for possession of immovable property not especially provided for under [434] any of

*Appeal No. 81 of 1912 under section 10 of the Letters Patent.

(1) (1910) I. L. R. 33 All. 224. (2) (1910) 12 C. L. J. 378.

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the other articles of the schedule in question. This seems to me clearly impossible, because the suit as framed is one to which article 142 would apply, and it discloses facts which would make article 138 of the schedule applicable. The courts below have held that article 138, of the schedule is excluded by the principle of the ruling of this court in *Narain Das* v. *Lalta Prasad* (1). That ruling obviously does not exclude article 138, because the particular case then before the Court was decided without any determination of the question whether article 138 or article 144 would have applied to the facts then before the Court. By implication it seems to me that this ruling is entirely against the plaintiff; but I will refer to this point again presently. There are other authorities for holding that article 138 of the schedule would apply to the present suit as for instance, cases reported in I. L. R. 35 Bom. 452, and in I L.R. 17 Mad. 89. I come back, therefore, to what seems to me the one question really arguable, namely, whether or not the courts below should have found in favour of the plaintiff on the ground that he has made out a sufficient case for applying the article of Limitation Act on which his suit was actually based, namely, article 142. I do not think the case for the plaintiff can be put any higher than this, namely, that the court should accept his certificate of formal delivery of possession on the 15th of May, 1899, as *prima facie* sufficient proof that he obtained actual possession on that date. If this proposition can be affirmed, then it would not be necessary for the plaintiff to prove that he actually lost possession in the months of July following, or on any specific date; he could claim to have made out a good title, plus possession within twelve years of the date of the suit. Now it is on this very point that the ruling in Weekly Notes, 1899, already referred to, seems to me against the plaintiff. Applying the principle involved in that ruling to the facts of the present case, I hold that if the judgment-debtor had been in actual possession on the 15th of May, 1899, then the court would have been bound to accept the plaintiff's certificate as sufficient proof that the judgment-debtor was actually ousted from possession on that date, and that possession passed to the plaintiff The case is otherwise when the judgment-debtor was not in possession on the 15th of May, 1899, but another person was in possession as auction-purchaser under a previous sale As against such auction-purchaser, formal delivery of possession to the present plaintiff is not proof that he was actually ousted. Something has been said before me in argument as to the dishonesty of defendants' proceedings, and as to the question of estoppel. The considerations are quite irrelevant to the question of limitation. If the plaintiff had come into court within twelve years of the date of the confirmation of his auction sale, it may be that the courts below are perfectly right in holding that no sort of defence on the merits would have been open to the defendant, in view of his proceedings, and particularly in view of the fact that he was a bidder at the auction sale of the 21st of April, 1898. The whole point of the law of limitation is, however, that a defendant cannot be put to the defence of his title at all unless the plaintiff claims from the courts the relief to which he is entitled within what the Legislature has laid down to be a suitable time with reference to the facts of each particular case. I hold that the suit as framed is barred by article 142 of the [435] first schedule to the Indian Limitation Act, because the plaintiff has failed to prove the ingredients necessary to bring his suit under the operation of that article. I hold that the facts disclosed are such that the suit would have been maintainable under article 138 of the same schedule if it had been filed two days earlier, but that it is barred under that article, because it was brought more than twelve years from the date of the confirmation of the auction sale. I hold that article 144 of the same schedule cannot be applied at all, because from any point of view the suit is one provided for by another article in the same schedule. I, therefore, accept this appeal, and setting aside the decrees of both the courts below, dismiss the suit with costs throughout."

Pandit *Uma Shankar Bajpai*, for the appellant.

Babu *Damodar Das*, for the repondent.

RICHARDS, C.J., and BANERJI, J.—The facts out of which this appeal arises are a littile peculiar. It appears that the defendant obtained three mortgage decrees on foot of three separate mortgages against the property which the plaintiff now seeks to recover. There were three separate sales. The defendant himself purchased at two of the sales. He bid at the third sale, but he was out-bid by the plaintiff, and the plaintiff was accordingly declared the auction-purchaser. The sale to the defendant was on the 21st of February, 1898; that to the plaintiff was on the

(1) Weekly Notes, 1899, p. 56.

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21st of April 1898. The defendant obtained either formal or actual possession on the 7th of November, 1898. The sale to the plaintiff was confirmed on the 30th of May, 1899. The present suit was not instituted until the 1st of June, 1910. In any view of the case, the plaintiff slept on his rights for nearly twelve years. The only question which had to be decided was one of limitation. It has been urged with great force in the present Letters Patent Appeal that article 144 of the Limitation Act is the article which should regulate the present suit. The learned Judge of this Court, in his decision against which the present Letters Patent Appeal has been preferred, held that article 138 applied. It is quite true that the plaintiff's suit is based on an auction purchase in execution of a decree; it is also true that at the date of sale to the plaintiff the judgment-debtor was in possession. At first sight it would appear as if article 138 applied. We are, however, inclined to think that article 138 only applies to suits in which the auction-purchaser is plaintiff, and the judgment-debtor, or some person claiming through **[436]** him, is defendant. [See *Ram Lakhan Rai* v. *Gajadhar Rai* (1) and also *Khiroda Kanta Roy* v. *Krishna Das Laha* (2).] The respondent meets this argument by saying that even assuming that article 144 is the article which applies to the circumstances of the present case, it has been found that he claims through the judgment-debtor and that therefore he is entitled to add to his own possession the possession of the judgment-debtor from the 30th of May, 1898. It is clear that if the defendant is so entitled to add this period, the claim would be time-barred. It is true the defendant claims through the judgment-debtor. He was an auction-purchaser of the judgment-debtor's interest and is in possession as such. It is, however, contended on behalf of the plaintiff, that having regard to the fact that the defendant allowed the property to be put up to sale a third time and bid at the sale himself, he ought not to be allowed to say that he claims through the judgment-debtor. Both the court of first instance and the lower appellate court placed considerable weight on the fact that the defendant bid at the auction sale at which the plaintiff was declared the purchaser. But no issue was framed as to whether or not the defendant is estopped from setting up the case that he claims through the judgment-debtor. It has not been explained how it was that the property came to be put up to sale on foot of each of the decrees, nor has it been shown how far the defendant was responsible for the property being so put up. All the decrees appear to have been put into execution about the same time, and it may have been that the court executing the decree was as much, or more, to blame than the defendant, in allowing the same property to be sold three times. Furthermore, it has not been found that the plaintiff was ignorant of the fact that two months before his purchase the property had been already sold and purchased by the defendant. If he knew all these facts it could hardly be said that he was misled by the fact that the defendant bid at the last auction sale. We think that before finally disposing of the appeal we should have a clear finding on this issue of estoppel. We therefore refer, under order XLI, rule 25, the following issue :—

[437] "Did the defendant by his act intentionally cause the plaintiff to believe that he did not already purchase the property himself, and that the property could be sold and a good title given under the decree in execution of which the property was sold to the plaintiff?"

(1) (1910) I. L. R. 33 All. 224.

(2) (1910) 12 C. L. J. 378.

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In considering this issue the court will bear in mind the importance of the knowledge of the plaintiff of what had previously occurred. The court will take such additional evidence as the parties may adduce, relevent to the above issue. On receipt of the finding ten days will be allowed for filing objections.

On return of the finding the appeal was dismissed.

Appeal dismissed.

35 A. 437 (=11 A. L. J. 638=20 I. C. 27.)

APPELLATE CIVIL.

Before Sir Henry Richards, Knight Chief Justice, and Mr. Justice Lyle.

MEGH RAJ AND ANOTHER (*Defendants*) *v.* MATHURA DAS AND OTHERS (*Plaintiffs*) AND SHIB SINGH AND OTHERS (*Defendants*).*

[21st May, 1913.]

Act No. IX of 1908 (*Indian Limitation Act*), *section* 19—*Limitation—Acknowledgment —Requisites for valid acknowledgment.*

Held that an acknowledgment of a debt to be a valid acknowledgment within the meaning of section 19 of the Indian Limitation Act, 1908, need not be addressed to the creditor, but may be made to some other person, as, e.g., by means of a deposition in court.

Held also that a statement in the form "the whole of Janki Prasad's mortgage money is owing," there being in existence at the time two mortgages held by Janki Prasad, must be taken to apply to both, in the absence of evidence indicating a different signification. *Maniram Seth* v. *Seth Rupchand* (1) and *Mylapore Iyasawmy Vyapoory Moodliar* v. *Yeo Kay* (2) referred to.

[Appl. 46 I. C. 973=4 M L. J. 551.]

THIS was a suit on a mortgage bond, dated the 24th of January, 1892. It was executed by Shib Singh and Ajit Singh, two brothers, in favour of Janki Prasad, who was a member of a joint Hindu family. The bond was executed for Rs. 1,200. Defendants 12 to 14 were subsequent tranferees of the property. The suit was instituted on the 9th of July, 1910, against the executants and their sons and grandsons. But the subsequent transferees were not impleaded till the 14th of July, 1911, the application for bringing them on the record having been put in on some day in the preceding February. The transferees pleaded that the suit was barred against them, they having been impleaded long after the period [438] of grace allowed by the Limitation Act of 1908. The reply to this was that one Ram Dayal, through whom they derived their title, had admitted the mortgage in question so late as the 2nd of June, 1909. Ram Dayal was examined by the court in a suit in which he was defendant and there he had said that "the whole of Janki Prasad's mortgage money is owing." That was a suit by a third party to recover possession of property covered by the present mortgage from Ram Dayal, who had purchased it at an auction sale. It appeared that there were other mortgages in favour of Janki Prasad as well as in favour of his brother, Mathura Prasad, executed by these two brothers in conjunction with some other persons.

The Subordinate Judge held that the statement of Ram Dayal in the deposition of 1902, amounted to an admission and decreed the suit.

* First Appeal No. 83 of 1912 from a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 28th of November, 1911.

(1) (1906) I. L. R. 33 Calc. 1047. (2) (1887) I. L. R. 14 Cal 801.

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Mr. *B. E. O'Conor* (The Hon'ble Dr. *Tej Bahadur Sapru* with him), for the appellants.

There were four mortgages over this property in favour of Janki Prasad or his brother in which the defendants were interested. It was not clear which of these Ram Dayal was referring to when he made that statement. He was mixed up in the description he gave because it did not tally with particulars of any one of the mortgages. There was not present before his mind any particular document under which he thought himself liable. There was no specification of any kind. An acknowledgment must be a clear acknowledgment of a specific liability. Besides, it was not a voluntary acknowledgment. Ram Dayal was examined by the court, he was neither examined in chief nor cross-examined. There was no question at the time regarding any of these mortgages.

The Hon'ble Dr. *Sundar Lal* (Dr. *Satish Chandra Banerji* and Pandit *Rama Kant Malaviya* with him), for the respondent.

The question was whether the acknowledgment fulfilled the requirements of section 19 of the Limitation Act. What was necessary to be seen was that the acknowledgment sufficed to identify the claim on the document under consideration. Looking to the depositions as a whole it was clear that Ram Dayal meant to say that the entire money due to Janki Prasad was unpaid.

[439] The Hon'ble Dr. *Tej Bahadur Sapru*, in reply.

The law did not require any specification of property, but the meaning of the admission must be clear. It was held in a case by the Privy Council that the admission must be to the creditor himself; *Mylapore Iyasawmy Vyapoory Moodliar* v. *Yeo Kay* (1), and it was followed in *Imam Ali* v. *Baij Nath Ram Sahu* (2). But these decisions were departed from by the Privy Council in *Maniram Seth* v. *Seth Rup Chand* (3).

RICHARDS, C. J. and LYLE, J.—This appeal arises out of a suit upon foot of a mortgage, dated the 24th of January, 1892. The court below has made a decree in the plaintiff's favour, but certain persons have preferred an appeal. They are purchasers of a portion of the property which the court below has ordered to be sold. The present suit was instituted on the 11th of July, 1910, but the appellants were not made parties to that suit until the 14th July, 1911. It will thus appear that the suit was barred against them unless something had happened which gave a fresh period of limitation. The allegation of the plaintiff was that there had been an acknowledgment by a predecessor in title of the appellants on the 2nd of June, 1902. The statement which is relied upon as an acknowledgment was made by one Ram Dayal in a suit brought against him and others for possession by an outsider. Being a party to the suit he was called and questioned by the Judge, and the statement he made was subsequently signed by him. In the course of his statement he said:—"The whole of Janki Prasad's mortgage money is owing." The contention of the appellants is that at that time there were two mortgages in favour of Janki Prasad and that the statement of Ram Dayal might just as well apply to one as the other and that therefore it is no sufficient acknowledgment within the meaning of section 19 of the Limitation Act. If it could be made good that the statement might apply equally to one of two mortgages and did not apply to both, a great deal might be said for the present appeal. However, the statement of Ram Dayal must be taken in conjunc-

(1) (1887) I. L. R. 14 Cal. 801.
(2) (1906) I. L. R. 33 Cal. 61.
(3) (1906) I. L. R. 33 Cal. 1047.

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tion with the circumstances and the rest of the statement he made. It appears that on the 30th of October, 1888, two sets of persons made a mortgage in favour of one [440] Mathura Das, who was joint with Janki Prasad : one set were Brahmans and the other set Thakurs. This was a mortgage with possession. On the 8th of November, 1888, exactly the same persons made another mortgage of the same property in favour of the same person. On the 24th of January, 1892, another mortgage was made, but this time it was made by the Brahmans alone and of their share. But on the very same day the Thakurs made the mortgage now sued upon, of their share in the property. These mortgages were in favour of Janki Prasad. In effect these two last mortgages were one transaction and they were very similar to the other transaction of 1888 in which the Brahmans and Thakurs joined together. Reading the statement which Ram Dayal made as a whole, it is perfectly clear that he was referring to the two mortgages of the 24th of January, 1892, though he was probably unaware that the money was advanced on two documents instead of one.

It is quite clear that he was referring to the entire debt due to Janki Prasad because he refers to some members of each of the two sets of mortgagors though he does not name them all correctly.

It is next contended that the statement does not satisfy the provisions of section 19 of the Limitation Act, because the acknowledgment was not given to the creditor, and the case of *Mylapore Iyaswamy Vyapoory Moodliar* v. *Yeo Kay* (1) is cited. The explanation to section 19 of the Limitation Act expressly states that an acknowledgment may be addressed to a person other than the person entitled to the property or right and in the case of *Maniram Seth* v. *Seth Rupchand* (2) where the acknowledgment was made under analogous conditions, their Lordships of the Privy Council referring to the explanation to section 19, held that the acknowledgment was good and satisfied the conditions of the section.

Under these circumstances, we think that the view taken by the court below was correct and we accordingly dismiss the appeal with costs.

Appeal dismissed.

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35 A. 441 (=11 A. L. J. 630=20 I. C. 41).

[441] APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Lyle.

SANWAL SINGH (*Defendant*) *v.* GANESHI LAL (*Plaintiff*).*

[16th May, 1913.]

Civil Procedure Code (1908), *order XXXIV; rule* 1 *order I, rule* 9—*Parties to suit—Mortgage—Joint mortgage of separate properties—Suit barred as against one mortgagee—Remaining property liable for whole debt.*

The separate properties of two mortgagors were jointly mortgaged to secure one debt. The mortgagee sued for sale just within limitation, making one of the heirs of one mortgagor a party defendant, and stating that nothing had been heard of the other for twenty-five years. In the written statement it was pleaded that this heir was alive but by that time the suit as against him was time-barred.

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* Second Appeal No 1040 of 1912 from a decree of E. C. Allen, District Judge of Mainpuri, dated the 4th of May, 1912, modifying a decree of Jawad Husain, Munsif of Shikohabad, dated the 23rd of January, 1911.

(1) (1887) I. L. R. 14 Cal. 801. (2) (1906) I. L. R. 33 Cal. 1047.

Held that the unimpleaded heir of the mortgagor was not a necessary party to the suit, and that the suit might be proceeded with against the other representative of the mortgagor and his separate property for the whole amount due on the mortgage.

Jai Gobind v. *Jas Ram* (1) followed. *Gendan Lal* v. *Babu Ram* (2) distinguished. *Imam Ali* v. *Baij Nath Ram Sahu* (3), *Hakim Lal* v, *Ram Lal* (4), *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (5), *Haro Kumari* v. *Eastern Mortgage Co.*, (6) and *Debendra Nath Sen* v. *Mirza Abdul Samad* (7) referred to.

[Fol. 39 Mad. 419=29 I. C. 113; Ref. 70 I. C. 542=35 C. L. J. 332; 75 I. C. 917; 82 I. C. 638.]

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ONE Umrao Singh in 1880 executed a mortgage of certain property in favour of the plaintiff's father. In 1910 the plaintiff instituted a suit for sale on the basis of this mortgage against Sanwal Singh, son of Angad Singh, one of the two sons of Umrao Singh, and alleged that, although there was, or had been, another son Mangal Singh, he had not been heard of for twenty-five years. In the written statement it was pleaded that Mangal Singh was alive, and was a necessary party to the suit.

The lower appellate court found that Mangal Singh was alive ; that he and Sanwal Singh were separate, and that the suit would not fail because Mangal Singh had not been impleaded, and decreed the plaintiff's claim against the property standing in the name of Sanwal Singh. The defendant thereupon appealed to the High Court.

Pandit *Braj Nath Vyas*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent.

RYVES and LYLE, JJ:—This was a suit to recover Rs. 920, the principal and interest due on a mortgage executed by Umrao [442] Singh on the 12th of July, 1880, in favour of the plaintiff's father, by sale of the mortgaged property.

It was stated in the plaint that Umrao Singh, the mortgagor, died leaving two sons, Mangal Singh and Angad Singh. The plaint recites :—"Mangal Singh has not been heard of for a long time, that is, for about twenty-five years, and Angad Singh died childless. In the public *khewat* the names of Mangal Singh, who has not been heard of, and of Sanwal Singh, defendant, stand recorded in the column of the mortgagor against the property mortgaged. Besides Sanwal Singh, defendant, no other heir of Umrao Singh, principal mortgagor, and of Mangal Singh, who has not been heard of, is in existence." This suit was instituted on the 2nd of August, 1910. In the written statement it was stated that Mangal Singh was alive and was in the service of the Indore State, and that he was a necessary party to the suit and that the claim was bad for non-joinder of a necessary party. This written statement was filed on the 24th of November, 1910. The courts below have decreed the suit and have directed that the whole amount claimed should be recovered by the sale of the property entered in the name of Sanwal Singh, and have excluded the share standing in the name of Mangal Singh. The learned District Judge found, *inter alia*, (1) that Mangal Singh was alive, (2) that Mangal Singh and Sanwal Singh were separate, (3) that the suit should not be dismissed altogether because he had not been made a party.

Before us, in second appeal, two only of the pleas taken in the memorandum of appeal, have been pressed; first that on the finding that Mangal Singh was alive the whole suit should have been dismissed, as he had not been made a party, and secondly, that in any event, the half of the

(1) Weekly Notes, 1898, p. 120.
(2) (1911) 9 A. L. J. 86.
(3) (1906) I. L. R. 33 Cal. 613.
(4) (1907) 6 C. L. J. 46.
(5) (1905) I. L. R. 29 Mad. 217.
(6) (1907) 7 C. L. J. 274.
(7) (1906) 10 C. L. J. 150.

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property recorded in Sanwal Singh's name ought not to have been made liable for more than half of the money claimed.

On the first point, reliance is placed on order XXXIV, rule 1, of the Code of Civil Procedure and *Gendan Lal* v. *Babu Ram* (1). This case, however, does not apply, although some observations of the learned Judges and particularly those of Mr. JUSTICE KARAMAT HUSAIN are against the appellant. We do not think [443] order XXXIV, rule 1, really has any application in the present case. That rule requires all persons having an interest in the mortgaged security to be joined in the suit. Now this mortgage was time-barred long ago on the proper construction of the law of limitation as laid down by their Lordships of the Privy Council.

Twelve years, and not sixty years, as had been held in these provinces, was the period within which, ordinarily, such a suit should be instituted. The plaintiff's suit on this mortgage would have been time-barred, had not the Legistlature added section 31 to the Limitation Act. Under the provisions of that section the suit was in time up to the 8th of August, 1910. The plaint was filed only a few days before this date. The plaintiff stated then that he had no knowledge whatever of the existence of Mangal Singh and that was the reason why he was not made a party. By the time the written statement was filed, the claim against Mangal Singh was time-barred and the mortgage as against him and his property was extinguished. We do not think it was the duty of the plaintiff to bring on the record a person against whom no claim could be enforced in the suit. At the time of the trial of the suit there was no mortgage subsisting on the property of Mangal Singh. The only property which could be made liable for the mortgage money was the share in possession of Sanwal Singh. In this share Mangal Singh had no concern. He would not, therefore, seem to be a person having any interest in the subsisting mortgage security.

The question may be looked at from another point of view also. Order I, rule 9, provides that no suit shall be dismissed by reason of misjoinder or non-joinder of persons. That rule does not apply when a cause of action arises against a number of persons jointly, because in that case when one of such persons is eliminated, no cause of action subsists against the rest of them. If it does not subsist against all, it cannot subsist against any. In this case, however, the property has been divided, and portions of it are held separately by Mangal Singh and Sanwal Singh. No cause of action arises against them jointly, and the failure to implead Mangal Singh is no reason for dismissing the suit against Sanwal Singh.

[444] On the second point, reliance is placed on *Imam Ali* v. *Baij Nath Ram Sahu* (2). In that case the ruling of this Court in *Jai Gobind* v. *Jas Ram* (3) was dissented from. But this opinion, as stated on page 121 of the report in I. L. R. 33 Cal. has not been consistently adopted even in the Calcutta Court. In *Hakim Lal* v. *Ram Lal* (4), the ruling in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (5), which supports us, was dissented from. In *Haro Kumari* v. *Eastern Mortgage Company* (6), however, the learned Judges considered the rulings in I. L R. 33 Calc., p. 613 and in I. L, R., 29 Mad., p. 217 and stated :—" We

(1) (1911) 9 A. L. J, 86.
(2) (1906) I. L R. 33 Cal. 613.
(3) Weekly Notes, 1898, p. 120.
(4) (1907) 6 C. L. J. 46.
(5) (1905) I. L. R. 29 Mad. 217.
(6) (1907) 7 C. L. J. 274.

consider the rule laid down in the last mentioned case is correct." In *Debendra Nath Sen* v. *Abdul Samad* (1) MOOKERJI, J., who also delivered the judgment in I. L. R., 33 Cal., p. 613, referred, apparently with approval, to the ruling in I. L. R., 29 Mad., 217 and to the ruling in C. L. J., Vol. VII, p. 274, and stated, as reported at page 175 :—" The general rule unquestionably is that a mortgagee cannot be required, at the instance of a purchaser of a part of the premises, to apportion his mortgage-debt among the several parts into which the property has been divided and to look to each only for the proportionate share, unless circumstances have happened, the effect of which, in fact and in law, is to create a severance of the security." It seems, therefore, that the rule in I. L. R. 33 Cal., p. 613, was intended to govern the particular facts of that case on the point, and not to lay down any general rule. But, be that as it may, it seems to us that we should follow the ruling of this Court in A. W. N. 1898, p. 120, with which we entirely agree. It was laid down in that case that " if two properties are jointly mortgaged for the same debt, each of these properties is liable for the whole debt, and it is open to the mortgagee to proceed either against the whole of the mortgaged property or against a part only of such property." In this case, if the original mortgagor had been alive it would have been open to the plaintiff to bring to sale the whole or any part of the mortgaged property in the mortgagor's possession, and we do not see any reason why the right of the mortgagee should, in any way, be cut down [445] or prejudiced owing to the fact that after the mortgagor's death the mortgaged property was divided without the mortgagee's permission, into two separate shares and separately possessed by two persons. We, therefore, think that the decree of the lower court was right and we dismiss this appeal with costs.

Appeal dismissed.

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MAY 16.

APPELLATE CIVIL.

35 A. 441=11 A. L. J. 630=20 I. C. 41.

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35 A. 445 (=11 A. L. J. 651=21 I. C. 617).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

SRI KISHAN LAL (*Petitioner*) *v.* KASHMIRO AND OTHERS (*Opposite parties*).*

[9th May, 1913.]

Civil Procedure Code (1908), *section* 110—*Appeal to His Majesty in Council*—*Requirements to be fulfilled before grant of certificate*—*Decree involving some question respecting property of the value of ten thousand rupees or upwards.*

The value of the subject matter of the suit in the court of first instance was over Rs. 10,000, but the value of the subject matter in dispute on appeal to His Majesty in Council was less than Rs. 10,000. On the other hand, the proposed appeal to His Majesty in Council necessarily involved a decision as to the validity of an award which dealt with property of far greater value and which had been declared by the High Court to be invalid.

Held that the provisions of section 110 of the Code of Civil Procedure applied and a certificate should be granted. It was not necessary that at the time of presenting the application for leave to appeal there should be pending in a court a dispute respecting other property of the value of Rs. 10,000. *Macfarlane* v.

*Privy Council Appeal No. 6 of 1913.

(1) (1906) 10 C. L. J. 150.

1913
MAY 9.

APPELLATE CIVIL.

35 A. 445 =11 A. L. J. 684 =21 I. C. 617.

Leclaire (1), *Musammat Aliman* v. *Musammat Hasiba* (2) and *Ananda Chandra Bose* v. *Broughton* (3) referred to.

[Dist. 26 I. C. 6 ; Ref. 37 I. C. 502=33 M. L. J. 400 ; 66 I. C. 606 ; 69 I. C. 985=16 L. W. 517=1923 M. W. N. 633 =13 M. L. J. 723=31 M. L. T. 395.]

THIS was an application for leave to appeal to His Majesty in Council against a judgment of RICHARDS, C. J. and BANERJI, J. reversing a decree of the Subordinate Judge of Meerut.

The facts, so far as they are material to the purposes of this report, are as follows :—

There was a dispute between the heirs of one Harnam Prasad as to the division of the family property. The family was possessed of property worth over Rs. 1,60,000, among which were certain mortgagee rights. The matter was referred to arbitration by the male heirs, and an award was made in 1893, by which all the property, including the mortgagee rights, was divided among the defendant, Musammat Kashmiro, the widow of the deceased, and certain persons who claimed to be members of the joint family with the deceased, the plaintiff being amongst them. The [446] lady was given an eight-anna share in the mortgagee rights, while the plaintiff was given four annas. The lady alone brought a suit upon the mortgage and recovered the money from the mortgagors. The plaintiff, thereupon, brought the present suit for recovery of his share (4 annas) in the mortgage money. The suit was valued at more than Rs. 10,000. The lower court gave the plaintiff a decree for Rs. 8,800. In appeal the High Court, holding that the award was fraudulent and collusive and that the family was a separate family, dismissed the suit.

The plaintiff applied for leave to appeal to His Majesty in Council. An affidavit was filed in the High Court along with this application that the decree would affect property valued at Rs. 40,000 in possession of the plaintiff under the award.

The Hon'ble Dr. *Sundar Lal*, for the appellant :—

In this case although the valuation of this particular appeal is below Rs. 10,000, yet the amount indirectly involved is over Rs. 10,000, inasmuch as the whole award has been declared to be invalid and that involves property worth over Rs. 10,000. The question of the validity or invalidity of the award cannot be raised in another suit. It is, therefore, a fit case in which leave to appeal should be granted. He cited *Andrew Macfarlane* v. *Francis Leclaire* (1), *Musammat Aliman* v. *Musammat Hasiba* (2) and *Ananda Chandra Bose* v. *Broughton* (3).

Mr. *Nihal Chand*, for the respondent :—

The subject-matter in dispute means the property in dispute in the suit or appeal. Section 110 of the Code of Civil Procedure, 1908, refers to suits in existence and not to suits that may be brought in the future. Here the property in dispute was worth less than Rs. 10,000 and leave to appeal should not be granted; *Banarsi Prasad* v. *Kashi Krishna Narain* (4) and *Hanuman Prasad* v. *Bhagwati Prasad* (5).

RICHARDS, C. J. and BANERJI, J.—This is an application for leave to appeal to His Majesty in Council. The value of the subject-matter of the suit in the court below exceeded Rs. 10,000, but that of the proposed appeal to His Majesty in Council is Rs. 8,767-2-0. that is, below Rs. 10,000. The decree of this Court [447] reversed the decree of the

(1) (1832) 15 Moo. P. C. 181.
(2) (1897) 1 C. W. N. (Notes) 93.
(3) (1872) 9 B. L. R. 423.
(4) (1900) I. L. R. 23 All. 227, (231).
(5) (1902) I. L. R. 24 All. 236.

court below. It is contended that, under section 110 of the Code of Civil Procedure, the appellant has a right to appeal to His Majesty in Council, because the decree of this Court involves, directly or indirectly, a claim or question respecting property of value exceeding Rs. 10,000. The question in this case was whether an arbitration award was binding upon Musammat Kashmiro, one of the respondents to the proposed appeal. It is admitted that the award relates to property far exceeding Rs. 10,000 in value. This Court held, reversing the decision of the court below, that the award was not binding on the lady for reasons stated in this Court's judgment. It is the correctness of this decision which is challenged in the proposed appeal. If the decree of this Court becomes final, the question of the validity of the award will also become final as regards property other than the property in dispute in the present suit. It is, therefore, clear that the decree of this Court does involve a question relating to property of a value exceeding Rs. 10,000.

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MAY 9.

APPELLATE CIVIL.

35 A. 445=11 A. L. J. 654 =21 I. C. 617.

It is contended on behalf of the opposite party that unless there is at the time of the presentation of the application for leave to appeal a dispute pending in some court respecting other property of the value of Rs. 10,000, leave cannot be granted under section 110. We are unable to agree with this contention. The first paragraph of the section provides for cases in which the value of the subject-matter of the suit and of the subject-matter in dispute on appeal to His Majesty amounts to Rs. 10,000, or upwards. The second paragraph was intended to provide for cases in which, although the value of the subject-matter of the suit or subject-matter in dispute on appeal to His Majesty was below Rs. 10,000, the decree or final order involved, directly or indirectly, a claim or question to or respecting property of the value of Rs. 10,000, or upwards. The paragraph to which we have referred is very wide and general, and it seems to us that it was clearly inserted in the section to meet a case like the present. The principle which underlies a question of this kind was discussed by their Lordships of the Privy Council in the case of *Macfarlane* v. *Leclaire* (1), and it seems to us that, in view of the opinion of their Lordships in that case, the second paragraph of section 596 [448] of the Code of 1882, which corresponds to section 110 of the present Code, was enacted. A similar view to that held by us appears to have been taken by the Calcutta High Court in *Musammat Aliman* v. *Musammat Hasila* (2) and *Ananda Chandra Bose* v. *Broughton* (3). As in the present case the decree involves a question respecting property of value exceeding Rs. 10,000, and as the decision of the court below was reversed by this Court, the case, in our opinion, fulfils the requirements of section 110 of the Code of Civil Procedure, and we so certify.

Leave granted.

(1) (1862) 15 Moo. P. C. 181.
(2) (1897) 1 C. W. N. (Notes) 93.
(3) (1872) 9 B. L. R. 423.

1913
MAY 24.

APPELLATE CIVIL.

35 A. 448=
22 I. C. 98.

35 A. 448 (=22 I. C. 98).

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

MISS EVA MOUNTSTEPHENS (*Petitioner*) *v.* MR. HUNTER GARNETT ORME (*Opposite party*).*

[24th May, 1913.]

Act No. X of 1865 (*Indian Succession Act*), *section* 244—*Civil Procedure Code* (1908), *section* 2—*Will—Probate—Application for probate dismissed—"Decree"—"Order"—Appeal.*

Held that the order of a District Judge granting or refusing probate of a will on an application made under the provisions of section 244 of the Indian Succession Act, 1865, is a decree within the meaning of section 2 of the Code of Civil Procedure, 1908, and appealable as such.

Held also that the court fee payable on such an appeal is Rs. 10 under article 17, clause vi, of the second schedule to the Court Fees Act, 1870.

Umrao Chand v. *Bindraban Chand* (1), *Esoof Hasshim Dooply* v. *Fatima Bibi* (2) and *Sheikh Azim* v. *Chandra Nath Namdas* (3) referred to.

THIS was an application in the court of the District Judge of Saharanpur for probate of the will of Miss Garnett Orme, who died at the Savoy Hotel, Mussoorie, on the 18th of September, 1911. The applicant was the executrix named in the will. The granting of probate was resisted by the brother of the testatrix upon various grounds, and on the 12th of October, 1912, the District Judge dismissed the application. The applicant appealed to the High Court, framing her appeal as a first appeal from order and paying a court fee of Rs. 2. Before the appeal came on for hearing, the opposite party raised a preliminary objection that the District Judge's decision amounted to a decree within the meaning of section 2 of the Code of Civil Procedure and should [449] have been appealed from as such. The case was accordingly put up for the hearing of this objection.

Messrs. *G. P. Boys* and *G. W. Dillon*, for the respondent.

Mr. *M. L. Agarwala*, for the appellant.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—This appeal has been filed as a first appeal from order. It is objected that it is really a first appeal from decree, and that the petition of appeal does not bear the full court fee stamp necessary under the law. The appeal is one from an order of the District Judge refusing to grant letters of administration with a copy of the will annexed to the estate of the late Miss Francis Mary Garnett Orme. The estate is roughly valued at Rs. 17,000. On behalf of the appellant it is urged that under section 263 of the Indian Succession Act the decision of the court below is termed an order and that it has been the regular practice of this Court to treat such appeals as first appeals from orders. The point is really covered by decisions. Section 261 of the Succession Act says as follows:—"In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have

* First Appeal No. 285 of 1913, from a decree of W. D. Burkitt, District Judge of Saharanpur, dated the 12th of October, 1912.

(1) (1895) I. L. R. 17 All. 475.
(2) (1896) I L. R. 24 Cal. 80.
(3) (1904) 8 C. W. N. 748.

appeared as aforesaid to oppose the grant shall be the defendant". So that it is quite clear that the proceeding in the court below was actually in the form of a civil suit in which under the above section the person applying for the letters of administration was the plaintiff and the person who opposed the grant was the defendant. In the case of *Umrao Chand* v. *Bindraban Chand* (1) the point was decided, though for another purpose, and it was clearly laid down that the order contemplated under section 86 of the Probate and Administration Act was a decree. Section 86 of the Probate Act corresponds in every way with section 263 of the Succession Act, just as section 83 of the Probate Act corresponds with section 261 of the Succession Act. The point was also considered and decided by the Calcutta High Court in *Esoof Hasshim Dooply* v. *Fatima Bibi* (2) and in *Sheik Azim* v. *Chandra Nath Namdas* (3). In so far as the practice of this [450] Court is concerned, appeals from decisions of a single Judge of this Court under the Probate and Administration Act have been treated as appeals from decrees, whatever may have been the practice in respect to appeals in similar cases from the decisions of the District Judges. We have, therefore, no hesitation in holding that the present appeal is a first appeal from decree.

As regards court fees, we have little hesitation in holding that the court fee payable is rupees ten under article 17, clause vi, Schedule II, of the Court Fees Act. The subject matter in dispute is in our opinion impossible to estimate at a money value. Therefore the above article will apply. A court fee of rupees two has already been paid. Therefore there is a deficiency of Court fee in respect of rupees eight only. As the appellant has been allowed time up to the 4th August, 1913, within which to deposit security for costs of the respondent, we allow her time up to that date to make good the deficiency in court fees.

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MAY 24.

APPELLATE CIVIL.

35 A. 448=
22 I. C. 98.

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35 A. 450 (=20 I. C. 497=11 A. L. J. 659).

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

KHUNNI LAL (*Plaintiff*) v. RAGHUNANDAN PRASAD (*Defendant*).*

[26th May, 1913.]

Act (Local) No. I of 1900 (*United Provinces Municipalities Act*) *section* 187—*Municipal election—Rules framed by Local Government for regulation of elections—Petition by defeated candidate—Appeal—Procedure—"Decree"—"Order."*

Held, on a construction of rule 42 of the rules, framed by the Local Government under section 187 of the Municipalities Act, 1900, for the regulation of municipal elections, that the term 'competent court' as used in rule 42 means a civil court of competent jurisdiction with reference to the valuation given by the petitioner in his petition. *Gur Charan Das* v. *Hari Sarup* (4) followed. *Held* also that no appeal lies from the order of a competent court passed on an election petition under rule 42 above referred to. *Sundar Lal* v. *Muhammad Faiq*(5) approved. *Raghunandan Prasad* v. *SheoPrasad* (6) and *Sabhapat Singh* v. *Abdul Ghaffur* (7) referred to.

[Ref. 35 All. 578.]

*Second Appeal No. 303 of 1913, from a decree of H. Nelson Wright District Judge of Bareilly, dated the 4th of January, 1913, confirming a decree of Aghor Nath Mukerji Officiating Subordinate Judge of Bareilly, dated the 19th of August, 1912.

(1) (1895) I. L. R., 17 All. 475
(2) (1896) I. L. R., 24 Cal. 30.
(3) (1904) 8 C. W. N. 748.
(4) (1912) I. L. R. 34 All. 391.
(5) (1912) 16 Oudh Cases, 36.
(6) (1913) I. L. R. 35 All. 308.
(7) (1896) I. L. R. 24 Cal. 107.

1913
MAY 26.

APPELLATE CIVIL.

35 A. 450=20 I. C. 497=11 A. L. J. 659.

THE facts of this case were shortly as follows:—

By an election which took place on the 18th of March, 1912, Babu Raghunandan Prasad was returned as a duly elected member for Ward 7 of the Bareilly Municipality. The [451] validity of the election was questioned on various grounds by Lala Khunni Lal, one of the rival candidates, by a petition in the court of the Subordinate Judge of Bareilly. That court held that the election of Babu Raghunandan Prasad, defendant was valid. From that decision the petitioner appealed to the District Judge of Bareilly, praying for a declaration that the election was void. That court, on a preliminary objection on behalf of the opposite party, held that no appeal lay from an order on an election petition. The petitioner appealed.

Babu *Girdhari Lal Agarwala*, for the appellant, contended that the decree of the court of first instance was appealable and that the court below was wrong in holding that no appeal lay. Section 96 of the Code of Civil Procedure gave a right of appeal from every decree, unless such appeal was barred by any special provision of law. The order passed by the first court, being a decree within the meaning of section 2 of the Code and there being no provision in the election rules forbidding a right of appeal, the decree so passed was appealable as such under section 96. The lower appellate court was wrong in holding that the hearing and decision of a petition contesting an election was not the hearing and decision of a suit and that the proceedings in the trial of such a petition were miscellaneous proceedings. The word 'suit' was not defined in the Code of Civil Procedure, but section 26 provided that a suit should be commenced with a plaint and that the contents of the plaint were to be in accordance with the provisions of order VII, rule 1, and those requirements had been complied with in the plaint in the present case, which went by the name of an election petition. In *Gur Charan Das* v. *Har Sarup* (1) it was held that the competent court, referred to in rule 42, was a Civil Court. The suit being declared to be of a civil nature, the final order passed in that suit was a decree and was as such appealable as a decree of the Civil Court. He further pointed out that second appeals had been presented and heard in this Court against orders passed on election petition; *Nawab Khan* v. *Muhammad Zamin* (2), *Gur Charan Das* v. *Har Sarup* (1) and *Raghunandan Prasad* v. *Shco Prasad* (3).

[452] The fact that the plaint in the present case was better known by the term 'election' petition did not alter the character of the proceedings based on such petition. Plaints were generally termed petitions of plaint and so also were appeals called petitions of appeals.

He also submitted that the matter was a very important one and was not quite free from doubt owing to the obscure language used in rule 42 of the election rules. The old election rules clearly provided that election suits were to be heard and decided by the Magistrate of the District; but the new rules introduced a change and authorized the Civil Courts to hear such applications. The procedure in the matter had by no means been uniform, and in the present case it had to be seen what result would follow from a consideration of rule 42 along with the provisions of the Civil Procedure Code. In the circumstances, the present suit was one of a civil nature, and as such was triable only by a Civil Court; the final

(1) (1912) I. L. R. 34 All. 391.
(2) (1912) I. L. R. 34 All. 649.
(3) (1913) I. L. R. 35 All 308.

order passed thereon was a decree, and, there being no provision anywhere forbidding a right of appeal from such decree, was appealable.

Dr. *Satish Chandra Banerji*, for the respondent, argued that election petitions were tried in England by specially constituted courts, whose decisions were final, except that the court had power to reserve certain questions as to admissibility of evidence for the consideration of the High Court. He referred to Halsbury's "Laws of England," Vol. 12, pp. 486, 488, 408, 460. He further urged that, as a matter of public policy, the litigations based on election petitions should not have a long course and a speedy determination of the matter and its finality should be enforced.

Babu *Girdhari Lal Agarwala* was heard in reply.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—This is a second appeal arising out of an election petition. The election petition was presented under rule 42 (1) made by the Local Government under section 187 (1), clause (*h*), of the Municipalities Act. It was filed in the court of the officiating Subordinate Judge of Bareilly and it was dismissed. The petitioner appealed to the District Judge, who, relying upon the ruling in *Sundar Lal* v. *Muhammad Faiq* (1), held that no appeal lay to him, as the decision of the first court was an order and not a decree, and **[453]** there was nothing in law which gave the petitioner a right of appeal against the order of the first court. The petitioner has come up in second appeal, and a plea is urged that the decision of the first court is a decree within the definition thereof in section 2 of the Code of Civil Procedure and therefore an appeal would lie therefrom. The decision of the question really depends upon the answer to another question—Was or was not the proceeding in the court of first instance a suit within the meaning of the word in section 2 of the Code of Civil Procedure?

Under the Municipalities Act, section 187 (1), sub-section (*h*), the Local Government has power to frame rules consistent with the Act and applicable to all or any municipalities generally for regulating all elections under the Act. Under the former Municipalities Act, under the rules framed by the Government thereunder regulating elections, an election petition had to be filed in the court of the District Magistrate, and his decision thereon was final. When the draft rules under the present Act were published, they contained the same provisions, but when they were considered, the power of the District Magistrate to hear election petitions was removed and the rule was cast in the present rules as follows:—"The validity of an election, made in accordance with these rules, shall not be questioned except by a petition presented to a competent court within 15 days after the day on which the election was held by a person or persons enrolled in the municipal electoral roll." It is quite clear, therefore, that the petitioner in the present case presented his petition to the competent court under the above mentioned rule. It has been held in this Court that the competent court means a court of civil jurisdiction, as the question which arises is neither a criminal nor a revenue matter (2). Civil Courts have to do with a number of miscellaneous matters under special Acts which empower Civil Courts in certain circumstances to pass certain orders. Orders passed under those Acts are only appealable in so far as provision is made for appeals in the Acts themselves. They are orders which are not dealt with by the Code of Civil Procedure, and they are not decrees, as they are not passed in the course of suits. In

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MAY 26.

APPELLATE CIVIL.

35 A. 450=20 I. C. 497=11 A. L. J. 659.

(1) (1912) 16 Oudh Cases, 36.

(2) *Cf.* Gur Charan Das v. Har Sarup, I. L. R. 31 All 391.

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MAY 26.

APPELLATE CIVIL.

35 A. 450=20 I. C. 497= 11 A. L. J. 659.

the present instance, the action taken by the Civil Court is taken in pursuance of the powers granted under the rules passed by [454] Government under section 187 of the Municipalities Act. Neither the Act nor the rules make any provision whatsoever for any appeal from an order which the competent court may pass on an election petition, and unless it can be established that the orders passed amount to decrees, it is quite clear that no appeal lay to the District Judge. In our opinion, an order passed on an election petition in the circumstances of the present case is not an order passed in a suit and does not amount to a decree, and, in the absence of any special provision, no appeal lies therefrom. The question was considered at considerable length in *Sundar Lal* v. *Muhammad Faiq* (1). Though appeals have been filed in this Court and decided, the present question was not raised nor decided. That does not prevent it being raised now and decided as between the parties to the present appeal. The case of *Raghunandan Prasad* v. *Sheo Prasad* (2) was not an appeal from an order passed on an election petition. An election had been held and an election petition had been presented to the District Magistrate and rejected. The suit was brought by the plaintiff in the court of the Subordinate Judge praying for a declaration that he had been elected by a majority of lawful votes, and only in the alternative for a declaration that the election was void, having been held under rules which had been cancelled. In *Sobhapat Singh* v. *Abdul Ghafur* (3) a candidate who had been elected had his election set aside under the rules made under the Bengal Act of 1884 by the authority of the District Magistrate, who there determined the validity of the election. Thereupon a suit was brought in the Civil Court by the person whose election had been set aside for a declaration of his right to vote and to stand as a candidate and for a declaration that he had been duly elected. It was there held that the suit, so far as it related to the declaration that he had a right to vote and to stand as a candidate, was of a civil nature and would lie in the Civil Court. It was further held that the plaintiff was not entitled to a declaration that his election was good, and that he was only entitled to a declaration that he was entitled to vote and to stand as a candidate for election.

[455] In England in cases of municipal elections, a special court is constituted by Statute for the trial of municipal election petitions. It consists of a single commissioner, whose decision is final. He has the power to reserve a question of law as to admissibility of evidence or otherwise for consideration of the High Court, if in his opinion the question requires such consideration. It seems to us that the policy of the law has all along been finality of the decision of the court, commissioner or other special officer empowered to hear election petitions. It seems to us unnecessary to discuss the reasons for such a policy. They appear to us to be obvious. Some awkward and absurd results are mentioned in the ruling mentioned above, to wit, *Sundar Lal* v. *Muhammad Faiq* (1). We agree with this decision in holding that the order passed on an election petition is not a decree and that no provision has been made for appeal from such order. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1912) 16 Oudh Cases, 36.
(2) (1913) I. L. R. 35 All. 303.
(3) (1896) I. L. R. 24 Cal. 107.

35 A. 455 (=11 A. L. J. 664=20 I. C. 933.)

1913
MAY 27.

APPELLATE CIVIL.

35 A. 455= 11 A. L. J. 664=20 I. C. 933.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

AMOLAK CHAND (*Defendant*) *v.* BAIJNATH (*Plaintiff*) AND BHOLANATH (*Defendant.*)*

[27th May, 1913.]

Act No. IX of 1908 (*Indian Limitation Act*), *schedule II, article* 75—*Bond—Option of suing for whole amount due on default of payment of instalments—Limitation.*

A bond payable by instalments gave to the creditor the option of suing for the whole amount due on default in payment of any instalment or of suing for the instalments separately. Two instalments were paid; the third was not, and more than six years after default in payment of this instalment, nothing further having been paid on the bond, the creditor sued to recover the whole amount due stating that the cause of action arose on the date when the third instalment became due.

Held that the suit was time-barred. *Ajudhia* v. *Kunjal* (1) distinguished.

[Dist. 37 All. 400; Fol. 63 I. C. 655; Ref. 60 I. C. 931=20 A. L. J. 819.]

THE facts of this case were as follows :—

The appellant executed an instalment bond in favour of the plaintiff respondent on the 7th of July, 1904. The sum borrowed was Rs. 600, which, with Rs. 80 as interests the defendant promised to pay by six-monthly instalments of Rs. 75, in four and a half years [456] The bond provided that in case of default of payment of any instalment, the creditors would be entitled to realize either the whole money with interest at 6 per cent. per annum or those instalments which remained unpaid. The defendant paid the first two instalments on the due dates. The third instalment, which fell due on 7th of January, 1906, was not paid. On the 17th of August, 1912, the plaintiffs brought their suit for the recovery of Rs. 530, principal and Rs. 223-2-0, interest, alleging that the cause of action for the suit accrued on the 7th of January, 1906, the date on which the breach of promise was made and also on the 7th of January, 1909, the date of payment of the last instalment. The defendant admitted the execution of the deed and the receipt of consideration, but pleaded limitation as a bar to the suit. The Munsif dismissed the suit, holding that it was brought beyond the period of limitation allowed by law. On appeal, the Subordinate Judge was of opinion that the suit was not time-barred and remanded the case to the first court for decision of the case on its merits. The defendant appealed.

Pandit *Shiam Krishna Dar*, for the appellant :—

The only question in this case was whether the suit, as brought, was barred by limitation. The bond being an instalment bond with a provision for the bringing of a suit for the whole amount on default of payment of any instalment, article 75, read with article 116, would apply. The first default was made on the 7th of January, 1906, and time began to run from that date for a suit on that bond. It was not open to the creditors to control the accrual of the cause of action which was laid down by the Limitation Act, and the fact that they had an option to sue made no difference so far as the running of time was concerned. The only way in which they could avoid limitation running from the date of default of the

* First Appeal No. 56 of 1913 from an order of Bans Gopal, Additional Subordinate Judge of Agra dated the 13th of January, 1913.

(1) (1908) I. L. R. 30 All. 123.

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first instalment was by proving waiver of the right to sue for the whole amount of the bond. In the present case, the plaintiffs' claim was to enforce the condition which entitled them to recover the whole amount and not to plead waiver. The present suit having been brought on the 17th of August, 1912, that is, more than six years after the accrual of the cause of action, was therefore barred by [457] time; *Sheo Narain* v. *Ram Din* (1), *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty* (2), *Rai Shitab Chand Nahar* v. *Hyder Mollah* (3). The case of *Ajudhia* v. *Kunjal* (4) was a case in which the claim was brought to recover the last three instalments that were due on a bond and not the whole amount. In that case it appears to have been assumed that the plaintiffs had waived their right to sue for the whole amount. But in the present case, the plaintiffs took their stand upon the special provision in the bond and sought to enforce that right. In fact, the plaintiffs themselves stated in their plaint that the cause of action to sue arose on the 7th of January, 1906, the date on which the first default was made.

Dr. *Satish Chandra Banerji* (for The Hon'ble Dr. *Tej Bahadur Sapru*), for the respondent :—

The bond gave the creditors an option to sue, but they were not bound to sue. It was open to them to exercise that option or not. Many instalments, due under the bond, were within time. Only a few earlier ones might be said to have been barred. There was no reason why the whole suit should have been dismissed and the plaintiffs not allowed to recover those instalments which were admittedly within time. There was no question of waiver in a case like this. He cited *Ajudhia* v. *Kunjal* (4), *Maharaja of Benares* v. *Nand Ram* (5) and *Shankar Prasad* v. *Jalpa Prasad* (6).

Pandit *Shiam Krishna Dar* was not heard in reply.

TUDBALL and MAHAMMAD RAFIQ JJ. :—This is a defendent's appeal and arises out of a suit on an instalment bond, dated the 7th of July, 1904, for a sum of Rs. 680 as consideration, Rs. 600 being the actual amount of the loan and Rs. 80 being the interest thereon. The whole was repayable in 4½ years in equal instalments of Rs. 75, payable every six months. There was a condition in the bond that if any instalment remained unpaid on the due date, then the creditor would be entitled to recover the whole sum at once with interest or that he might sue for each instalment as it fell due and remained unpaid. The first two instalments were paid on the due dates. The third instalment was due on the 17th of January, 1906. Neither this nor any of the subsequent [458] instalments were paid. On the 17th of August, 1912, *i.e.*, six years and seven months after the 7th of January, 1906, the plaintiff brought the present suit. An examination of his plaint would show that he sued to recover the full amount which was due on the 7th of January, 1906, together with interest at the stipulated rate, and which fell due by reason of the default of the 7th of January, 1906, *i.e.*, Rs. 530, principal, *plus* Rs. 223-2, interest. In his plaint he distinctly states that the cause of action for the suit accrued on the 7th of January, 1906. It is to be noted that he does not sue for each of the instalments, which fell due successively every six months together with interest on each instalment from its due date. He is clearly electing to

(1) (1910) 14 Oudh Cases, 129.
(2) (1904) I. L R 31 Cal. 297.
(3) (1896) 1 C. W. N. 229.
(4) (1908) I. L. R. 30 All. 123.
(5) (1907) I. L. R. 29 All. 431.
(6) (1894) I. L. R. 16 All. 371.

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take one of the two options given him by the bond, *viz.*, that one which enabled him to recover the full amount of the debt due by reason of the default in one instalment.

The court of first instance dismissed the suit as time-barred, under articles 75 and 120 of the second schedule of the Limitation Act. The court below, relying mainly on the decision of *Ajudhia* v. *Kunjal* (1), held that the suit was not barred by limitation and remanded it to the court of first instance for decision on the merits. The defendant has come here on second appeal, and it is strongly urged, first, that the ruling referred to does not apply, and secondly, that in view of article 75 of the Limitation Act, the suit is clearly barred. In our opinion, the appeal must succeed. Both under the terms of this bond as well as in law, when the debtor failed to pay the instalment on the 7th of January, 1906, it was open to the creditor either to claim the whole of the debt or two waive that right and take the other option of recovering the instalments. Article 75 distinctly states that the period of limitation begins to run when the default is made, unless where the payee waives his right based on the provision, and then when fresh default is made in respect of which there is no such waiver. It is perfectly clear from the plaint itself that the plaintiffs have not waived that right, which entitled them to recover the whole of the balance due by reason of the default of the 7th of January, 1906. In fact, they take their stand upon that provision and seek to enforce their right. The existence of **[459]** a waiver is distinctly negatived by the plaint, which states that the right accrued on the 7th of January, 1906. To enforce that right they had six years from that date. The present suit has been brought beyond the period of limitation allowed by law. In regard to the ruling in *Ajudhia* v. *Kunjal* (1), an examination thereof shows clearly that it cannot apply to the facts of the present case. That suit was brought to recover the last three of the instalments that were due under that bond and not the whole amount due by reason of a default in payment of an instalment It appears to have been proved or assumed that the plaintiffs had forborne to sue, in other words, had waived their rights based on the special provision of the bond and were enforcing their rights in respect of the instalments that were due and had not been paid. In the present case, the facts are directly the contrary. The claim is to enforce the condition which entitled the creditor to recover the whole amount due by reason of the default in payment of one instalment on the 7th of January, 1906. In our opinion, the suit is clearly barred under the provisions of the above-mentioned articles. We allow the appeal, set aside the order of the court below and restore the decree of the court of first instance with costs.

Appeal allowed.

(1) (1908) I. L. R. 30 All. 128.

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35 A. 459 (=11 A. L. J. 673=20 I. C. 37).

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Before Mr. Justice Banerji and Mr. Justice Ryves.

MUHAMMAD ABDUL MAJID KHAN (*Plaintiff*) *v.* AHMAD SAID KHAN AND OTHERS (*Defendants*).*

[27th May, 1913.]

Civil Procedure Code (1908) *section* 92—Waqf—*Suit for declaration of plaintiff's right as* mutawalli *and for possession—Jurisdiction.*

Where the plaintiff came into court alleging that he was the rightful *mutawalli* of a certain *waqf*, and that the defendant, on the death of the last incumbent, had wrongfully taken possession of the *waqf* property, and asking to be put into possession thereof as *mutawalli*, it was *held* that this was not a suit which fell within the purview of section 92 of the Code of Civil Procedure and was properly filed in the court of a Subordinate Judge. *Budree Das Mukim* v. *Chooni Lal Johurry* (1) and *Ghelabhai Gavrishankar* v. *Uderam Icharam* (2) referred to. *Muhammad Ibrahim Khan* v. *Ahmad Said Khan* (3) and *Saiyid Ali* v. *Ali Jan*, (4) distinguished.

[Fol. 41 Cal. 749: Rel. 69 I. C. 786=20 A. L. J. 712=44 All. 721; Ref. 69 I. C. 304=41 M. L. J. 608=1921 M. W. N. 833=15 L. W. 18=45 Mad. 113 (F. B.); Fol. 71 I. C. 767=45 All. 385.]

[460] THE facts of the case are briefly, as follows:—

On the death of the *mutawalli* of a certain *waqf* the defendant No. 1 took possession of the *waqf* property as *mutawalli* and got his name entered in the revenue papers. The plaintiff, claiming that he was, under the will of the creator of the *waqf*, the rightful *mutawalli*, brought a suit in the Subordinate Judge's court for a declaration to that effect and for possession of the property. The Subordinate Judge was opinion that the suit fell within the scope of section 92, Civil Procedure Code, and dismissed it as being beyond his jurisdiction. The plaintiff appealed.

The Hon'ble Dr. *Sundar Lal* (for Babu *Jogindro Nath Chaudhri* with him Mr. *S. A. Haider*) for the appellant :—

The suit does not fall within section 92, Civil Procedure Code. The plaintiff does not seek to be appointed a *mutawalli*. He says that he is the *mutawalli* and that the defendant has no title. The suit is for declaration and possession; it does not claim any of the reliefs contemplated by section 92. The suit is not one for the removal of a trustee ; for, according to the plaintiff, the defendant is not a trustee at all, but a person without right, a mere trespasser. Section 92, contemplates a suit by two or more members of the public who are interested in the welfare of the trust but have no other individual rights whatsoever in it. Such a suit would not be affected in any way if any other members of the public, having an interest in the trust, were to be substituted for the original plaintiffs. The present suit does not deal with a public right ; it has to determine only a private right. The question is between two individuals, as to which of them is entitled, under the constitution of the trust, to the office of *mutawalli*. The matter in issue is a private right, peculiar to the individual claiming it.

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* First Appeal No. 107 of 1912 from a decree of Keshab Deb, Subordinate Judge of Moradabad, dated the 18th of December, 1911.

(1) (1906) I. L. R. 33 Cal. 789.
(2) (1911) I. L. R. 36 Bom. 29.
(3) (1910) I. L. R. 32 All. 503.
(4) (1912) I. L. R. 35 All. 98.

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I rely on the following cases:—*Budree Das Mukim* v. *Chooni Lal Johurry* (1) *Manijan Bibee* v. *Khadem Hossein* (2) *Ghelabhai Gavrishankar* v. *Uderam Icharam* (3) and *Sir Dinsha Manekji Petit* v. *Sir Jamsetji Jijibhai* (4). The case relied on by the lower court, namely, *Muhammad Ibrahim Khan* v. *Ahmad Said Khan*, (5) has no bearing on the present case. The only [461] point decided by it is that the selection of a trustee of a public trust is not a matter which can be referred to arbitration.

The Hon'ble Mr. *Abdul Raoof* (for Maulvi *Ghulam Mujtaba*; with him the Hon'ble Dr. *Tej Bahadur Sapru*), for the respondents:—

The suit, although not brought in that form, is virtually one for the appointment of a new trustee, and falls within clause (*b*) of sub-section (1) of section 92. The question raised in the suit is whether the plaintiff or the defendant No. 1 should be appointed *mutawalli* to succeed to the last incumbent; and until the question is decided in favour of the plaintiff by a competent court he has no right to describe himself as being the *mutawalli*. His description of himself as being such, and of the defendant No. 1 as being a trespasser, cannot alter the real nature of the suit and take it out of the scope of section 92. The present case is covered by the ruling in *Muhammad Ibrahim Khan* v. *Ahmad Sayid Khan* (5). It is not necessary for me to go to the length of contending that no one can be a *mutawalli* unless and until he has been appointed by the District Court; my submission is that when there is a dispute between rival claimants to the office of *mutawalli* then it is only the court of principal civil jurisdiction that can decide the dispute, and make the appointment. That is the basis of the ruling in the case cited. For, if an ordinary civil court could take cognizance of such a dispute, then it could also delegate its powers to arbitrators and the matter could be decided by arbitration; which is a conclusion directly opposed to that ruling, which decides that it is because only a court of special jurisdiction can take cognizance of such disputes that those disputes cannot be referred to arbitration; *Sayid Ali* v. *Ali Jan* (6).

The Hon'ble Dr. *Sundar Lal* was not heard in reply.

BANERJI and RYVES JJ.:—This was a suit brought by the plaintiff in the court of the Subordinate Judge of Moradabad for a declaration that he was entitled to the office of *mutawalli* of the trust property in suit, under the will of the founder of the waqf as against defendant No. 1, and for possession of the waqf property by the ejectment of defendant No. 1. The last *mutawalli*, Nawab Abdul Karim Khan, died on the 31st of August, 1908. On [462] the death of Nawab Abdul Karim Khan, defendant No. 1 applied in the Revenue Court for the entry of his name in respect of the endowed villages. The present plaintiff and others entered objections, but the Revenue Court decided in favour of defendant No. 1, and an appeal against that decision was dismissed by the Commissioner. A dispute had arisen as to who was entitled to the office of *mutawalli*, and the contending parties referred the matter to arbitrators who made an award in favour of Nawab Muhammad Ibrahim Khan. Muhammad Ibrahim Khan applied to file the award in court. That application was disallowed and the appeal from that order to this Court was dismissed on the 1st of April, 1910. Subsequently, this suit was instituted by the present plaintiff, Nawab Abdul Majid Khan. Various defences were

(1) (1906) I. L. R. 33 Cal. 789.
(2) (1904) I. L. R. 32 Cal. 273.
(3) (1911) I. L. R. 36 Bom. 29.
(4) (1908) I. L. R. 33 Bom. 509.
(5) (1910) I. L. R. 32 All. 508.
(6) (1912) I.L. R. 35 All. 98.

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raised and several issues were framed, but the only point decided was that the suit as brought came within the scope of section 92 of the present Code of Civil Procedure and was, therefore, beyond the jurisdiction of the court. The suit was accordingly dismissed. Hence this appeal. The only question to be decided in this appeal is whether section 92 applies or not. In our opinion, the scope and application of section 92 is very limited in character. In the first place it enables, by sub-section (1), the Advocate-general, or two or more persons having an interest in a trust created for a public purpose of a charitable or religious nature, to bring a suit in the principal civil court of original jurisdiction or in any other court empowered in that behalf by the Local Government, within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, where there has been an alleged breach of such trust or where the direction of the court is deemed necessary for the administration of any such trust and then only to obtain a decree of one or more of the kinds specified in the section. Sub-section (2) of that section enacts that, save as provided by the Religious Endowments Act of 1863, no suit, claiming any reliefs specified in sub-section (1), shall be instituted in respect of any such trust as is therein referred to, except in conformity with the provisions of that sub-section. The suit contemplated by the section is one brought in the interest of the public, through the Advocate-General, or of a section of the public or community interested in a particular public trust. through two [463] or more of its members with the previous sanction in writing of the Advocate-General, and does not apply to a suit brought by an individual to enforce his personal rights. In *Budree Das Mukim* v. *Chooni Lal Johurry* (1) WOODROFFE, J., stated :— "The suit contemplated by the section (*i.e.*, section 539 of the old Civil Procedure Code), is one of a representative character. It is obvious that the Advocate General, Collector or other public officer can and do sue only as representing the public, and if, instead of these public officers, two or more persons having an interest in the trust sue with their consent, they so sue under a warrant to represent the public as the objects of the trust. See *Lakshmandas Ragunathdas* v. *Jugalkishore* (2). It follows from this that when a person or persons sue, not to establish the general rights of the public of which they are member or members, but to remedy a particular infringement of their own individual right, the suit is not within or need not be brought under the section." And further on he says :—"In my opinion the present suit, so far as it is brought by the plaintiffs in their individual capacity as trustees to enforce their individual claim to be such trustees of the temple in suit, is not within the scope of the section." In *Ghelabhai Gavrishankar* v. *Uderam Icharam* (3) the plaintiff sought to eject the defendants as trespassers and prayed for possession of the trust property and for the appointment of a trustee by the court, for the settlement of a scheme for the administration of the trust and for such other reliefs as the court might see fit to grant. The court held that, so far as it was a suit to eject the trespasser from property which is the subject of a public religious trust, section 539 of the old Civil Procedure Code did not apply, and that the suit rightly lay in the Subordinate Judge's court. On behalf of the respondent, great stress was laid on the case of *Muhammad Ibrahim Khan* v. *Ahmad Said Khan* (4). Now the

(1) (1906) I. L. R. 33 Cal., 789.
(2) (1896) I. L. R., 22 Bom. 216.
(3) (1911) I. L. R. 36 Bom. 29.
(4) (1910) I. L. R. 32 All. 503.

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only point decided in this case is that the right to succeed to the trusteeship of waqf property is not a right which can be settled by a reference to arbitration. Lord HALSBURY, L. C., in *Quinn* v. *Leatham* (1), is reported to have said at page 506 that "a case is only an authority for what it [464] actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it." This case is therefore, not an authority on the question which is now before us. The case of *Saiyid Ali* v. *Ali Jan* (2) is also clearly distinguishable. In that case the *mutawalli* had been appointed by the District Judge, and it was therefore held that, as it was a suit for the removal of a duly appointed *mutawalli*, it could only be brought in conformity with the provisions of section 92. In this case, the plaintiff says that he is the rightful *mutawalli* and that defendant No. 1 is wrongfully in possession of the waqf property. He does not ask for any of the reliefs specified in section 92, He is not suing on behalf of the public or of any section of the public but merely as an individual to enforce his own alleged individual rights.

In our opinion, such a suit doss not come within section 92 of the Civil Procedure Code and is, therefore, within the jurisdiction of the Subordinate Judge. We, therefore, allow the appeal, and, setting aside the decree of the lower court, remand the case to that court, under order XLI, rule 23, with directions to re-admit the suit under its original number and proceed to determine it on the merits. Costs here, and in the court below, will abide the result.

Appeal allowed and cause remanded.

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35 A. 464 (=21 I. C. 2=11 A. L. J. 671).

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Muhammad Rafiq.

SHIVA PRAKASH (*Defendant*) *v.* KARNA (*Plaintiff*) AND DHARAMJIT (*Defendant*).*

[31st May, 1913.]

Civil and Revenue Courts—Jurisdiction—Occupancy holding—Usufructuary mortgage—Surrender of holding—Ejectment of mortgagee—Suit by mortgagee for declaration that surrender was not binding on him.

An occupancy tenant who had made a usufructuary mortgage of his holding then proceeded to surrender the holding to the zamindar, who had the mortgagee ejected by the Revenue court.

Held, on suit by the mortgagee for a declaration that the surrender of his holding by the mortgagor was not binding on him, that no such suit would lie in the face of the ejectment proceedings in the Revenue court which were binding on the parties. *Kam Devi Kuari* v. *Bindesri Upadhya* (3) followed.

[465] IN this case one Dharam Jit, an occupancy tenant, made a usufructuary mortgage of his holding in favour of Karna. Some years afterwards Dharam Jit surrendered the holding which he had mortgaged to Karna to his zamindar Shiva Prakash. Shiva Prakash took proceedings

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* Second Appeal No. 4 of 1912 from a decree of Mubarak Husain, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, of Agra, dated the 23rd of September, 1911, confirming a decree of Muhammad Amanul Haq, Additional Munsif of Agra, dated the 24th of July 1911.

(1) (1901) A. C. 495.
(2) (1912) I. L. R. 35 All. 98.
(3) (1911) 8 A. L. J. 940.

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against Karna in the revenue court and had him ejected. Thereupon Karna brought the present suit in a civil court, asking for a declaration that the surrender of his holding by Dharam Jit to the zamindar was not binding upon him, the plaintiff. The court of first instance gave the plaintiff a decree, and this decree was affirmed by the lower appellate court. The zamindar thereupon appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent.

BANERJI and MUHAMMAD RAFIQ, JJ.:—Dharam Jit, an occupancy tenant, made a usufructuary mortgage of his holding to the plaintiff, Karna, on the 16th of April, 1901. Dharam Jit subsequently surrendered his holding to the zamindar, Jotshi Shiva Prakash, in June or July, 1910. Shiva Prakash brought a suit in the Revenue court for ejectment of Karna and obtained a decree for ejectment on the 29th of November, 1910. Meanwhile on the 12th of September, 1910, Karna brought the suit out of which this appeal has arisen for a declaration that the surrender of his holding by Dharam Jit was not binding on him, the plaintiff.

The court of first instance granted the plaintiff a decree, and this decree has been affirmed by the lower appellate court. In our judgment, the decisions of both the courts below are incorrect. The Revenue Court having made a decree for ejectment, and this decree having been carried into effect and the plaintiff having been ejected, the present suit is, in our opinion, not maintainable. The decree of the Revenue Court is binding on the parties and any decree made in this suit would be wholly nugatory. The point is covered by authority, the latest reported case on the subject being *Ram Devi Kuari* v. *Bindesri Upadhya* (1). The judgment of the learned Judge who decided that case was affirmed on appeal under the Letters Patent (2). In this judgment all the authorities on the point are collected, and we are of opinion that in view of the decision in that case and of some of the cases on **[466]** which it is based, this appeal must prevail and the plaintiff's suit must fail. We accordingly allow the appeal, set aside the decrees of the courts below and dismiss the plaintiff's suit with costs.

Appeal allowed.

35 A. 466 (=11 A. L. J. 678=20 I. C. 335).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Sir Pramada Charan Banerji.

ABDUL AZIZ KHAN AND OTHERS (*Defendants*) *v.* NIRMA (*Plaintiff*).*

[5th June, 1913.]

Act No. XXI of 1850 (Caste Disabilities Removal Act) section 1—Act No. XV of 1856 (Hindu Widows' Remarriage Act), section 2—Hindu widow—Conversion and consequent remarriage—Widow's estate not divested—Hindu law.

The widow of a separated Hindu became a convert to Muhammadanism and married a Muhammadan.

Held that the widow did not thereby lose her interest in the property of her late husband in view of the provisions of Act No. XXI of 1850; nor did section

*First Appeal No. 157 of 1912 from an order of W. D. Burkitt, District Judge of Saharanpur, dated the 18th of July, 1912.

(1) (1911) 8 A. L. J. 940.

(2) L. P. A. 127 of 1912, decided on the 26th of July, 1912.

2 of the Act No. XV of 1856 affect the situation, inasmuch as that section applied to *Hindu* widows only. *Khunni Lal* v. *Gobind Krishna Narain* (1) followed. *Matungini Gupta* v. *Ram Rutton Roy* (2) dissented from.

[Fol : 44 I C 299=23 M. L. T. 81=7 L W. 411=1918 M. W. N. 274; 48 I. C. 50 =35 M. L. J. 317=1918 M. W. N. 625=8 L. W 480; Disappr: 67 I C. 550=1923 Pat. 235=3 P. L. T. 551.]

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THE facts out of which this appeal arose were as follows:—

One Musammat Parbati, a Hindu widow, wished to construct a temple and a well on a portion of the property of her late husband. She came to court on the allegation that the defendants obstructed her in carrying out the work and prayed for an injunction restraining them from interference. Her suit was decreed by the court of first instance. The defendants appealed to the District Judge. While the appeal was pending, Musammat Parbati became a convert to Muhammadanism and was married to a Muhammadan. Her mother-in-law, the respondent to the present appeal, put in an application to the District Judge that Musammat Parbati having been converted to Muhammadanism, her own name may be substituted in her place as a respondent in the appeal. An application was also put in by Musammat Parbati, praying that her suit be dismissed and the appeal of the defendants be allowed. The defendants put in an application objecting to the claim of Musammat Nirma, the mother-in-law of Musammat Parbati, on the ground that Musammat Parbati having withdrawn her suit, her mother-in-law had no status in law to carry it on. [467] The District Judge allowed the mother-in-law to be brought on the record in place of Musammat Parbati, holding that Musammat Parbati must be deemed to have forfeited her rights and that the succession had opened up in favour of the mother-in-law. The defendants appealed.

Mr. *S. A. Haidar*, for the appellants:—

Two enactments of the Legislature have to be considered. The first is Act XXI of 1850. Parbati was a Hindu widow, she changed her religion and, so far as the provisions of that Act went, she could not be deprived of her rights to the property. The latest case on the point is *Khunni Lal* v. *Gobind Krishna Narain* (3). There was an earlier case *Bhagwant Singh* v. *Kallu* (4). The same view is expressed by Ghosh in his *Hindu Law*, pages 219 and 220. It was true that Mayne dissented from that view; page 80 (7th edition.) He also disapproved of the decision in 11 All. 100. The second enactment was the Hindu Widows' Remarriage Act (XV of 1856). That Act did not apply. The lower court was wrong in holding that it did. It applied to Hindu widows who remarried as Hindus. The lady in this case had become a Muhammadan before her second marriage. Section 6 of the Act made the whole thing clear and showed what the Legislature meant. The case of *Matungini Gupta* v. *Ram Rutton Roy* (2) is against this contention, but the judgement of PRINSEP, J., is the correct exposition of the law on the subject. The lady in that case remained a Hindu up to the time of her marriage.

Mr. *M. L. Agarwala*, for the respondent:—

The question had to be considered with reference to the peculiar position of a Hindu widow. She was a life-tenant and something more, she held the life-estate and protected the reversion. The two were kept distinctly in view by the law. As soon as she did anything to the reversion, her acts could be challenged. The reversioner could bring a suit. Act XXI of 1850 protected only the life-interest of the widow. The object of the Act was to protect only the interest which she had in the

(1) (1911) I. L. R. 33 All. 356.
(2) (1892) I. L. R. 19 Cal. 289.
(3) (1911) I. L. R. 33 All. 356 (364).
(4) (1888) I. L. R. 11 All. 100.

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35 A. 466=11 A. L. J. 678 =20 I.C. 335.

property. The right to protect the reversion had devolved on the respondent. The application for substitution of names could be made under order [468] XXII, rule 10, of the Code of Civil Procedure. So far as the Hindu Widows' Remarriage Act went, it referred to widows who took the estate as Hindu widows. It could not be construed to mean widows who were Hindus at the time of remarriage. Every Act had to be interpreted to give it a reasonable meaning. Otherwise it would be open to this anomaly that a widow would forfeit her estate if she married a Hindu, but if she married a non-Hindu she would keep it. The Act did contemplate the conversion of widows and it purposely used the expression 'any widow' instead of 'Hindu widow' in section 2. The adjective 'Hindu' was used in sections 3 and 6 and not in section 2. This distinction was significant. It was not the conversion that lost her the estate but the remarriage.

RICHARDS, C. J. and BANERJI, J.—This appeal arises under the following circumstances. One Musammat Parbati, the widow of one Ganga Ram, who was a Hindu, instituted a suit claiming that she, in exercise of her legal rights, wished to make a well, and build a temple on a portion of the property in the possession of which she was as a Hindu widow. She alleged that the defendants to the suit were preventing her from exercising her legal rights and she claimed an injunction to restrain them. The plaintiff got a decree in the court of first instance. The defendant appealed. While the appeal was pending, Musammat Parbati became a convert to Muhammadanism and married one Wali Muhammad. She then put in a petition stating that she no longer wished to prosecute her suit and prayed that her suit might be dismissed. Thereupon the present respondent, Musammat Nirma, the mother of her husband, who would have been entitled to the estate for her life if Musammat Parbati were then dead, made an application that she might be brought upon the record and allowed to defend the appeal. The court below allowed this application. Hence the present appeal.

The appellants contend that Musammat Parbati did not lose her estate upon becoming a convert to the Muhammadan religion, but that her right to her husband's property was protected by Act XXI of 1850 and that being a Muhammadan she was entitled to contract a legal marriage with her present husband. On the other hand, the respondent contends that under section 2 of Act XV of [469] 1856, the remarriage of Musammat Parbati worked a forefeiture of her interest in her first husband's estate, and that, therefore, there was a devolution of interest to the present respondent. It was further contended that even if this be not so, Musammat Parbati, though she represented her husband's estate so long as she remained a Hindu widow, ceased to do so when she changed her religion and married again, and that therefore the present respondent, as next reversioner, ought to be allowed to continue the proceedings and protect the estate.

In our opinion, her conversion to the Muhammadan religion did not divest Musammat Parbati of her interest in her first husband's estate in view of the provisions of Act XXI of 1850. This has been repeatedly held in this Court and by their Lordships of the Privy Council. The last case to which we may refer is the case of *Khunni Lal* v. *Govind Krishna Narain* (1). We are also clearly of opinion that section 2 of Act XV of 1856 does not divest her of her interest in her first husband's estate.

(1) (1911) I L. R. 33 All. 356.

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35 A. 466=11 A. L. J. 678=21 I. C. 335.

Section 2 of Act XV of 1856 cannot possibly include all widows. It is necessarily confined to "Hindu widows." Musammat Parbati was not a Hindu when she married her present husband. This Court has consistently held that the provisions of this Act do not apply to cases where the second marriage is valid irrespective of the provisions of the Act. Therefore, on the main ground of appeal, we think that the contention of the appellant is correct. Our attention has been called to the ruling of the Calcutta High Court, in the case of *Matungini Gupta* v. *Ram Rutton Roy* (1). This ruling is inconsistent with the rulings of our own Court.

With regard to the second contention, namely, that Musammat Parbati, in the events which have happened, ceased to represent her late husband's estate, we need only point out that the sole ground upon which the respondent could be substituted for Musammat Parbati would be that there had been a devolution of the estate, which, for the reasons already stated, is clearly not the case. No doubt, if anything detrimental to the estate is done by Musammat Parbati or by any other person, the reversioners may have a right to take steps for the protection of the estate by [470] instituting a suit of their own. This is a very different thing to being substituted for Musammat Parbati in a suit which she instituted of her own motion and which she does not choose to prosecute.

We allow the appeal, set aside the order of the court below and dismiss the application with costs.

Appeal allowed.

35 A. 470 (=20 I. C. 889=11 A. L. J. 717).

APPELLATE CIVIL.

Before Mr. Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

RAM RAJ (*Objector*) *v.* BRIJ NATH AND OTHERS (*Opposite parties*).*

[16th June, 1913].

Act No. VII of 1889 (*Succession Certificate Act*)—*Certificate of succession—Joint certificate not illegal if granted with the consent of the grantees.*

Held that the grant of a joint certificate under the provisions of the Succession Certificate Act, 1889, is not illegal, provided that the persons to whom such certificate is granted all consent to its being granted in this form.

THE facts of the case were these:

Brij Nath, one of the heirs of a deceased Hindu, applied for a succession certificate. Two other heirs, Ram Raj and Ranchhor, preferred separate objections and claimed the certificate for themselves. Subsequently all three agreed to the grant of a certificate to them jointly. Another claimant to the certificate was Musammat Tirbeni about whom the District Judge remarked as follows:—" The position of Musammat Tirbeni in the family is only that of a person with a right to maintenance. She alleges that, as a special case, some of these debts belong to her. The ground on which the allegation is made is unusual. It seems not too probable that a woman would lend her *stridhan* to be invested and take no steps to see that it was invested in her own name. The burden of proving such a case is upon her, both as a matter of law and as a matter of common sense. Musammat Tirbeni adduced no evidence" The District Judge granted the certificate to the three jointly, on condition of their furnishing security for the indemnity of Musammat Tirbeni. One of the objectors appealed.

*First Appeal No. 62 of 1913 from an order of A. Sabonadiere, District Judge of Aligarh, dated the 29th of November 1912.

(1) (1892) I. L. R. 19 Cal. 289.

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APPELLATE CIVIL.

35 A. 470=
20 I. C. 889
=11 A. L. J.
717.

Babu *Binoy Kumar Mukerji*, for the appellant:—

A joint certificate granted to several persons is not contemplated by the Succession Certificate Act and is illegal; *Lonachand Gangaram* v. *Uttamchand Gangaram* (1) and *Madan Mohan* v. *Ramdial* (2) and the cases cited therein. If the granting [471] of a joint certificate is invalid, the consent of parties would not make it valid. Further, the District Judge was of opinion that *prima facie* there was no substance in Musammat Tirbeni's claim. She having failed to make out a *prima facie* claim, the Judge was not justified, without holding any further inquiry, in requiring security to be furnished by the grantees of the certificate. Before ordering security to be given, the Judge should have satisfied himself, by making a summary inquiry, that there was some foundation for her claim. I rely on the principle of the ruling in *Balmakund* v. *Kundan Kunwar* (3).

The respondents were not represented.

BANERJI and TUDBALL, JJ.:—We do not think that there is any merit in this appeal. The facts are these: An application was made by Brij Nath for a succession certificate to realize debts due to Ram Ratan, deceased. Ram Raj, Brij Nath and Ranchhor stated themselves to be the next reversioners to the estate of Ram Ratan, and they agreed that the certificate should be granted to all three of them. This has been done. But as Musammat Tirbeni claimed to be the owner of some of the debts, the learned Judge has ordered that three persons to whom the certificate was granted to furnish security. It is contended that the order granting a certificate to three persons is illegal. No doubt, it is inconvenient that a certificate should be granted to more than one person, but in the case before us the persons to whom the certificate was granted agreed to its being granted to all of them. One of these persons is the appellant himself. We do not think that the appellant can now contend that the court ought not to have granted the certificate. The precedents cited relate to cases in which there were rival claimants for the certificate, and the lower court granted a joint certificate to those claimants. This, of course, was held to be wrong. As for the order relating to the furnishing of security, we think under the circumstances it was a proper order. We dismiss the appeal but without costs, as the respondent is not represented.

Appeal dismissed.

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35 A. 472 (= 21 I. C. 72=11 A. L. J. 759).

[472] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

JANKI MISIR AND ANOTHER (*Defendants*) *v.* RANNO SINGH (*Plaintiffs*) *and* MAHADEO SINGH AND ANOTHER (*Defendants*).*

[1st July, 1913.]

Pre-emption—Custom—Evidence—Sales to strangers unchallenged, as evidence negativing custom—Mode in which such sales should be proved.

Where the court is trying the issue of the existence or non-existence of a custom of pre-emption, every instance of a sale to a stranger is material

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* Second Appeal No. 445 of 1913 from a decree of L. Marshall, District Judge of Jaunpur, dated the 15th of January, 1913, confirming a decree of Gopal Das Mukerji, Munsif of Jaunpur, dated 10th of June, 1912.

(1) (1891) I. L. R. 15 Bom. 684.
(2) (1882) I. L. R. 5 All. 195.
(3) (1905) I. L. R. 27 All. 452.

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35 A. 472=
21 I. C. 72
=11 A. L. J. 758.

evidence which the court ought to take into consideration and weigh when coming to a conclusion on the issue. But a mere vague statement that there had been sales to strangers without the production of the sale-deeds or certified copies thereof and without some further details of the sale is not sufficient to prove sales to strangers. *Sewak Singh* v. *Girja Pande* (1) discussed.

THIS was a suit for pre-emption based upon an alleged custom as to the existence of which the principal evidence was an entry in the village wajib-ul-arz. The defendants disputed the construction of the entry in the wajib-ul-arz relied upon by the plaintiffs, and they also pleaded that there had been several cases in the village of sales to strangers in respect of which no claim for pre-emption had been made, and put forward these instances as evidence that the custom alleged did not exist. The court of first instance, however, decreed the claim and this decree was confirmed on appeal. The defendants vendees appealed to the High Court.

Mr. *A. P. Dube* and Dr. *S. M. Suleman*, for the appellants.

Dr. *Satish Chandra Banerji*, for the respondents.

RICHARDS, C. J. and TUDBALL, J.—This appeal arises out of a suit for pre-emption. Both the courts below decreed the claim. The defendant vendee appeals. He argues first that the extract from the wajib-ul-arz is ambiguous and not sufficient to prove the existence of the custom. He also argues that there was other evidence as to the non-existence of the custom which the court below has failed to appreciate; and lastly, it is argued that the court was not competent to set aside the lease mentioned in the plaint. We can see no ambiguity in the clause in the wajib-ul-arz. We, therefore, think that the courts below were right in holding that it was good *prima facie* evidence of the existence of a custom of pre-emption in this village, and that it was an incident of that custom that a relation *ek-jaddi* had preference over a co sharer who was not [473] *ek-jaddi*. The court below has found that the lease was not *bona fide* and was merely part of a scheme to avoid pre-emption. We are bound by this finding in second appeal, and therefore we cannot differ from the court below on this question. One of the witnesses for the defendant vendee deposed that there had been several sales to strangers. The court of first instance refers to the decision in *Sewak Singh* v. *Girja Pande* (1). STANLEY C. J., at page 9 of the report, says:—"The mere fact that evidence was given that sales and mortgages had taken place in the villages as to which no pre-emptive claim had been made does not negative the existence of the custom." With great respect, we think that this remark goes too far. In our opinion, where the court is trying the issue of the existence or non-existence of a custom every instance of a sale to a stranger is material evidence which the court ought to take into consideration and weigh when coming to a conclusion on the issue. In the present case having regard to the remarks of the court of first instance, which have been more or less accepted by the lower appellate court, we have gone into and considered the evidence that was given by the vendee on the subject of sales to strangers. The only evidence there was was that of a witness who was undoubtedly somewhat hostile to the plaintiff, in which he stated in vague terms that during his recollection these 5—7 sales were to strangers. In not a single one of these alleged cases was the sale-deed produced, nor were even the names of the majority of the vendees mentioned. Except for the vague statement that the sales were to strangers, the court was not informed who the vendees were. In our

(1) (1904) 2 A. L. J. 6.

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35 A. 272=21 I. C. 72=11 A. L. J. 759.

opinion, this was not the proper way to prove instances of sales to strangers. The sale-deeds should have been produced, or certified copies of them. It should be clearly and distinctly proved to the court who the vendees were and any other circumstances connected with the sales. Under these circumstances, we see no sufficient reason to set aside the decree of the court below. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

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35 A. 474=(21 I. C. 43=11 A. L. J. 761).

[474] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

PARMANAND SINGH AND OTHERS (*Defendants*) *v.* MAHANT RAMANAND GIR (*Plaintiff*).*

[1st July, 1913.]

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *sections* 11 et seqq—*Occupancy holding Mahant—Mahant capable of acquiring occupancy rights for the benefit of the* math *which he represents.*

Held that the mahant of a *math*, just as much as any other tenant who holds for his own personal benefit, can acquire occupancy rights under the provisions of the Agra Tenancy Act, 1901, for the benefit of the *math* which he represents.

THIS was a suit for redemption of a mortgage made by a former *mahant* of a *math*. The plaintiff, as the present *mahant*, sued to redeem the property mortgaged, which belonged to the *math* and consisted of certain trees and rights of occupancy tenancy in certain plots of land. It was pleaded in defence that the plaintiff had no right to sue, as a *math* was not capable of acquiring or holding an occupancy tenancy. The court of first instance decreed the suit for the redemption of the mortgage of the occupancy tenancy and dismissed it as to the trees, and the lower appellate court confirmed the decree.

Mr. *M. L. Agarwala* (and Munshi *Benode Behari*), for the appellants :—

An idol could not acquire occupancy rights in a holding. The Act contemplated cultivation by the tenant himself. Under section 10 of the Agra Tenancy Act, in case of transfer of *sir* lands, they become subject of ex-proprietary tenancy. The idea was to provide means of subsistence for the tenant. A *math* could not acquire ex-proprietary rights. The Act did not contemplate the acquisition of such rights by the manager of a *math*. A "person" meant a living human being, and the section referred to a person who had "held" personally. This view was taken by the Board of Revenue in Select Decision No. 19 of 1912. Again the expression used in section 13 was 'he'. It could include 'she' but not an inanimate object. A tenant must be a person capable of occupying or cultivating the land.

Munshi *Gobind Prasad*, for the respondent, was not called upon.

[475] RICHARDS, C. J. and TUDBALL, J.—This appeal arises out of a suit for redemption of a mortgage. Two grounds of appeal are mentioned in the memorandum of appeal, namely, that the plaintiff was not entitled to redeem the property and secondly that the suit was barred by limitation.

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* Second Appeal No. 57 of 1913 from a decree of Sri Lal, District Judge of Ghazipur, dated the 12th of September, 1912, confirming a decree of Aijaz Husain, Munsif of Rasra, dated the 31st of May, 1912.

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21 I. C. 43=
11 A. L. J.
761.

We are unable to accept the argument in favour of this last ground of appeal. With regard to the first point, it is urged that nobody except a human being is capable of acquiring or holding an "occupancy" tenancy and reliance is placed upon a ruling of the Board of Revenue, No. 19 of 1912, *Babu Hira Das* v. *Pandit Sheo Dat Tiwari*. It has to be admitted that property of all descriptions generally speaking, can be held by a *math*; but it is attempted to draw a distinction between an occupancy holding and other classes of property. In the present case the courts below have found that the property which it is sought to redeem formed portion of the *math* property and that it was held by the mortgagor as *mahant*. It was pleaded in the suit that the motgagor had been deposed from his office as *mahant*, and that he was succeeded by Sheo Pujan Gir, who was in turn succeeded by the present plaintiff. The mortgagor was made party to the suit, but he has not appeared to defend the case. It must be admitted that it is not necessary that the owner of an occupancy holding should do the actual cultivation with his own hands. He is quite entitled to, and in many cases must, employ others to do the cultivation. It is quite clear that there is no express prohibition against the acquisition of an occupancy holding by the manager of a *math* on behalf of the *math*. We do not think that it is possible to infer such a prohibition from any suggestion of alleged policy in the Tenancy Act.

We, therefore, think that the decision of the court below was correct and ought to be affirmed. We dismiss the appeal with costs.

Appeal dismissed.

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35 A. 476 =(11 A. L J. 801 =21 I. C. 598.)

[476] FULL BENCH

Before Mr. Justice Sir George Knox, Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BAJRANGI LAL AND OTHERS (*Judgment-Debtors*) *v.* MAHABIR KUNWAR AND OTHERS (*Decree Holders.*)*

4th July 1913.

Act No. VII of 1870 (*Court Fees Act*), *schedule I, article* 1; *schedule II, article* 11—*Civil Procedure Code* (1908,) *order XXXIV, rule* 5—*Court fee—Appeal from final decree in a mortgage suit.*

Held that an appeal from the final decree passed under order XXXIV, rule 5, of the Code of Civil Procedure 1908, requires *ad valorem* court fee and cannot be stamped as an appeal from an order.

[Ref. 50 I. C. 279, Fol. 22 Bom. L. R. 811=57 I. C. 579.]

THE question raised in this case was as to the proper court fee payable upon an appeal from a final decree under order XXXIV, rule 5, of the Code of Civil Procedure. When the appeal was filed the stamp-officer of the Court reported as follows:—

"This is an appeal against an order passed under order XXXIV, rule 5, and it is appeable as an appeal from decree. This appeal is valued at Rs. 582-11-9 on which a court fee of Rs. 44-4-0 is payable. Rupees 2 having been paid, there is, therefore, a deficiency of Rs. 42-4-0 on this memorandum of appeal."

On admission of the appeal a further report was made:—

"For the reasons given in my report, dated the 14th of June, 1912,

* Stamp Reference in Execution Second Appeal No. 900 of 1912.

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FULL BENCH.

35 A. 476=11 A. L. J. 801 =21 I. C. 498.

on the memorandum of appeal to this Court, the decree-holders respondents are liable to pay a court-fee of Rs. 105 on Rs. 1,503-6-0-1, the valuation of their appeal to the lower appellate court. A court-fee of annas 8 having been paid, there is, therefore, a deficiency of Rs. 104 8-0 due from them for the lower appellate court."

The question thus raised was remitted by the Taxing Judge, to the Bench hearing the appeal, by whom the following order was made.

KNOX and MUHAMMAD RAFIQ, JJ:—Another question arises in connection with the second appeal. The appeal before us is an appeal against an order under order XXXIV, rule 5, of the Code of Civil Procedure. It was valued at Rs. 582-11-9 and was put in on a paper bearing a court-fee stamp of Rs. 2. The office reported that the fee payable was Rs. 44-4-0 and that therefore **[477]** the appellant had to pay a deficiency of Rs. 42-4-0. The appellant raised no objection and made good the deficiency. The stamp-officer of the Court then pointed out that for similar reasons the decree-holders, the respondents in this appeal, were liable to pay a court fee of Rs. 105, instead of the court fee of eight annas which they paid on their appeal in the court of the District Judge. There was, therefore, a deficiency of Rs. 104-8-0 due from them. The respondents contested this report, and the Judge of this Court, to whom a reference was made, and who happens to be the Taxing Judge of the Court, held that the matter was one for the Bench hearing the appeal. The learned vakil for the respondents contended before us that the fee which he had paid in the court of the District Judge was all that was required by law and there was no deficiency due from him. The question raised is not free from difficulty, and it will affect a large number of cases. if this Court should hold that an appeal from an order absolute should bear the same fee as if it were an appeal from an original decree. The learned vakil asks us for time in which to prepare the case. We grant two weeks; but we think it would be well if we had another Judge to assist us in determining this question. We think that the learned Government Advocate should also appear in the interest of the revenue. We direct that these papers be laid before the Hon'ble the Chief Justice with a request that a third Judge should be added to the Bench for the determination of this question.

The case was then laid before KNOX, TUDBALL and RAFIQ, JJ.

Babu *Sital Prasad Ghose*, for the respondent:—

The court is bound to make a final decree under order XXXIV, rule 5, if the provisions of the preliminary decree passed under order XXXIV, rule 4, are not complied with. So that the only matter which the court, upon an application under order XXXIV, rule 5, is called upon to decide, is whether there has or has not been such compliance. This is no more than what an executing Court has to do, and it is submitted that the final decree is an order within the meaning of section 47 of the Code. It is not suggested that an application for a decree under order XXXIV, rule 5, must bear an *ad valorem* court fee, and there is no reason why, when such application is refused and an appeal is taken **[478]** from that refusal, the memorandum of appeal should be stamped with an *ad valorem* court fee. Anyhow the Court Fees Act makes no distinction between preliminary and final decrees, and the word 'decree used in that Act must bear the ordinary meaning given to that expression in the first part of the definition of the term in the Code of Civil Procedure It is clear, therefore, that the court fee paid by the present respondent in the court of the District Judge was all that required was by law and there was no deficiency due from him.

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35 A. 476=11 A. L. J. 801 =21 I. C. 498.

The Government Advocate (Mr. *W. Wallach*), was not called upon to reply.

KNOX, TUDBALL and MUHAMMAD RAFIQ, JJ :—We have heard all that the learned vakil for the respondent can urge in support of his contention that he was only bound in the lower appellate court to pay a court fee of annas eight as though he were appealing from an order, instead of an *ad valorem* duty. Looking to the change which has been made by the Legislature in order XXXIV. rules 4 and 5, as compared with sections 88 and 89 of the Transfer of Property Act, we have no doubt whatever that the court fee which he should have paid was an *ad valorem* court fee. The Legislature has deliberately altered the words "order absolute" and replaced them by the words "final decree." This is our answer to the question.

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35 A. 478 (=21 I. C. 628=11 A. L. J. 766).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight. Chief Justice and Mr. Justice Tudball.

YAD RAM (*Plaintiff*) *v.* CHEDA LAL AND OTHERS (*Defendants*).*

[8th July, 1913.]

Pre-emption—Wajib-ul-arz—*Partition of village into several mahals*—Dastur dehi *relating to whole village*—*Suit by co-sharer of one mahal against co-share of another mahal on ground of nearness in relationship to the vendor.*

The *dastur dehi* of a village divided into several mahals, but which nevertheless was held to be applicable to the whole village, and to represent an arrangement come to by the co-sharers in the village amongst themselves, provided, as to pre-emption, as follows :—" If a co-sharer wants to sell his share, he must sell first to near co-sharers, then in the patti, then in the mahal, then in the village." *Held* that the effect of this clause was to give to a co-sharer in one mahal who was a relation of the vendor a preferential right of pre-emption over a co-sharer in another mahal who was not a relation,

[479] THIS was a suit for pre-emption based upon the provisions of the wajib-ul-arz or *dastur dehi* of the village of Sarai Ghasi. The village at one time was divided into a 2½-biswa mahal held by the Skinner family and a 17½-biswa mahal held by other co-sharers. Subsequently the larger mahal was again sub-divided. The *dastur dehi*, however, was apparently applicable to the entire village, and represented an arrangement come to amongst the entire body of co-sharers. The provisions of the *dastur dehi* as to pre-emption were as follows :—" If a co-sharer wants to sell his share, he must sell first to near co-sharers, then in the patti, then in the mahal, then in the village." The property the subject of the present suit was situate in the Skinner mahal. The vendee was a co-sharer in another mahal of the village ; and the plaintiff pre-emptor was a co-sharer in a third mahal, but claimed precedence of the vendee owing to his being a relation of the vendor. The court of first instance dismissed the suit. The plaintiff appealed to the High Court.

The Hon'ble Dr. *Sundar Lal*, for the appellant.

Dr. *Satish Chandra Banerji* and Babu *Piari Lal Banerji*, for the respondents.

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* First Appeal No. 99 of 1912 from a decree of Muhammad Husain, First Additional Subordinate Judge of Meerut, dated the 30th of November, 1911.

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APPELLATE CIVIL.

35 A. 478=21 I. C. 628=11 A. L. J. 766.

RICHARDS, C. J. and TUDBALL, J.—This appeal arises out of a suit for pre-emption. The village in which the property is situate is called mauza Sarai Ghasi. At one time this village was divided into a 2½-biswa share, held by the Skinner family, and a 17½ biswa share held by other co-sharers. In course of time the 2½ biswas appear to have been formed into one mahal, and the 17½ biswas into another mahal. The 17½ biswas were afterwards divided into a number of different mahals. The property which is sought to be pre-empted is situate within the Skinner mahal. It appears that on the 13th of February, 1892, this very property was sold and purchased by one Bhola Mal. The present vendor, Ram Sahai, brought a suit for pre-emption, which was successful. He was a sharer in another mahal and he based his suit upon a record set forth in the *dastur dehi* of 1886. His claim was decreed, the court being of opinion that the record in the *dastur dehi* was one of an arrangement between the sharers in the entire village. There is this distinction between the present case and the one just mentioned, that in that case the claim was against a [480] stranger whilst, in the present case, the claim is by a sharer in a different mahal, who is a near relation of the vendor against a person who is a sharer in another mahal, but no relation. The court below has decided againt the plaintiff and dismissed the suit. It has referred to the case of *Ganga Singh* v. *Chedi Lal* (1). In that case this Court considered at some length what was the proper way to approach the consideration of a case of pre-emption where the issue was the existence or non-existence of a custom of pre-emption, and it pointed out that the weight which should be attached to extracts from the wajib-ul-arzes in different cases varied very much. The circumstances of the present case are very different. The extract from the *dastur dehi* of 1886, has been translated as follows :—

"If a co-sharer wants to sell his share, he shall first sell it to his near co-sharers, then to sharers in the patti, mahal, or the village; and if they refuse to take, then to any one he may like."

A more literal translation would be :—

"A co-sharer must sell first to near co-sharers, then in the patti, then in the mahal, then in the village."

This *dastur dehi*, notwithstanding that the village had been divided into a large number of mahals, was the *dastur dehi* for the entire village. Having regard to the division which had taken place, *karibi* cannot refer to anything exeept relationship, that is to say, a sharer who is related. Furthermore, the fact that defendant's vendor himself set up the right of pre-emption contained in this very document, is, we think, a very strong point both against himself and his vendee. The title of the defendant's vendor was this very decree in a suit for pre-emption. We are not in any way deciding that a custom of pre-emption exists. There are many reasons for thinking that the growth of such a custom in this village, owned as it was in part by members of the Skinner family was very improbable. But if the *dastur dehi* records an arrangement between the sharers in the village, it is an arrangement which is still in force. We think there was such an arrangement. There only remains the question whether or not, assuming that an arrangement between the owners of the village as to pre-emption [481] exists, it extends to giving a right of a sharer in one mahal, who is a relation, a preference over a sharer in another mahal who is no relation. We think that the clause, as a whole, can have no other meaning.

(1) (1911) I. L. R. 33 All. 605.

We, therefore, think the decree of the court below was erroneous and ought to be set aside. Before, however, finally deciding this appeal, it will be necessary to refer an issue to the court below, namely :—

What was the true sale consideration ?

We accordingly refer the above issue to the court below. The court below will receive such evidence relevant to this issue as the parties may adduce. On return of the finding, the usual ten days will be allowed for filing objections.

Issue remitted.

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APPELLATE CIVIL.

35 A. 479= 21 I. C. 628= 11 A. L. J. 766.

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35 A. 481 (=11 A. L. J. 726=21 I. C. 464).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Sir Pramada Charan Banerji.

MAHADEO SINGH AND ANOTHER (*Decree-Holders*) *v.* SHEO KARAN SINGH AND ANOTHER (*Judgment-Debtors*).*

[11th July, 1913.]

Hindu law—Daughter's estate—Decree for possession of father's estate obtained by daughter—Right of daughter's sons to execute such decree.

The daughter of a separated Hindu obtained a decree for possession of her father's estate against certain trespassers. Before, however, she could obtain possession, she died and her sons applied for execution. *Held* that the daughter represented her father's estate when she brought her suit for possession and that persons who succeeded to the estate were entitled to execute the decree which she had obtained.

[Ref: 38 All. 111=32 I. C. 104 ;]

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case are stated in the judgment under appeal which was as follows :—

"The two respondents Mahadeo Singh and Basdeo Singh, with their mother Lakhpati Kuar, instituted a suit for recovery of possession of certain immovable property against one Jagram Singh, on the allegation that the property in suit belonged to one Sarup Singh, who was the father of Lakhpati Kuar and grandfather of the respondents. Jagram Singh was a collateral of Sarup Singh. He resisted the suit on various grounds. The claim of the respondents was dismissed on the ground that it was premature and that it could not be brought in the life-time of their mother ; but a decree was passed in favour of Lakhpati Kuar in her own right as the daughter of Sarup Singh. She was decreed a daughter's estate. The first court passed the decree in her favour on the 26th of [482] November 1909, and it was upheld on appeal on the 13th of May, 1910. Both Musammat Lakhpati Kuar and Jagram died before the decree could be executed. The two respondents, the sons of Lakhpati Kuar, filed an application in the court of the Munsif of Azamgarh for execution of the decree in favour of their mother against the appellants, who are the legal representatives of Jagram Singh. The appellants opposed the application for execution, on the ground, among others, that the decree in favour of Lakhpati Kuar awarded her a life-estate only and could not be executed after her death. The learned Munsif gave effect to this plea and rejected the application. On appeal the learned District Judge reversed the decree of the first court on the ground that the respondents were the legal representatives of Musammat Lakhpati Kuar, the original decree-holder, and that for that reason the decree could be executed by them. The appellants have come up in second appeal to this Court and press the plea upon which the application was dismissed by the learned Munsif. I think that this appeal must prevail. The question at issue between the parties is not whether the respondents are or are not the legal representatives of Musammat Lakhpati Kuar, but whether the decree in favour of

* Appeal No. 46 of 1913 under section 10 of the Letters Patent.

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35 A. 481=11 A. L. J. 796 =21 I. C. 464.

Lakhpati Kuar is capable of execution after her death. It is admitted that the decree was passed in her favour as the daughter of Sarup Singh, giving her a daughter's estate in respect of the property relating to which the decree was passed in her favour. After her death the decree became inoperative. It may be that the two respondents have a right to succeed to that property in preference to the collaterals of Sarup Singh. But that is a question which should be decided between the rival claimants by a regular suit. The mere fact of the two respondents being the daughter's sons of Sarup Singh does not give them the right to apply for execution of a decree, which became inoperative after the death of their mother. The appeal prevails. I set aside the order of the lower appellate court and restore that of the first court. Costs are allowed to the appellants."

The applicants appealed under section 10 of the Letters Patent.

Dr. *Surendra Nath Sen*, for the appellants :—

Musammat Lakhpati, as owner and representative of the estate, brought the suit for recovery of the estate from a person who was a mere trespasser. It was not a mere personal action like a suit for damages; she represented and was acting for the benefit of the whole estate. After her death the appellants became the owners of the estate. Under such circumstances the decree obtained by her cannot cease to be operative after her death. The appellants are entitled to execute it. In her suit it was established that the property was the exclusive property of her father and that she was the heir. It follows as a legal consequence that after her death her sons are the owners. They need not bring a fresh suit to establish the same matter against the same defendant or [483] his representatives; they are entitled to the benefit of the decree obtained by the former holder of the estate as such.

Maulvi *Muhammad Ishaq*, for the respondents :—

Musammat Lakhpati's success in her suit did not necessarily carry with it the effect that after her her sons would be the owners. The sons might predecease her or be under some disqualification. It was not a judgment *in rem* but a personal decree. Under the Hindu Law the daughter's sons do not derive their title through the daughter, but through the maternal grandfather. The appellants, not being the heirs of Musammat Lakhpati but of Sarup Singh, are not benefited by the decree in her favour. On her death the question of the succession to Sarup Singh's estate opens up afresh. As sons of Musammat Lakhpati the appellants are not entitled to execute the decree.

Dr. *Surendra Nath Sen* was not heard in reply.

RICHARDS, C. J., and BANERJI, J.—In this case one Musammat Lakhpati brought a suit for possession against certain persons who, she alleged, had taken possession of her father's estate. She succeeded in establishing her case and getting a decree for possession. Before, however, the decree for possession could be executed she died, and thereupon her sons applied for execution, but their application was rejected by the court of first instance. On appeal, this decision was reversed and the application of the appellants was allowed. In second appeal, a learned Judge of this Court held that the decision of the court of first instance was correct and ought to be restored. Hence the present appeal.

In our opinion, the decree of the lower appellate court was correct. Musammat Lakhpati undoubtedly represented her father's estate when she brought the suit, and the persons who succeeded to the estate are entitled to execute the decree which she obtained. Otherwise the reversioners would be obliged to institute a fresh suit and to litigate again the same matters against the very same persons against whom Musammat Lakhpati had established her case. In principle the matter is governed

by the decision of their Lordships of the Privy Council when they decided that, for general purposes, the widow represents the estate. We can, in the present case, make no distinction between a widow in possession [484] of her deceased husband's estate and a daughter in possession of her deceased father's estate. We allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs in all courts.

Appeal allowed.

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35 A. 481=11 A. L. J. 796 =21 I.C. 464.

35 A. 484 = (11 A. L J. 749 =21 I C. 271).

APPELLATE CIVIL.

Before Mr. Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

ALAM SINGH (*Plaintiff*) *v.* GOKAL SINGH AND OTHERS (*Defendants*).*

[17th June, 1913.]

Civil Procedure Code (1903), *order XXXIV, rule* 1—*Mortgage—Suit for sale—Intentional non-joinder of subsequent mortgagee—Effect of such non-joinder.*

Subsequently to the execution of a mortgage of a 4 biswa zamindari share in favour of A. S. the mortgagor executed a further (usufructuary) mortgage of a portion of the same share in favour of A. S, and his brother N. S. A. S. brought a suit for sale on the earlier mortgage, but without making N S. a party thereto. *Held*, that the effect of the non-joinder of N. S. would not be the total dismissal of the suit, but only of so much of it as related to that portion of the property which was covered by the subsequent mortgage.

[Diss: 24 I. C. 25=12 A. L. J. 619; Ref. 72 I. C. 453; 74 I. C. 943=21 A. L J. 701.]

THE facts of this case were as follows :—

A simple mortgage, hypothecating a 4 biswa zamindari share, was executed on the 21st of April, 1892, in favour of Alam Singh. On the 28th of June, 1895, a usufructuary mortgage of 1½ biswas out of the 4 biswas was executed in favour of Alam Singh and his separated brother, Narain Singh. Alam Singh brought a suit on the prior mortgage. He did not mention the second mortgage and did not make Narain Singh a party to the suit. Objection on this score was taken at the earliest opportunity by the transferee of the equity of redemption. The existence of the second mortgage was proved, and the plaintiff was called upon to make Narain Singh a defendant. The plaintiff refused to do so on the ground that at that time the suit had become time-barred as against Narain Singh. The court of first instance dismissed the suit on the ground that Narain Singh was a necessary party and had not been impleaded. This decision was upheld by the lower appellate court. The plaintiff appealed to the High Court.

Mr. *E. A. Howard*, for the appellant :—

A subsequent mortgagee is, no doubt, a necessary party and order XXXIV, rule 1, requires him to be impleaded. But failure [485] to implead him does not necessarily entail the dismissal of the suit altogether. Order XXXIV, rule 1, is expressly made subject to the other provisions of the Code; it is therefore, governed by order 1, rule 9. The court should have determined the rights of the parties actually before it. Narain Singh would neither be bound nor affected by the decree; he

* Second Appeal No. 1388 of 1912 from a decree of A. Saboonadiere District Judge of Aligarh, dated the 7th of June, 1912, confirming a decree of Rama Das, Munsif of Etah, dated the 2nd of February, 1911.

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APPELLATE CIVIL.

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11 A. L. J.
749=21 I. C.
271.

could enforce his right of redemption in a subsequent suit. The case of *Ram Charan Lal* v. *Muhammad Rahid-ud-din* (1) is in my favour. In any event, the whole suit should not have been dismissed, but only to the extent of the property comprised in the second mortgage.

Babu *Binoy Kumar Mukerji* (with him Munshi *Gobind Prasad*), for the respondents :—

Previous to the enactment of the present Code of Civil Procedure it was well established that the deliberate non-joinder of a subsequent mortgagee was fatal to the suit. The question is how far the provisions of order I, rule 9, are to govern order XXXIV, rule 1. On this point I rely on the observations at page 553 of the report of the case *Hori Lal* v. *Munman Kunwar* (2). The plaintiff was well aware of the existence of the second mortgage, as he himself was one of the mortgagees thereunder. This is a case of deliberate non-joinder of a necessary party. Moreover, when called upon to make Narain Singh a party, the plaintiff refused to do so. The provisions of order XXXIV, rule 1, would become quite nugatory if cases like the present could go on with impunity, and the result would be a perplexing multiplicity of suits. At all events, the suit should be dismissed at least to the extent of the property comprised in the second mortgage. This suit is now time barred as against Narain Singh; as against the property comprised in his mortgage, the suit must be dismissed.

Mr. *E. A. Howard* replied.

BANERJI and TUDBALL JJ.:—This was a suit for sale under a mortgage, dated the 21st of April, 1892, executed in favour of the plaintiff, Alam Singh, by one Chatar Singh. The first set of defendants are the legal representatives of the mortgagor, who is now dead. The other defendants are subsequent transferees of the mortgaged property. It appears that on the 28th of June, 1895, a usufructuary mortgage of 1 biswa, 10 biswansis, out of the mortgaged [486] property, the extent of which is 4 biswas, was made in favour of the plaintiff, Alam Singh, and Narain Singh, his brother. Narain Singh was not made a party to the suit. On the ground that Narain Singh was a necessary party to the suit under order XXXIV, rule 1, of the Code of Civil Procedure and had not been made a party, the court of first instance dismissed the suit. The decree of that court has been affirmed by the lower appellate court. The plaintiff has preferred this appeal, and it is contended on his behalf that the claim ought not to have been totally dismissed.

There can be no doubt that Narain Singh, as subsequent mortgagee of a portion of the mortgaged property, had an interest in the equity of redemption and was, therefore, a necessary party within the meaning of order XXXIV, rule 1 of the Code of Civil Procedure. The effect, however, of the omission of Narain Singh from the suit was, in our opinion, not the total dismissal of the suit, but only of so much of it as related to the 1 biswa, 10 biswansis, of which Narain Singh is a subsequent mortgagee. There still remains the remaining 2 biswas, 10 biswansis and as to this, the omission of Narain Singh did not affect the claim. The plaintiff, if he is entitled to a decree, is entitled to realize the amount of his mortgage from the remainder of the mortgaged property. The courts below ought, therefore, to have tried the case as between the persons who were parties to the suit in respect of the portion of the mortgaged property which was

(1) (1912) 10 A. L. J. 134.

(2) (1912) I. L. R. 34 All. 549.

unaffected by the subsequent mortgage in favour of Narain Singh and the plaintiff.

We accordingly allow the appeal, set aside the decrees of the courts below and remand the case to the court of first instance with directions to readmit it under its original number in the register and to try it on the merits. If the court finds that the plaintiff is entitled to a decree, the decree should be confined to the 2½ biswas which are not comprised in the mortgage of the 28th of June, 1895. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

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APPELLATE CIVIL.

35 A. 484=11 A. L. J. 749 =21 I. C. 271.

35 A. 487 (=21 I. C. 288=11 A. L. J. 901=17 C. W. N. 1165=1913 M. W. N. 785=14 M. L. T. 299=26 M. L. J. 492=18 C. L. J. 384 =15 Bom. L. R. 1001=40 I. A. 182).

[487] PRIVY COUNCIL.

PARTAB SINGH AND ANOTHER (*Plaintiffs*) *v.* BHABUTI SINGH (*Defendant*),*

[*On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.*]

[20th June and 23rd July, 1913.]

Minor—Representation of minor in suit—Suit to set aside compromise of and decrees in suits to which minors were parties—Civil Procedure Code (1882), *sections* 443, 456, 462—*Minors unrepresented owing to fraud and misrepresentation of* de facto *guardian whose interest conflicted with theirs—Form of decree—Civil Procedure Code* (1908), *section* 93—*Act No. I of* 1877 (*Specific Relief Act*), *section* 42—*Question of law.*

In this case the appellants sued for a declaration that a compromise of certain pre-emption suits and decrees based thereon, made on their behalf in 1899 when they were minors, were not binding on them having been obtained by the fraud and misrepresentation of the respondent (who was then their *de facto* guardian and manager of their property) and in proceedings in which they were practically unrepresented; and they prayed that they might be restored to the position held by them prior to the date on which the compromise and decrees were made. It appeared that, although the appellants were described in the proceedings as "under the guardianship" of one *H. P.*, he had never been properly appointed their guardian *ad litem* by the Court as required by section 443 of the Civil Procedure Code, 1882; that no *bona fide* application had ever been made under section 456 to have a guardian *ad litem* appointed by the Court; and that the leave of the Court had not been obtained to enter into the compromise on the appellant's behalf as was necessary under section 462.

Held that the appellants were entitled to the declaration they sought. *H. P.* had, their Lordships found, been introduced into the suits of 1899 by the respondent as the guardian or next friend of the appellants to advance the interests of the respondent and to defeat the interests of the appellants, which conflicted with those of the respondent: he had throughout acted under the directions and on behalf of the respondent and in his interest and contrary to the interests of the appellants, and the respondent had taken advantage of his position to the detriment of the appellants. There was therefore no one to protect them, and they were unrepresented in the proceedings, which were therefore not binding on them. *Manohar Lal* v. *Jadunath Singh* (1) followed.

Section 42 of the Specific Relief Act (I of 1877) which had been applied to the case by the majority of the Court of the Judicial Commissioners was held not to be applicable.

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* *Present*:—Lord ATKINSON, Lord PARKER, Sir SAMUEL GRIFFITH, Sir JOHN EDGE and Mr. AMEER ALI.

(1) (1906) I. L. R. 28 All. 585; L. R. 33 I. A. 128.

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Semble the question whether on certain stated facts the relief which the appellants prayed for should be granted or refused, was a question of law within the meaning of section 98 of the Civil Procedure Code (Act V of 1908); and where, on a difference of opinion on that question between two Judges of the [488] Court, the case was referred under that section to a third Judge, that was the only question he had jurisdiction to consider and decide.

[Fol: 18 M. L. T. 401=29 I. C. 579; Dist: 25 I. C. 620; Ref: 62 I. C. 794=2 Lah. 164; Fol. 65 I. C. 18=34 C. L. J. 293; Dist: 74 I. C. 964=21 A. L. J. 483; Ref: 74 I. C. 970=93 C. L. J. 245; 71 I. C. 705=4 P. L. T. 147=2 Pat. 335; 83 I. C. 312 =20 L. W. 248=47 M. L. J. 273=47 Mad. 783; Ref: 17 A. L. J. 257=50 I. C. 109:]

APPEAL from a judgment and decree (14th March, 1910) of the Court of the Judicial Commissioner of Oudh, which reversed the judgment and decree (29th July, 1908) of the Subordinate Judge of Sitapur, and dismissed the suit of the appellants.

The suit was brought on the 22nd of February, 1908, for a declaration that an agreement of compromise, dated the 15th of December, 1899 entered into on the plaintiffs' behalf during their minority, and two decrees based thereon were not binding on them; the plaint alleging in effect that the compromise, and consequent withdrawal of two suits for pre-emption (the subjects of the compromise) were fraudulent, inasmuch as one Hari Prasad, who acted in the said suits on behalf of the plaintiffs and was a subordinate and under the orders of their then guardian *de facto* the defendant Bhabuti Singh (now the sole respondent), had never been properly appointed by the Court as their guardian *ad litem*, and the Court's sanction to the compromise had been obtained by misrepresentation. The relief claimed was that the plaintiffs might be restored to the position held by them prior to the 15th of December, 1899, the date on which the two decrees were passed.

Bhabuti Singh was the only defendant who appeared, and, so far as is now material, his defence was that the plaintiffs were independently represented by Hari Prasad who had acted in their best interests by withdrawing their suit and entering into the compromise; and that the withdrawal, having received the sanction of the Court, could not be disturbed.

The circumstances prior to the suit and leading up to the compromise will be found fully stated in the judgment of their Lordships of the Judicial Committee.

The Subordinate Judge decreed the suit with costs making the declaration as sought by the plaintiffs.

From that decree the defendant preferred an appeal, which was heard by the Judicial Commissioner (Mr. E. CHAMIER) and the First Additional Judicial Commissioner (Mr. L. G. EVANS), who differed in opinion, the former holding that the appeal ought to be dismissed, and the latter being of opinion that it should be allowed and the relief claimed refused to the plaintiffs. Mr. CHAMIER said:

[489] "I hold that the plaintiffs were not effectively represented in the suits of 1899. Their *de facto* guardian was their opponent, who used his position to bring about a compromise much to his own advantage and to the detriment of the minors. I think there can be no doubt that the plaintiffs are not bound by such proceedings."

And to a contention that the Court had a discretion to give or refuse relief under section 42 of the Specific Relief Act (I of 1877), and that relief should in their case be refused on various grounds he said:

"I think there can be little doubt that the plaintiffs had not funds in hand wherewith to purchase the property. If the cases had been fought out, the minors

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would have got a decree for pre-emption. Bhabuti Singh also would, according to the practice of the court, have been given a decree for pre-emption in case the minors did not pay the purchase money within the time limited by their decree. Bhabuti Singh would have been under no obligation to raise money on his personal security for the minors in order to enable them to take advantage of the decree and he would have been unable to mortgage their property for the purpose even if he had been so minded. It is clear therefore that Bhabuti Singh would have done nothing to prevent the dismissal of the minors' suit. Had Bhabuti Singh adopted this course such a suit as the one before us could never have been brought. . . . . I think it is a question whether such a suit as this is brought under section 42 of the Specific Relief Act, and whether we can in the exercise of our discretion refuse relief to the plaintiffs ; but assuming that the suit is brought under that section I am of opinion that we ought to give the plaintiffs relief. . . . . As for the argument that as Bhabuti Singh was under no obligation to claim pre-emption on behalf of the minors he was at liberty to direct Hari Prasad to withdraw their suit and their defence, I need only say that it is quite clear that a guardian is not entitled to use his ward's rights as a means of procuring an advantage for himself. A suit for pre-emption was filed on behalf of the minors. It was not disposed of according to law, but was suppressed for the benefit of the minors' guardian. In my opinion the Court was right in decreeing the plaintiffs' claim."

Mr. EVANS agreed generally with the facts found by the Judicial Commissioner, but said,

"In the present case the most that can be found against the defendant is that he used the rights of the minors to obtain some personal advantage. He did not allow any fraudulent decree to be passed against them, nor did he allow them to be unjustly deprived of any property. It appears to me that it would be an improper exercise of the discretion of this Court to allow the plaintiffs to reopen this litigation, which terminated in 1899, merely because their *de facto* guardian did not see fit to prosecute a claim for pre-emption on their behalf, especially when it is not proved that there were any funds in his possession belonging to the minors for investment in immovable property. . . . . I hold that this is pre-eminently a case in which the Court should not [490] exercise the discretion vested in it by section 42 of the Specific Relief Act and should refuse to grant the relief prayed for. I would allow the appeal, and dismiss the claim."

The Court of the Judicial Commissioner on the same day made the following order under section 98 of the Civil Procedure Code (Act V of 1908).

"We are both agreed that the sanction of a court does not validate a compromise which is invalid on other grounds.

"We are also agreed that Bhabuti Singh was the *de facto* manager of the minors' property, that he was not obliged to institute a suit for pre-emption on their behalf, that he caused the suit for pre-emption to be instituted on their behalf in order to protect himself against other claimants, that Hari Prasad in withdrawing the minors' suit and joining in the compromise acted under Bhabuti Singh's instructions, that if the cases had been fought out lots would have been drawn as regards the share in Khushalpur, the minors would have obtained a decree for pre-emption of the share in Ismailganj and Bhabuti Singh would have been given a decree for pre-emption in case the minors did not pay the purchase money within the time limited by their decree, that Bhabuti Singh had funds wherewith to take advantage of the decree, that the minors had no funds and Bhabuti Singh was under no obligation to raise funds for them.

"On these facts one of us is of opinion that the plaintiffs should be given a declaration that the compromise and decrees are not binding on them and that they are remitted to their original rights; the other is of opinion that the suit should be dismissed. The point on which we differ is certainly not a question of fact. After hearing counsel for the parties we hold that it is a point of law within the meaning of section 98 of the Code of Civil Procedure and we accordingly direct that the appeal be laid before the Second Additional Judicial Commissioner under that section."

The matter was therefore re-argued before the Second Additional Judicial Commissioner (Mr. T. C. PIGGOTT), who agreed substantially with the First Additional Judicial Commissioner, being of opinion that

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the only facts with which the Court trying the case was not acquainted at the time when it accepted the compromise of the 15th of December, 1899, were that the suit for pre-emption in which the minors were plaintiffs (177 of 1899) had never been seriously intended to succeed, and that a decree for pre-emption in favour of the plaintiffs in that suit would, so far as can now be ascertained, have resulted in no benefit to the latter. In my opinion the case for the plaintiffs breaks down because these were not material facts from the point of view of the decision of the suits of 1899, and because their concealment on the part of Bhabuti Singh, if it was fraudulent at all, was not a fraud on the [491] minor plaintiffs but on certain other possible pre-emptors who might have been thereby discouraged from asserting their right.

The appeal from the Subordinate Judge was therefore allowed and the suit dismissed with costs in both Courts.

On this appeal—

Arthur Grey and *R. Jacob* for the appellants contended that they were not effectively represented in either of the suits for pre-emption in 1899, and that the respondent used his position as their guardian to bring about a compromise much to his own advantage, and to the detriment of the appellants. That was the finding of the Judicial Commissioner, and it was submitted that it was correct, and that he was right in holding that the appellants were not bound by such proceedings. Though they were described as under the guardianship of Hari Prasad, he was never appointed their guardian *ad litem* by any order of the Court as required by section 443 of the Civil Procedure Code, 1882; and admittedly no *bona fide* application was ever made for that purpose under section 456. The compromise was signed by Hari Prasad as guardian of the appellants, but no sanction of the Court to it was ever asked for or obtained as required by section 462 of the Code. Reference was made to *Manohar Lal* v. *Jadunath Singh*(1), in which under similar circumstances it was declared that a compromise was not binding, and the minors were remitted to their original rights. In the appellate Court the effect of the findings and judgments of the Judicial Commissioner and the First Additional Judicial Commissioner was that under section 98 of the Civil Procedure Code, 1908 (corresponding with section 575 of the Code of 1882) the appeal stood dismissed, and the decree of the Subordinate Judge confirmed. The exercise of the discretion of the Court to grant or refuse relief to the plaintiffs under section 42 of the Specific Relief Act (I of 1877) was not a point of law within the meaning of section 98 of the Code, and a difference of opinion between the Judges on that point did not justify the reference of the case to a third Judge, even if the Court, after having delivered judgment had power to refer the case at all to another Judge, which it was submitted it had not: *Lal Singh* v. *Ghansham Singh* (2) was referred to. The Second Judicial [492] Commissioner exceeded his powers in coming to any finding apart from the specific point of law (assuming it was such) referred to him, and his judgment was, so far, irrelevant. Upon the facts found by the Bench of two Judges who first heard the appeal, the appellate Court had no discretion to refuse the relief claimed by the appellants. Their omission to ask in terms that the decree in their pre-emption suit should be set aside did not disentitle them to relief in the form of the declaration they sought. Reference was made to *Isri Dut Koer* v. *Hans-*

(1) (1906) I. L. R. 28 All. 585 (589): L. R. 33 I. A. 129 (132).
(2) (1887) I. L. R. 9 All. 625 (642).

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butti Koerain (1). Even if such a discretion existed, it had been exercised by the Subordinate Judge in favour of the appellants and no sufficient reasons had been given for interfering with his exercise of discretion as the decree appealed from had done.

[*De Gruyther*, *K. C.*, said he did not contend that section 42 of the Specific Relief Act had any application at all to the case.]

De Gruyther, *K. C.*, and *G. R. Lowndes*, for the respondent contended that the dismissal of the pre-emption suit in which the appellants were plaintiffs was not procured by any fraud upon them by the respondent; that had been found by the judgment appealed from. Nor had the dismissal of that suit been shown to have been in any way prejudicial to the interests the appellants then had. If that suit had been contested to the end, the appellants would have been unable to take advantage of any decree that might have been passed in their favour. There was also in the evidence recorded in the present suit nothing to show that the said suit of 1899 was not instituted *bona fide* in the interests of the appellants. The present suit, it was submitted, having been filed for the purpose of obtaining a declaratory decree only, was bad in form, inasmuch as it did not pray that the decree in the suit of 1899 in which the appellants were plaintiffs should be set aside. But, assuming that it was rightly framed in asking only for a declaratory decree, the Court had a discretion as to granting or refusing such declaration, and that discretion had been properly exercised by the appellate Court, because the appellants were not under the circumstances of the case entitled to the relief they claimed. Reference was made to the Oudh Laws Act (XVIII of 1876), sections 6 and 9, as to the nature and extent of rights of [493] pre-emption as having preference over other claims, though the period of time within which they must be brought was limited, namely, one year from the date of sale. The appeal should be dismissed.

Arthur Grey replied.

1913. *July* 23*rd*:—The judgment of their Lordships was delivered by Sir JOHN EDGE:—

The suit in which this appeal from a decree of the Court of the Judicial Commissioner of Oudh has arisen was brought by Kunwar Partab Singh and Kunwar Ahbaran Singh in the Court of the Subordinate Judge of Sitapur against Bhabuti Singh and others on the 22nd of February, 1908. The plaintiffs, who are the appellants here, sought by their suit to have it declared that a decree which was made on the 15th of December, 1899, in a suit for pre-emption which had been brought by Bhabuti Singh, who is respondent here, on the 26th of June, 1899, against certain vendees and others, and in which the appellants, who were then minors, had been added as defendants, was not binding as against them. The plaintiffs appellants also sought in this suit to have a decree set aside which had been made on the 15th of December, 1899 in a suit for pre-emption which had been brought on the 27th of July, 1899, by them under the guardianship of one Hari Prasad against vendees and others and in which Bhabuti Singh had been added as a defendant, and they claimed to be restored to the position which they had held prior to the 15th of December, 1899, and such other relief as they were entitled to.

The material facts which their Lordships find are briefly as follows. The plaintiffs were the sons of Raja Balbhaddar Singh, who died on the 27th of December, 1897. The property of the joint family consisted of, amongst

(1) (1883) I. L. R. 10 Cal. 324 (332); L. R. 10 I. A, 150 (156).

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other things, shares in Mahal Ismailganj and Mahal Khushalpur, in respect of which Raja Balbhaddar Singh was at his death recorded in the Revenue Papers as the proprietor. After the death of Raja Balbhaddar Singh the defendant respondent, Bhabuti Singh assuming to act as the guardian of the plaintiffs and as the manager of their property, obtained in April, 1898, mutation of names in the Revenue Papers in their favour. Syed Muhammad Ismail Syed Idur Hasan and Syed Mohammad Sadiq on the 3rd of August, 1898, sold certain shares in mahal Ismailganj and Mahal Khushalpur [494] to Munshi Niaz Ahmad. Babu Ram and Bhagwan Das. It was in respect of that sale that the suits for pre-emption of the 26th of June, 1899, and the 27th of July, 1899, were brought. The vendors and the vendees were original defendants to these suits. Bhabuti Singh had a right of pre-emption equal but not superior to the right of pre-emption of Partab Singh and Ahbaran Singh in respect of the shares which were sold in Mahal Khushalpur, and he had a right of pre-emption inferior to theirs in respect of the shares which were sold in Mahal Ismailganj. It is obvious that the interests of the minors Partab Singh and Ahbaran Singh conflicted with the interests of Bhabuti Singh. On the 26th of June, 1899, Bhabuti Singh, on his own behalf, brought a suit to pre-empt the shares which had been sold in the two mahals, and made the vendors and vendees defendants to the suit. On the 5th of August, 1899, Bhabuti Singh caused Partab Singh and Ahbaran Singh, who were then minors, to be added as defendants to that suit. According to the amended plaint, Partab Singh and Ahbaran Singh, minors, under the guardianship of Hari Prasad, were added as defendants under an order, dated the 5th of August, 1899. The Court appears to have made an order on the 5th of August, 1899, that Partab Singh and Ahbaran Singh should be added as defendants, but it does not appear that the Court had ordered that they should be added as defendants under the guardianship of Hari Prasad. The amendment of the plaint adding Partab Singh and Ahbaran Singh as defendants was not attested by the signature of the Judge. No order appointing Hari Prasad as a guardian for the suit for Partab Singh or Ahbaran Singh was applied for or was made. By section 443 of the Code of Civil Procedure, 1882, it was enacted that—

"Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the suit.".

By section 441 of the same Code it was enacted that—

"Every application to the Court on behalf of a minor (other than an application under section 449) shall be made by his next friend, or by his guardian for the suit."

The result is that the minors, Partab Singh and Ahbaran Singh were not in law represented in the suit which was brought by Bhabuti Singh.

[495] On the 27th of July, 1899, Bhabuti Singh, who was then the *de facto* guardian of the minors Partab Singh and Ahbaran Singh, and the manager of their property, caused a suit for pre-emption in respect of the sale of the 3rd of August, 1898, to be brought by Partab Singh and Ahbaran Singh under the guardianship of Hari Prasad against the same vendors and vendees who were defendants to the suit of the 26th of June, 1899. The shares which it was sought to pre-empt by the suit of the 27th of July, 1899, were the same shares which it had been sought to pre-empt by the suit of 26th of June, 1899. On the 7th of August, 1899, Bhabuti Singh

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was added as a defendant to the suit of the 27th of July, 1899. On the 27th of July, 1899, Hari Prasad had in the suit in which Partab Singh and Ahbaran Singh were the plaintiffs filed an application to be appointed their guardian *ad litem*. The application purported to be made under section 456 of the Code of Civil Procedure, 1882. The Subordinate Judge to whom the application was made, by his order of the 27th of July, 1899, held that the application was unnecessary, and directed that the costs should be borne by the plaintiffs in that suit in any event.

Bhabuti Singh, the vendors, the vendees, and Hari Prasad, professing to act on behalf of Partab Singh and Ahbaran Singh, entered into an agreement of compromise, and on the 15th of December, 1899, filed in the suit in which Bhabuti Singh was the plaintiff a petition in which it was stated that it was agreed that Bhabuti Singh should pay Rs. 15,000 without costs to the vendees, and that a decree for possession of the property sold should be passed in favour of Bhabuti Singh by right of pre-emption. On that petition the then Subordinate Judge passed a decree in that suit in favour of Bhabuti Singh. As Hari Prasad had not been appointed guardian for the suit for the minors Partab Singh and Ahbaran Singh, they were in law unrepresented, and the decree did not bind them. Further, Hari Prasad had not obtained the leave of the Court to enter into that agreement of compromise on behalf of the minors Partab Singh and Ahbaran Singh.

In pursuance of the agreement of compromise to which their Lordships have referred, Hari Prasad, professing to act as guardian of the minors Partab Singh and Ahbaran Singh, on the 15th of December, 1899, presented to the Court a petition in the suit in [496] which Partab Singh and Ahbaran Singh were the plaintiffs, in which it was stated that it had been settled between the parties that the decree should be passed in favour of Bhabuti Singh in his suit ; that the compromise had been filed in Court ; and that Partab Singh and Ahbaran Singh were willing to withdraw their claim; and it was prayed that the withdrawal of their claim should be sanctioned, and that their suit should be dismissed. That petition was signed by Hari Prasad, Bhabuti Singh, the vendors, and the vendees. Hari Prasad appeared in Court in support of that petition, and stated that —" Since Bhabuti Singh has acquired this *hakkiat* on the basis of pre-emption, therefore the minors have now no objection, and they do not advance a claim to the said *hakkiat* as against Bhabuti Singh." On that petition the then Subordinate Judge dismissed the suit of Partab Singh and Ahbaran Singh. It does not appear that the Subordinate Judge was informed that the minors Partab Singh and Ahbaran Singh were in law unrepresented in the suit of the 26th of June, 1899, in which Bhabuti Singh had obtained a decree as against them and others for the pre-emption of the shares which Partab Singh and Ahbaran Singh were in their suit claiming to pre-empt nor does it appear that the Subordinate Judge was informed that the petition for the dismissal of the suit of Partab Singh and Ahbaran Singh was made in pursuance of an agreement of compromise which Hari Prasad acting as next friend of the minors Partab Singh and Ahbaran Singh, had entered into without the leave of the Court. This Board has held in *Manohar Lal* v. *Jadunath Singh* (1), that in cases to which section 462 of the Code of Civil Procedure, 1882, applies there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the

(1) (1906) I. L. R. 28 All. 585 ; L. R. 33 I. A. 128.

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compromise, and it ought to be shown, by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained, and that it is not sufficient proof that the exigencies of section 462 were complied with to show that the minor was described in the title of the suit as a minor, as in that case, suing "under the guardianship of his mother," and that the terms of the compromise were before the Court. The agreement of compromise in pursuance of which Hari Prasad obtained the [497] dismissal of the suit of Partab Singh and Ahbaran Singh was void as against them and on that ground, if there were no other, they are entitled to have the decree dismissing the suit of the 27th of July, 1899, set aside.

Hari Prasad had been a karinda of Raja Balbhaddar Singh, and he acted in a subordinate capacity under Bhabuti Singh in the management of his property of Partab Singh and Ahbaran Singh after Bhabuti Singh assumed the guardianship of the minors. Their Lordships agree with the learned Judicial Commissioner that in the proceedings to which they have referred "Hari Prasad was a mere dummy, that there was no one to protect the interests of the plaintiffs (Partab Singh and Ahbaran Singh), and that in fact Bhabuti Singh took advantage of his position." Their Lordships find that Hari Prasad was introduced into the suits of 1899 by Bhabuti Singh as the guardian or next friend of the minors Partab Singh and Abharan Singh to advance the interests of Bhabuti Singh and to defeat the interests of Partab Singh and Ahbaran Singh, for whom previously and subsequently Bhabuti Singh was acting as guardian and as the manager of their property. Hari Prasad throughout acted under the directions and on behalf of Bhabuti Singh and in his interests, and contrary to the interests of Partab Singh and Ahbaran Singh and to their detriment. Upon these findings of fact it follows as an obvious conclusion that the compromise and the proceedings which were taken in pursuance of it were not binding upon Partab Singh and Ahbaran Singh, and it is clear, apart from the other considerations which their Lordships have already discussed, that Partab Singh and Ahbaran Singh are also on these findings of fact entitled to relief.

The Subordinate Judge of Sitapur in this suit gave Partab Singh and Ahbaran Singh a decree on the 29th of July, 1908. From that decree Bhabuti Singh appealed to the Court of the Judicial Commissioner of Oudh. The appeal was heard by a Bench consisting of the Judicial Commissioner and the First Additional Judicial Commissioner. The learned Judicial Commissioner, on the facts found by him, held that Partab Singh and Ahbaran Singh were entitled to the decree which they had obtained from the Subordinate Judge, and that the appeal should be dismissed with costs. The First Additional Judicial Commissioner agreed with [498] the findings of the Judicial Commissioner on all the material facts. In his judgment the First Additional Judical Commissioner stated :—

"I agree with my learned colleague in holding that it is satisfactorily established that the appellant (Bhabuti Singh) was *de facto* manager of the minors' property at that time (1899) and that Hari Prasad in withdrawing the minors' suit acted under his instructions. If the case had been fought out the minors (Partab Singh and Ahbaran Singh) would probably have obtained a decree for the larger portion of the property and lots might have been drawn with respect to a smaller portion thereof. In arranging for this compromise the appellant acted in his own interests, and the reason why he got a pre-emptive suit instituted on behalf of the minors was to protect himself in case other persons who had a better right of pre-emption than himself instituted suits claiming pre-emption of the property. After the period of limitation for such suits had expired he withdrew the minors' claim and obtained a decree in his own favour."

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Notwithstanding that finding the First Additional Judicial Commissioner, for reasons which appear to their Lordships to be irrelevant, considered that, exercising a discretion under section 42 of the Specific Relief Act, 1877, he ought to refuse to grant the relief for which Partab Singh and Ahbaran Singh had prayed, and held that the appeal should be allowed and the suit dismissed with costs. Section 42 of the Specific Relief Act, 1877, did not apply. The Judicial Commissioner and the First Additional Judicial Commissioner having differed in opinion on the point of law as to whether section 42 of the Specific Relief Act, 1877, applied to the case, directed that the appeal should be laid before the Second Additional Judicial Commissioner under section 98 of the Code of Civil Procedure, 1908. The Second Additional Judicial Commissioner did not apparently confine himself to a consideration of the point of law, with which alone he had under section 98 of the Code of Civil Procedure, 1908, jurisdiction to deal; he apparently agreed with the opinion of the First Additional Judicial Commissioner that section 42 of the Specific Relief Act, 1877, applied, and held that the appeal should be allowed and the suit should be dismissed with costs in both Courts. In accordance with the opinions of the First Additional Judicial Commissioner and the Second Additional Judicial Commissioner a decree was passed on the 14th of March, 1910, by the Court of the Judicial Commissioner of Oudh allowing the appeal and dismissing the suit with costs. From that decree this appeal has been brought.

[499] Their Lordships are of opinion that this appeal should be allowed and the decree of the Court of the Judicial Commissioner should be set aside, and that the appellants, Partab Singh and Ahbaran Singh, should have a decree setting aside the decree of the 15th of December, 1899, in their suit, and declaring that the agreement of compromise and the decree of the 15th of December 1899 in the suit of Bhabuti Singh are not binding upon them or either of them, and that they are entitled to such rights as they had before their suit was dismissed on the 15th of December, 1899. Their Lordships will advise His Majesty accordingly. Bhabuti Singh the respondent must pay the costs of this appeal and of his appeal to the Court of the Judicial Commissioner of Oudh.

Appeal allowed.

Solicitors for the appellants :—*Ranken Ford, Ford & Chester.*
Solicitors for the respondent :—*T. L. Wilson & Co.*

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35 A. 499 (=20 I. C. 916=11 A. L. J. 783.)

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Lyle.

BABU RAM (*Defendant*) v. SAID-UN-NISSA AND OTHERS (*Plaintiffs*).*

[8th July, 1913.]

Act No. VIII of 1890 (*Guardians and Wards Act*), *section* 29—*Guardian and minor—Certificated guardian—Sale—Powers of certificated guardian different from those of a guardian under the general rule of law.*

The powers of a certificated guardian are regulated and defined by the Guardians and Wards Act, and the rule of law, that, there being no mutuality in a contract to which a minor was a party, it could not be enforced by him, does

*Second Appeal No. 42 of 1918 from a decree of D. L. Johnston, District Judge of Meerut, dated the 2nd of October, 1912, modifying a decree of Muhammad Hussain, First Additional Subordinate Judge of Meerut, dated the 24th of July, 1912.

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APPELLATE CIVIL.

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not apply to a contract for the sale of immoveable property entered into by the certificated guardian of a minor with the sanction of the Court ; such a contract is valid and a suit for damages for breach of the contract will lie on behalf of the minor. *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1) distinguished.

[Ref. 68 I. C. 346 ; 79 I. C. 471.]

The facts of this case are set forth in the judgment of the Court; but, briefly, this was a suit for damages on account of the breach by the defendant of a contract to purchase certain immovable property, entered into with the certificated guardian of certain minors with the sanction of the Court. The property was subsequently sold by auction at less than the convenanted price ; [500] hence this suit to recover the balance. The court of first instance decreed the claim, with the exception of an item of Rs. 250. On appeal by the defendant the plaintiffs' cross-objection as to this item was allowed and the claim decreed in full. The defendant appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *Satish Chandra Banerji*, for the appellant.

Dr. *S. M. Sulaiman* and Maulvi *Ghulam Mujtaba*, for the respondents.

RYVES and LYLE, JJ :—Musammat Said-un-nissa plaintiff No. 1 is the mother of the plaintiffs Nos. 2—6. Of these, Zia-ul-Islam was a major and the rest were minors. Some property belonging to them was under attachment and had been advertized for sale in execution of a decree obtained against Sultan-ul-Haq, the deceased husband of Musammat Said-un-nissa and the father of the remaining plaintiffs. The mother was anxious to sell the property by private contract and applied to the District Judge to be appointed a certificated guardian of her minor sons. This application was granted on the 29th of July, 1911. On the 2nd of September, 1911, Babu Ram applied to the court for leave to purchase the property for Rs. 5,000. The Judge passed an order that "the applicant, plaintiff No. 1 is allowed to sell the shops at least for Rs. 5,000 to Babu Ram or anyone else who may offer a higher price. The draft of the deed should be filed for the approval of the court." This order was passed on the 15th of September, 1911. Subsequently a draft deed was prepared and was filed by the plaintiffs in the District Judge's Court and the District Judge approved of that draft on the 31st of October. In that deed, the two major plaintiffs agreed to execute a sale-deed of their own shares, while Musammat Said-un-nissa entered into a similar contract as guardian of the minors for the sale of their shares in the property. This draft must be considered as an acceptance by the plaintiff of Babu Ram's offer to purchase the property for Rs. 5,000 and this acceptance, as found by the lower court, was duly communicated to Babu Ram. Subsequently, Babu Ram failed to carry out the contract and, in the result the property was sold by auction and realized less than Rs. 5,000. This suit was brought to recover the difference between what was realized and the sum of [501] Rs. 5,000 which Babu Ram contracted to pay for it, by way of damages for breach of contract. The first court decreed the suit with the exception of Rs. 250, which sum was claimed as costs involved in the auction-sale, on the ground that the alleged damage on this head was too remote. There was an appeal and a cross-objection before the learned District Judge. He dismissed the appeal, but allowed the cross-objection with reference to this sum of Rs. 250.

(1) (1912) I. L. R. 39 Cal. 232.

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35 A. 499=20 I. C. 906=11 A. L. J. 783.

Before us it has been argued, first, that there was no complete contract between Babu Ram on the one hand and the plaintiff, Said-un-nissa, on the other. As we have already said, we have a finding of the learned District Judge on this point which is conclusive. It was then argued on the authority of *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1) that the plaintiff could not make a valid contract for sale of this immovable property on behalf of the minors. In the case in I. L. R., 39 Calcutta, what was laid down was that the manager, with whom their Lordships were then concerned, could not bind the minor or the minor's estate by a contract for purchase of immovable property, and that, as the minor was not bound by the contract, there was no mutuality, and that the minor, who had attained majority at the date of suit, could not claim specific performance. It was not shown in that case that the manager was the certificated guardian of the minor, and, even if he was, that he had obtained sanction of the court under section 29 of the Guardians and Wards Act to enter into a contract on behalf of the minor. A certificated guardian's powers are regulated and defined by Statute, namely, the Guardians and Wards Act. In the present case, the contract was entered into by a certificated guardian after receipt of the Court's sanction and the suit is for damages for breach of a contract so entered into. In our opinion the Privy Council ruling does not apply to the facts of the present case. We do not think the Privy Council ruling applies to guardians appointed by Statute, such as the Guardians and Wards Act or the various Court of Wards Acts. The third objection taken is that the lower court should not have allowed the item of Rs. 250. In our opinion, for the reasons given by the lower court, its decree was justified. We dismiss the appeal with costs.

Appeal dismissed.

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35 A. 502 (=11 A. L. J. 765 =21 I. C. 29).

[502] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Sir Pramada Charan Banerji.

KOKLA (*Plaintiff*) *v.* PIARI LAL AND ANOTHER (*Defendants*).*

[11th July, 1913.]

Evidence—Admissibility of evidence—Family settlement—Evidence of settlement consisting of a joint application by the parties for mutation in respect of the property in dispute.

The brother and widow of a deceased Hindu settled a dispute between them as to the ownership of the property of the deceased by means of a joint application in the Revenue Court asking that the property should be recorded half in the name of each. This was done, and subsequently each sold the share of which he or she was recorded as owner. Thereafter the widow sued to recover the share which had gone to her husband's brother. *Held*, that it must be presumed from the application in the mutation proceedings, the recording of names by the Revenue Court in accordance with that application and the subsequent sales on the strengh of that record, that the parties entered into a family arrangement, and the application presented to the Revenue Court was therefore, not compulsorily registrable and was admissible in evidence.

[Fol. 37 All. 105 ; Ref. 12 A. L. J. 1316=26 I. C. 791 ; 67 I. C. 210=34 C. L. J. 323.]

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*Appeal No. 39 of 1913, under section 10 of the Letters Patent.

(1) (1912) I. L. R. 39 Cal. 232.

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JULY 11.

APPELLATE CIVIL.

35 A. 502=11 A. L. J. 765 =21 I. C. 29.

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case are fully stated in the judgment under appeal, which was as follows:—

"One Mohan Singh died in 1903 leaving a brother Ram Prasad Singh and a widow Musammat Kokla. A dispute arose between these two on the death of Mohan Singh as to the property of the latter. Ram Prasad, alleging that the property was the joint family property and that Kokla Kunwar was unchaste, claimed the entire property. Kokla Kunwar, on the other hand, alleged that as the widow of Mohan Singh, who had acquired the property for himself, she was entitled to succeed. They put in an application in the Revenue Court before whom proceedings in mutation were being held. In this application they stated that the family being a joint one they had agreed that each be recorded in respect of one-half of Mohan Singh's property. After the mutation proceedings Ram Prasad Singh sold his one-half of the property and Kokla Kunwar also sold hers. Kokla Kunwar instituted this suit in May, 1911, claiming possession of the one-half of the property, which had been sold by Ram Prasad Sing to Piari Lal, defendant No. 2, who is the appellant in this Court. The suit was defended in the court of first instance by Piari Lal alone. The plaintiff alleged that the property was the self-acquired property of her husband to which she was entitled on his death; that she had been induced by fraud and misrepresentation to agree to her brother-in-law being recorded in respect of one-half of the property, and that she had no one to advise her at the time as to the propriety of this agreement. The court of first instance, while holding that there was no fraud or misrepresentation proved to have been practised on her, found that the property was the joint property of the family and that the plaintiff had become unchaste. On these findings the suit was dismissed. The plaintiff appealed. The lower appellate court was not satisfied that the [503] unchastity imputed to the plaintiff had been established and held that the property had been the self-acquired property of Mohan Singh, inasmuch as he had obtained it personally as a grant from the Government. On the question of fraud the court below states:—'The plaintiff alleges that she acceded to the compromise on account of misrepresentations that were made to her. No misrepresentation was proved, and if it was necessary for her to establish this contention her suit and the present appeal must certainly fail.' In the latter part of the judgment the learned Judge further observes:—In the case now under consideration there is nothing to show what the circumstances were in which the compromise was arrived at.' The learned Judge was further of opinion that 'the compromise amounted to a transfer of a right to immovable property such as could only be effected by means of a registered instrument.' The compromise in the present case was simply an application put in the Revenue Court. It was not registered. On these findings the lower appellate court decreed the plaintiff's suit. The plaintiff's suit had included a claim for mesne profits, the amount of which was not ascertained in the court of first instance, and the lower appellate court, without noticing this omission, gave the plaintiff a decree for the full amount claimed. In appeal to this Court this last point is also one of the grounds taken in the memorandum of appeal. It is contended on behalf of the appellant that this petition to the Revenue Court should be looked upon in the nature of a family settlement on which the court should act, and I am referred to a ruling of their Lordships of the Privy Council in *Khunni Lal* v. *Gobind Krishna Narain* (1) and to another case, *Madan Lal* v. *Chhuttan Singh* (2). With reference to the view of the court below that the document was one requiring registration it is pointed out that the petition to the Revenue Court is not relied on as a deed of transfer of immovable property, but simply as evidence of the agreement between the parties as to how the entry in the Government papers should be made of their respective rights thereto. A further ground taken is that the suit is barred by limitation inasmuch as the plaintiff comes in eight years after the settlement of 1903. Finally it is contended that the conduct of the plaintiff is such as to operate as estoppel in favour of defendant No. 1. The ruling referred to in the judgment of the lower appellate court, *Rustam Ali Khan* v. *Gaura* (3), does not, in my opinion, bear on the present case. In that case there was a dispute between the plaintiff and her two sisters in the matter of mutation of names in the Revenue Court. A compromise was entered into and the compromise dealt with other properties, over and above the landed property in respect of which the Revenue Court was concerned with in the mutation proceedings, and it was held that in respect of this latter property the compromise could have no effect, inasmuch as the document of compromise had not been registered It was observed in the course of the judgment

(1) (1911) I. L. R. 33 All., 356.
(2) (1912) 10 A. L. J. 101.
(3) (1911) I. L. R. 33 All. 728.

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JULY 11.

APPELLATE CIVIL.

35 A. 502=11 A. L. J. 766 =21 I. C. 29.

that, as bearing on the issues raised in the case, the proceedings before the Revenue Courts, including the petition of compromise and the orders passed by the court, were undoubtedly admissible in evidence and must be taken into account for what they may be worth. In my opinion the contention advanced on behalf of the appellant in respect of the compromise is correct and [504] must be sustained. By the petition to the Revenue Court neither of the parties thereto purported to convey any property. The petition simply contained a statement by the parties that they agreed that each should be recorded in respect of one-half of the property in dispute. Such documents are put in every day in the Revenue Courts and so far as my experience goes registration of such instruments is not insisted on. If then registration of this document is not necessary, it can be looked to as evidence of the agreement between the parties so far back as 1903. The plaintiff alleged that the compromise, as it is called, had been obtained from her by means of fraud, misrepresentation, &c. As I understand the judgments of the courts below the plaintiff made no attempt to lay even the foundation of a case of fraud or misrepresentation, and there is undoubtedly a clear finding by the lower appellate court that no fraud or misrepresentation was proved. The settlement of the dispute between the parties embodied in the application to the Revenue Court was a good agreement and is good evidence of what the parties considered should be done in the dispute they were engaged in. This being the case and nothing having happened subsequent to this agreement which would give the plaintiff any right to resile from it, I must hold that the plaintiff's suit is not maintainable. I allow the appeal, set aside the decree of the lower appellate court and dismiss the plaintiff's suit with costs in all courts."

The plaintiff appealed.

The Hon'ble Pandit *Moti Lal Nehru*, for the appellant.

The Hon'ble Dr. *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the respondents.

RICHARDS, C. J. and BANERJI, J.--The facts out of which this appeal arises are fully set forth in the judgment of the learned Judge of this Court which is reported in 11 A. L. J. R. 157. To put them very shortly, the dispute is about a moiety of the property which at one time belonged to Mohan Singh. Mohan Singh died in 1903, leaving a brother, Ram Prasad Singh, and a widow, Musammat Kokla, the plaintiff in the present suit. They were disputing about the estate of Mohan Singh. Ram Prasad Singh alleged that he was joint with Mohan Singh, whilst Musammat Kokla said that Mohan Singh was separate. The dispute ended by the parties agreeing that half the property should be recorded as belonging to Musammat Kokla, whilst the other half should be recorded as belonging to Ram Prasad Singh. Later on, Ram Prasad sold the half share that stood in his name, whilst Musammat Kokla sold the half that stood in her name. She then brought the present suit to recover the half that had stood in Ram Prasad's name and had been sold by him. The lower appellate court has found that Mohan Singh and Ram Prasad [505] Singh were separate, but it has also found that it was not established that any fraud or misrepresentation had been practised on Musammat Kokla and accordingly decreed her suit.

The learned Judge of this Court held that under the circumstances the petition filed in mutation proceedings must be regarded as a family settlement and it did not require registration, and on these grounds dismissed the plaintiff's suit.

In our opinion, it must be presumed from the whole proceedings commencing with the petition for mutation, the order of the revenue authorities recording the names in accordance with the petition, and the subsequent sales upon the strength of this record, that the parties entered into a family arrangement. On these grounds we think the decree of the learned Judge of this Court ought to stand. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

35 A. 505 (=21 I. C. 456=11 A. L. J. 769).

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JULY 15.

APPELLATE CIVIL.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Sir Pramada Charan Banerji.

35 A. 505=21 I. C. 456=11 A. L. J. 769.

SRI KISHAN DAS AND ANOTHER (*Plaintiffs*) *v.* YAKUB KHAN AND OTHERS (*Defendants*).*

[15th July, 1913.]

Landlord and tenant—Tenant in possession without a patta*—Suit to enforce hypothecation of property as security for rent.*

Held that a hypothecation of other property by certain tenants as security for their rent was none the less enforceable because, though the tenants had executed a *kabuliat* in respect of the land held by them, no *patta* had been executed by the landlords in their favour. *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh* (1) referred to.

THIS was a suit to enforce a hypothecation of certain property executed by tenants as security for their rent. The tenants were in possession of the land leased to them, in respect of which rent was due, and had executed a *kabuliat* therefor; but no *patta* had been executed in their favour by the landlords, and upon this ground it was contended that no rent was legally exigible and the security was not enforceable. The court of first instance decreed the claim; but the lower appellate court gave effect to the defendants' contention and reversed this decree. The plaintiffs appealed to the High Court.

[506] The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellants.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

RICHARDS, C. J. AND BANERJI, J.—The decision of the court below in this case cannot be supported. Ismail Khan and Zarina Khatun were admittedly in possession of the property leased to them by the plaintiffs. To secure the rent which they agreed to pay for such use and occupation, they hypothecated their property. The present suit was one to enforce the hypothecation. The suit was clearly maintainable, and the court below was wrong in holding that because no *patta* was granted to the executants of the *kabuliat*, the rent agreed to be paid was not payable and the security for its payment could not be enforced. This case is similar in some respects to that of *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh* (1). We allow the appeal, set aside the decree of the court below and remand the case to that court under order XLI, rule 23, of the Code of Civil Procedure with directions to re-admit it under its original number in the register and to dispose of the other questions which arise in the case. The appellant must have the costs of this appeal. Other costs will follow the event.

Appeal decreed and cause remanded.

* Second Appeal No. 82 of 1913, from a decree of Abdul Hasan, Additional Subordinate Judge of Moradabad, dated the 21st of September, 1912, reversing a decree of Sidheshwar Mitter, Munsif of Amroha, dated the 23rd of September 1911.

(1) (1909) I. L. R. 31 All. 276.

35 A. 506 (=11 A. L. J. 804=14 Cr. L. J. 615=21 I. C. 663.)

APPELLATE CRIMINAL.

Before Mr. Justice Tudball and Mr. Justice Ryves.

EMPEROR *v.* RAM NEWAZ.*

[17th July, 1913.]

1913 JULY 17.

APPELLATE CRIMINAL.

35 A. 506=11 A. L. J. 804 =14 Cr. L. J. 615=21 I. C. 663.

Act No. XLV of 1860 (*Indian Penal Code, sections* 37, 302, 304—*Murder—Culpable homicide not amounting to murder—Fatal assault with* lathis *by three persons acting in concert.*

Three persons, brothers, attacked with *lathis* a fourth, against whom they bore a grudge, and beat him with great severity, so that he died shortly afterwards. His skull was badly fractured, and numerous other injuries were inflicted upon him. It did not appear which injuries were caused by which of the assailants, but the evidence showed that they were acting in concert and intended to cause such bodily injury as was likely to cause death. *Held* that all three assailants were guilty of murder. *King-Emperor* v. *Subbappa Chunnappa* (1) and *King-Emperor* v. *Kanhai* (2) followed. *Emperor* v. *Bhola Singh* (3), *Queen-Empress* v. *Duma Baidya* (4), *Gourodas Namasudra* v. *Emperor* (5), *Empress* v. *Dharam Rai* (6) and *Dhian Singh* v. *King-Emperor* (7) distinguished.

[Ref : 50 I. C. 337; 83 I. C. 636=26 Cr. L. J. 76; Dist : 71 I. C. 234=20 A. L. J. 900= 24 Cr. L. J. 106=45 All. 130; Rel: 73 I. C. 709=24 Cr. L. J. 673; Fol: 74 I. C. 858 =24 Cr. L. J. 826.]

[507] THIS was an appeal by the Local Government from an order of acquittal passed by the Sessions Judge of Banda in the case of one Ram Newaz charged under sections 304 and 302 of the Indian Penal Code, with being concerned, along with his two brothers Ram Bharose and Ram Bisal, with causing the death of one Ram Saran. The facts of the case are set forth at length in the judgment of the Court.

The officiating Government Advocate (Mr. *W. Wallach*), for the Crown.

Mr. *D. R. Sawhny*, for the accused.

TUDBALL and RYVES, JJ.—This is an appeal by the Local Government from a decision by the Sessions Judge of Banda, whereby he acquitted one Ram Nawaz of the offences of murder and culpable homicide not amounting to murder under sections 302 and 304 of the Indian Penal Code. The accused was committed for trial together with his two brothers, Ram Bharose and Ram Bisal, on a charge under section 304 of the Indian Penal Code. The Sessions Judge added a charge under section 302 of the Indian Penal Code. He convicted Ram Bharose and Ram Bisal of the lesser offence under section 304 of the Indian Penal Code and acquitted them of murder. He sentenced them to ten years' rigorous imprisonment each.

In regard to Ram Newaz, though he found that he was present and took part in the assault on the deceased, he passed an order of acquittal. Ram Bhraose alone appealed against his conviction.

A Bench of this Court (of which one of us was a member), on the record coming before it, issued notice to both Ram Bharose and Ram Bisal to show cause why they should not be convicted of murder and the sentences enhanced. In the result, the appeal of Ram Bharose was dismissed, the two men were convicted of murder and were sentenced to death. The case

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* Criminal Appeal No. 401 of 1913 by the Local Government, from an order of Pitamber Joshi, Sessions Judge of Banda, dated the 5th of March, 1913.

(1) (1912) 15 Bom. L. R. 303.
(2) (1912) I. L. R. 35 All 329.
(3) (1907) I. L. R. 29 All. 282.
(4) (1896) I. L. R. 19 Mad. 488.
(5) (1908) I. L. R. 36 Cal. 659.
(6) Weekly Notes, 1887, p. 236.
(7) (1912) 9 A. L. J. 180.

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of Ram Newaz was not then before the Court and his guilt or innocence was not considered. The Local Government has now appealed against his acquittal, and we have to decide whether or not his alleged participation in the assault has been proved and, if so, of what offence he is guilty.

The case for the prosecution is a simple one. The evidence of Ram Dat and Sub-Inspector Wali Muhammad Khan shows [508] that Ram Bharose trespassed in the house of one Jasodia for the purpose of committing adultery with her daughter. On an alarm being raised, some neighbours arrived upon the scene, seized Ram Bharose and beat him. The deceased Ram Saran was one of them. Ram Bharose was prosecuted and convicted and sentenced in December, 1912, to four weeks' rigorous imprisonment, from which he was released some time in January last.

The case for the prosecution is that on the 24th of January, 1913, shortly before sunset, the three brothers Ram Bharose, Ram Bisal and Ram Newaz met the deceased Ram Saran near a tank outside the village in which they all reside. The deceased was returning home from a neighbouring village. The three brothers were armed with *lathis*. They at once attacked Ram Saran, felled him to the ground and continued all three to beat him with their clubs as he lay. The witnesses, Gajadhar *Bharbunja*, Sheonath *Arack* and Sheonarain *Brahmin*, who were not far away, were attracted to the spot, and on their remonstrance the accused ran away. The relations of the deceased were summoned, and they removed the body. Ram Kishore, the brother of the deceased, proceeded to the police station, some eight miles distant, where at 8 P. M. a report was made as against all three of the accused. The presence of the witnesses, Sheonath and Gajadhar, at the scene, was also mentioned. Ram Saran died that same night as a result of the injuries inflicted by the three accused.

The medical evidence shows that the deceased was mercilessly and brutally beaten with clubs. On the crown of the head, there were two contused wounds and innumerable abrasions. One blow had been inflicted behind the right ear. On each arm there were two contused wounds and there was an injury to the left hand. There were marks of injuries on both knees and the mark of a blow on the waist. There was compound fracture of both bones of the left lower leg. The skull was found to have been fractured into four pieces. It is, therefore, evident that the deceased, as the medical witness states, had been cruelly beaten with *lathis*.

As to the actual facts of the assault, they are proved by the evidence of the witnesses, Gajadhar and Sheonath and Sheonarain. These are persons of different castes, and there is not a word in the evidence to show that they are otherwise than impartial [509] witnesses who have testified to the facts to the best of the ability of ignorant villagers. There are no doubt some trivial minor discrepancies, but none of such importance as to throw any doubt on their honesty or good faith. The evidence of Gajadhar shows that, while grazing his cattle that evening on the embankment of the tank, he noticed Ram Saran walking along at the foot of the embankment. He also saw the three brothers walking along the top of it. The next thing he noticed was that the three accused were beating Ram Saran at the foot of the embankment. He shouted to Sheonath, who was on the other side of the embankment, and the latter and also the witness Sheonarain ran up to see what was happening. Sheonath states that when he caught sight of the scene, the deceased was on the ground and the three accused were all striking him

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with their *lathis*. On the witnesses remonstrating, the accused persons ran away. Sheonarain corroborates. The witnesses admit that Ram Saran had a *lathi* and this is obvious by reason of the fact that one accused, Ram Bisal, bore the marks of two blows on his person when at 8 p.m. he arrived at the police station and made a report. Of course it is possible that he might have caused these two injuries to be inflicted on his person by his brothers, but it is far more probable that Ram Saran, when attacked, used his weapon in self-defence. Ram Bisal reportad that he had found Ram Saran allowing his cattle to graze on the crops in his field (which is some 200 yards or more from the tank) and when he atttempted to remove them Ram Saran called to his three brothers, who arrived and drove off the cattle, while Ram Saran himself struck Ram Bisal twice with his *lathi*. This was the case put forward by Ram Bisal in his defence, and in the judgment on his appeal the reasons for holding it to be false are set forth. The police officer who made the inquiry found blood stains at the foot of the embankment, which clearly indicate the spot where Ram Saran was beaten. This story, moreover, is clearly untrue and does not account in any way for the numerous and severe injuries found on the body of the deceased. We are here, however, concerned with the case of Ram Newaz. There can be no doubt of the truth of the prosecution story. The Judge and the assessors were unanimous in accepting it.

[510] The defence of Ram Newaz was an *alibi*. The assessors stated that they accepted it. The Judge refused to do so, and held that Ram Newaz was present but probably did not take a prominent part in the assault. Ram Newaz gave his age as twenty years in the Magistrate's Court. At the trial he said he was sixteen years old. His exact age is not clear, but we may take it that he is a young man approaching twenty years in age.

He called two witnesses to establish his *alibi*, one a Brahman and one an Arack, from the village of Tam Bani where his maternal uncles live. They say that one and a half months prior to their giving evidence the accused went to the village and stayed some twenty or twenty-two days with his uncle. Their village is some sixteen miles from the scene of the murder.

In addition to the reasons given by the Sessions Judge for not accepting this evidence, there is the fact that it is of a very vague and unreliable nature, and in the face of the clear evidence for the prosecution we are unable to accept it. We agree with the Judge that Ram Newaz was present and took part in the assault. The witnesses ascribe to him the same action as to the other two accused. Being the youngest of the three brothers, he may perhaps have been led into the matter by them, but we fail utterly to understand why the lower court acquitted him. He was present and actively aiding and abetting his brothers. The mere suggestion that he probably did not take a prominent part as the Sessions Judge has put it, is no good reason for acquittal, and we have, therefore, no hesitation in holding that Ram Newaz was present and did take part, using his *lathi* to beat the deceased. It is urged, on his behalf, that he can only be held guilty of an offence under section 325 of the Indian Penal Code and our attention is called to the decisions reported in *Emperor* v. *Bhola Singh* (1), *Queen-Empress* v. *Duma Baidya* (2)

(1) (1907) I. L. R. 29 All. 282.

(2) (1896) I. L. R. 19 Mad. 483.

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and *Gouridas Namasudra* v. *Emperor* (1), *Empress* v. *Dharam Rai* (2), *Dhian Singh* v. *King-Emperor* (3). In this respect, we must point out that the facts and circumstances of cases vary and each case has to be decided in view of its actual facts. We have pointed out that the deceased was cruelly and mercilessly beaten by three men armed [511] with *lathis*, who continued to use their weapons upon him after he had fallen to the ground. The *lathi* is a lethal weapon, as has been held more than once by this Court. The circumstances of the case leave no doubt in our minds that the assailants either intended to cause death or had every reason to know that the probable result of their joint act would be death. It is pleaded that there had been no premeditation and that the attack was made suddenly, directly the assailants caught sight of the deceased. Whether there was or was not premeditation is perhaps not clear, but there was concerted action and the attack was so ferocious as to lead almost to the inference that it had been premeditated.

In any event, we cannot hold that the assailants could not have contemplated or did not contemplate that the result of their action would be death or such bodily injury as is likely to cause death.

The death was not necessarily the result of any single blow. It was the result of the many blows inflicted on the head.

In this respect we would call attention to the decision in *King-Emperor* v. *Subbappa Chunnappa* (4). In the present case, as in the reported case, the attack was a single indivisible thing.

The facts of the present case are very similar to those of *Emperor* v. *Kanhai* (5). The using of lethal weapons in the manner in which they were used in the present case leaves no room for doubting that the assailants intended to cause such bodily injury as is likely to cause death. They must, in the present case, have known that death would probably result, even if they had not fully intended to cause death, though indications of such an intention are not by any means absent. The assault was an act of revenge and carried out brutally and savagely. We have no hesitation in holding that Ram Newaz is guilty of murder. In regard to sentence, the Crown does not press for the extreme penalty. The accused is a youth who was, no doubt, led into the matter by his two elder brothers, and we agree that the ends of justice will be met by imposing the lesser of the two sentences allowed by the law. We allow the appeal and set aside the acquittal of Ram Newaz. We convict him of murder under section 302 of the Indian Penal Code and sentence him to transportation for life.

Appeal allowed.

(1) (1908) I. L. R. 36 Cal. 659.
(2) Weekly Notes, 1887, p. 236.
(3) (1912) 9 A. L. J. 180.
(4) (1912) 15 Bom. L. R. 803.
(5) (1913) I. L. R. 35 All. 329.

35 A. 512 (=11 A. L. J. 786=20 I. C. 892).

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JULY 18.

FULL BENCH.

35 A. 512=11 A. L. J. 786 =20 I.C. 892.

[512] FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

NANDAN SINGH (*Plaintiff*) *v.* GANGA PRASAD (*Defendant*).*

[18th July, 1913.]

Act (Local) No. II of 1901 *(Agra Tenancy Act), section 34—Defendant in possession of land without consent of owner—Ejectment of defendant through Revenue Court—Subsequent suit for rent—Cause of action—Misjoinder of causes of action—Civil Procedure Code* (1908), *order II, rule* 2.

On a partition of certain revenue paying property some land which fell to the plaintiff's share remained in possession of the defendant, who refused to vacate it. The plaintiff sued the defendant for ejectment in the Revenue Court. The defendant pleaded that he was an ex-proprietary tenant, but the Court held him to be a non-occupancy tenant and ejected him. The plaintiff then brought the present suit under section 34 of the Agra Tenancy Act, 1901, for rent of the land held by the defendant during the period prior to his ejectment as land occupied by the defendant without the plaintiff's consent.

Held, that the defendant, being in occupation of the land without the consent of the plaintiff, was liable to pay rent therefor, under section 34 of the Agra Tenancy Act, and further that the claim could be maintained notwithstanding that the defendant was not in possession at the date of the suit. *Sheo Gopal Pande* v. *Thakur Baldeo Singh* (1) distinguished.

Held further, that the suit was not barred by reason of the plaintiff, having in his previous suit for ejectment treated the defendant as a tenant.

Held also, that the plaintiff's cause of action under section 34 of the Agra Tenancy Act was no part of his cause of action to recover possession of the property, and could not be joined in the previous suit, and the present suit was, therefore, not barred by the provision of the Code of Civil Procedure, order II, rule 2.

[Ref. 29 I. C. 565; 60 I. C. 65]

THE facts of this case were as follows:—

The plaintiff and the defendant were co-sharers in a village. Disputes arose between them which were referred to arbitration. An award followed, in terms of which the property was divided. The property in suit fell to the share of the plaintiff, and it was decided that one co-sharer would have no right in the share of the other. The award was made a rule of court and a decree was passed in accordance therewith. The defendant continued in possession of the property in suit contrary to the terms of the decree. The plaintiff then brought a suit for the ejectment of the defendant in the Revenue Court under sections 58 and 63 of the [513] Agra Tenancy Act. The Revenue Court decreed that suit. In that suit the defendant pleaded that he was an ex-proprietary tenant, but the court held him to be a non-occupancy tenant. The present suit was then brought by the plaintiff under section 34 of the Agra Tenancy Act, 1901, for recovery of arrears of rent for the period during which the defendant was in possession prior to ejectment. The court of first instance decreed the suit, but the lower appellate court dismissed it on the ground that the plaintiff, having ejected the defendant, as a tenant, could not now turn round and sue him as a person in occupation of the land without his consent. The plaintiff appealed.

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* Second Appeal No. 602 of 1912 from a decree of J. L. Johnston, Second Additional Judge of Aligarh, dated the 14th of February, 1912 reversing a decree of Saghir Husain, Assistant Collector, First Class, of Aligarh, dated the 26th of April, 1911.

(1) (1911) 8 A. L. J. 1087.

1913
JULY 18.

FULL BENCH.

35 A. 512=11 A. L. J 786==20 I.C. 892.

Munshi *Parshotam Das Tandan* (with him The Hon'ble Dr. *Tej Bahadur Sapru*), for the appellant, submitted that the defendant, having held the land of the plaintiff, was bound to pay rent therefor. He was, no doubt, a trespasser, but he could not be ejected as a non-occupancy tenant; *Balli* v. *Naubat Singh* (1). This was a suit under section 34 of the Agra Tenancy Act. Under that section "rent" could be recovered from a person who remained in possession against the consent of the landlord. Rent is only paid by a tenant. It follows, therefore, that a person who remains in possession against the consent of the landlord is his tenant. The defendant remainad in possession of the plaintiff's land and must pay compensation for use and occupation.

Mr. *M. L. Agarwala* (with him Munshi *Girdhari Lal Agarwala*), for the respondent, submitted that the defendant was not a tanant, and the Revenue Court could not pass a decree for rent against him. He was only a trespasser, and a suit for his ejectment and for mesne profits should have been brought in the civil court. If a decree for rent was passed against him it would be holding a trespasser to be a tenant. Where no rent is fixed before ejectment it cannot be fixed after ejectment; *Kamta Prasad* v. *Panna Lal* (2), *Sheo Gopal Pande* v. *Thakur Baldeo Singh* (3). In the first suit the plaintiff sued the defendant as his tenant, and the present suit under section 34 is not maintainable. That section applies where a suit for compensation is brought against a person who is in possession at the date of the suit. Then again, the plaintiff [514] should have claimed rent in the previous suit, and having failed to claim it the present is barred by the provisions of the Code of Civil Procedure, 1908, order II, rule 2, which apply to Revenue Courts also (See section 193, Agra Tenancy Act). The present claim arises out of the same cause of action as the previous suit. The omission to sue for rent in the previous suit is fatal to this suit; *Mewa Kuar* v. *Banarsi Prasad* (4), *Lalji Mal* v. *Hulasi* (5), *Debi Dial Singh* v. *Ajaib Singh* (6), *Venkoba* v. *Subbanna* (7), *Maksud Ali* v. *Nargis Dye* (8).

RICHARDS, C.J., and BANERJI and TUDBALL, JJ.:—This appeal arises out of a suit instituted in the Revenue Court to recover a sum of money claimed to be payable as arrears of rent under section 34 of the Agra Tenancy Act. The facts have been very clearly ascertained and are as follows. The plaintiff and the defendant or their predecessors in title were co-sharers. Disputes arose between them, which resulted in an arbitration award and a decree in accordance therewith. Under that decree the plaintiff became entitled to the property in respect of which the present claim is made not withstanding that the defendant had previously been in possession and occupation of this particular land. Under the arbitration award and the decree following it the defendant had to give it up to the plaintiff. He did not do so. A suit for his ejectment was then instituted in the Revenue Court. In this suit the defendant was described as a cultivator, but in the body of the plaint the actual facts were set out as stated above. The arbitration proceedings were referred to, the decree which followed on the award was mentioned, as also the fact that the defendant had insisted upon remaining in possession though many times asked by the plaintiff to give up possession. The defence was not that the defendant was a proprietor, but that he was the ex-proprietary tenant and not liable to be ejected. He based

(1) (1912) 9 A. L. J., 771.
(2) (1912) I. L. R., 35 All. 123.
(3) (1911) 8 A. L. J., 1087.
(4) (1895) I. L. R., 17 All., 533.
(5) (1881) I. L. R., 3 All., 660.
(6) (1881) I. L. R., 3 All. 543.
(7) (1887) I. L. R., 11 Mad. 150.
(8) (1892) I. L. R., 20 Cal. 928.

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his claim to be ex-proprietary tenant on the allegation that the land in dispute had been his *sir* before the arbitration proceedings. The award had already decided that the land was not his *sir* nor his *khudkasht*, and the Revenue Court gave a decree to eject the defendant, holding that he was a non-occupancy tenant.

[515] The present suit has now been instituted under section 34 of the Tenancy Act. The court of first instance ascertained the amount which it thought fair and equitable to be paid by the defendant under the circumstances. The lower appellate court reversed the decree of the court of first instance and dismissed the plaintiff's suit. Hence the present appeal. 35 A. 512=11 A. L. J. 786 =20 I.C. 892.

Section 34 is as follows :—

" A person occupying land, without the consent of the land-holder, shall be liable for the rent of that land at the rate payable in the previous year, or, if rent was not payable in the previous year, at such rate as the court may determine to be fair and equitable, but he shall not be deemed to hold the land within the meaning of section 11 until he begins to pay rent therefor."

The appellant contends that there is no doubt that the defeneant was a person occupying his land without his consent and that, therefore, he was bound to pay compensation at a fair and equitable rate which has been ascertained by the court of first instance. The respondent urges, on the other hand, that the plaintiff having sued the defendant in the Revenue Court as a tenant, cannot now recover rent from him under section 34 as a person occupying the land "without his consent." He further contends that the plaintiff, in the previous suit to recover possession, was bound to make the claim for rent under the provisions of order II, rule 2, of the Code of Civil Procedure, and lastly, that compensation or rent under section 34 can only be recovered against the person who is still in occupation of the land at the time of the institution of the suit.

The wording of section 34 is certainly somewhat peculiar. In England there is a well known form of action, viz., the action for use and occupation. In such a case where no rent has been fixed and the land is occupied *with the permission* of the owner, an action for use and occupation lies, and where the ownership of the plaintiff is proved as well as the occupation by the defendant, *prima facie* it will be assumed that there was a contract by the defendant to pay reasonable compensation for the occupation. Section 34, however, provides that a person who occupies the land *without permission* shall be liable to pay rent therefor. We are bound to construe the section according to the plain words used.

[516] We now come to the question whether the proceedings in the Revenue Court, which ended in the ejectment of the defendant, can be said to bar the present claim. We have already pointed out that in bringing these proceedings the plaintiff clearly and distinctly stated the real facts of the case and that the defendant was in possession against his consent. There can be little doubt that on the facts of the present case, as now ascertained, the most appropriate remedy for the plaintiff to have taken would have been a suit in the civil court for recovery of possession, coupled with a claim for mesne profits. It is quite unnecessary for the purposes of the present appeal to decide whether or not, under the circumstances of the present case, the Revenue Court had power to eject the defendant. It is quite clear that unless the relationship of landlord and tenant exists, the Revenue Court has no power to eject. It is, therefore, quite possible that the decree of the Revenue Court was erroneous, but this is not a matter which we have to decide in this appeal. In our

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35 A. 512=11 A. L. J. 786 =20 I.C. 892.

opinion, the proceedings which the plaintiff did take cannot be said to bar the present suit on the ground that he was treating the defendant as his tenant. He set out the actual facts as already mentioned and in his plaint as well as his evidence stated the fact that the defendant was holding in spite of him and against his will. Under the circumstances, the rulings which have been cited during the course of the arguments have no application.

We now come to the third point, viz., whether it was incumbent upon the plaintiff to join in his previous suit the present claim. Order II, rule 2, is as follows :—

" Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, &c."

It is urged that part of the plaintiff's cause of action was his present claim under section 34 and that, therefore, he should have included it in his claim.

In our opinion, the plaintiff's cause of action under section 34 was no part of his cause of action to recover possession of the property, assuming the claim to be regarded as a claim for arrears of rent. The very words of rule 4 of the same order show that a claim for rent is not on the same cause of action as the claim for possession. Rule 4 is as follows :—" No cause of action [517] shall, unless with the leave of the court, be joined with a suit for the recovery of immovable property, except (*a*) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof (*b*) claims for damages for breach of any contract under which the property or any part thereof is held, and (*c*) claims in which the relief sought is based on the same cause of action." This rule shows that, but for these exceptions, claims for mesne profits and for arrears of rent could not be joined with a suit to recover possession of immovable property except with the leave of the court. It further shows that claims for mesne profits and arrears of rent are regarded as different causes of action. The inconvenience of holding that claims for rent under section 34 are based on the same cause of action as claims for ejectment is illustrated by the fact that under the Tenancy Act the court which hears an ejectment suit would, in some cases, and would not in others, be the same as the court which hears a suit for arrears of rent. The court of appeal also in one case is not the same as in the other. We may also observe that this point was not raised either in the court of first instance or in the grounds of appeal to the lower appellate court.

As to the last point, we think it is quite clear that a claim can be made, notwithstanding that the person has ceased to be in occupation. The case of *Sheo Gopal Pande* v. *Thakur Baldeo Singh* (1) has no bearing on the present case. In our opinion, the plaintiff was entitled to make a claim under section 34. As no rent had been paid in the previous year, the court was bound to determine what sum would be fair and equitable. We find that the court of first instance fixed the sum at Rs. 240 a year. It based its decision upon a decree for profits of the very same land, between the parties on a former occasion. The lower appellate court did not decide the question. We do not think that the rent to be paid by the defendant could have been fixed upon any more equitable basis than that adopted by the court of first instance. We, therefore, allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance. The appellant will have his costs in all courts.

Appeal allowed.

(1) (1911) 8 A. L. J. 1087.

35 A. 518 (=11 A. L. J. 841=20 I. C. 896).

[518] APPELLATE CIVIL.

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35 A. 518=11 A. L. J. 841 =20 I.C. 896.

Before Mr. Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.

HARIBANS RAI AND OTHERS (*Judgment-Debtors*) *v.* SRI NIWAS NAIK (*Decree-holder.*)*

[21st July, 1913].

Civil Procedure Code (1908), *order XXXIV, rule* 14—*Execution of decree—Usufructuary mortgage—Suit for possession of mortgaged property—Decree for possession and costs—Execution for costs by attachment of part of mortgaged property.*

Certain usufructuary mortgagees suing for possession of the mortgaged property, which had not been delivered to them, obtained a decree for possession and for costs. In execution of their decree for costs the mortgagees applied for attachment of part of the mortgaged property. *Held* that this application was not barred by the provisions of order XXXIV, rule 14, of the Code of Civil Procedure, 1908. *Khiarajmal* v. *Daim* (1) distinguished. *Muhammad Abdul Rashid Khan* v. *Dilsukh Rai* (2) referred to.

[Ref. 50 I. C. 134=17 A. L. J. 481=41 All. 399.]

THE facts of this case were as follows:—

The appellants and their predecessors in title executed a usufructuary mortgage in favour of one Subba Rai on the 3rd of October, 1887. The mortgage was assigned to Sri Niwas Rai Kalia and others, the respondents. Part of the property mortgaged was in the possession of prior mortgagees and the mortgagors also held mortgagee rights in other property which they included in the mortgage. In regard to those two descriptions of property, it was provided in the mortgage that the mortgagors would redeem the prior mortgage and foreclose the mortgage held by them and then deliver possession to their mortgagee, Subba Rai. The mortgagors complied with the terms of the mortgage so far that they redeemed the prior mortgage and the mortgage held by them, but they did not deliver possession foreclosed to the mortgagee. Thereupon the assignees of the mortgagee brought a suit for possession and obtained a decree, which awarded them costs. In execution of this decree for costs, they applied for attachment of the mortgaged property, that is, of the equity of redemption of the mortgagors in respect of the said property. The appellants objected to the attachment on the ground that it would contravene the provisions of order XXXIV, rule 14, of the Code of Civil Procedure, and that as the mortgagees are in possession under the [519] mortgage, they were not entitled to bring to sale the mortgagors' rights. This objection was overruled by the court below, and the mortgagors thereupon appealed to the High Court.

Mr. *Muhammad Ishaq Khan*, for the appellants.

Babu *Sital Prasad Ghosh* (with him Babu *Jogindro Nath Chaudhri*), for the respondents.

BANERJI, and RYVES JJ.:—The facts of this case are these:—The appellants and their predecessors in title executed a usufructuary mortgage in favour of one Subba Rai on the 3rd of October, 1887. The mortgage was assigned to Sri Niwas Rai Kalia and others, the respondents. Part of the property mortgaged was in the possession of prior mortgagees and the mortgagors also held mortgagee rights in other property which they included in the mortgage. In regard to these two descriptions of

*First Appeal No. 237 of 1912 from a decree of Ali Ausat, officiating Subordinate Judge of Ghazipur, dated the 14th of June, 1912.

(1) (1904) I. L. R. 32 Cal. 296. (2) (1905) I. L. R. 27 All. 517.

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property, it was provided in the mortgage that the mortgagors would redeem the prior mortgage and foreclose the mortgage held by them and then deliver possession to their mortgagee, Subba Rai. The mortgagors complied with the terms of the mortgage so far that they redeemed the prior mortgages and foreclosed the mortgages held by them, but they did not deliver possession to the mortgagee. Thereupon the assignees of the mortgagee brought a suit for possession and obtained a decree, which awarded them costs. In execution of the decree for costs, they have applied for attachment of the mortgaged property, that is, of the equity of redemption of the mortgagors in respect of the said property. The appellants objected to the attachment on the ground that it would contravene the provisions of order XXXIV, rule 14, of the Code of Civil Procedure, and that as the mortgagees are in possession under the mortgage, they are not entitled to bring to sale the mortgagors' rights. This objection having been overruled by the court below, this appeal has been preferred, and the same plea has been reiterated in the appeal. In our opinion, the decision of the court below is right. Rule 14 of order XXXIV of the Code of Civil Procedure provides that " where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage." The question is whether the [520] decree in this case is " a decree for the repayment of money in satisfaction of a claim arising under the mortgage." While it is contended on behalf of the appellant that as the decree for costs was passed in a suit brought in connection with the mortgage, and is, therefore, a decree in respect of a claim arising under the mortgage, it is urged, on the other hand, that the claim which the decree-holder seeks to satisfy is not a claim arising under the mortgage,but a claim arising under a decree passed for costs. In our opinion, this latter contention is correct. Rule 14 seems to us to provide for cases in which the decree-holder seeks to satisfy a claim which he could enforce by virtue of his mortgage. This rule, in our opinion, gives effect to the principle of equity refered to by their Lordships of the Privy Council in *Khiarajmal* v. *Daim* (1) in the following terms :— "Their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that the mortgagee cannot, by obtaining a money decree for the mortgage-debt, and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his rights to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage." In the present case the suit which the decree-holders brought was no doubt a suit relating to the mortgage, but the costs awarded were costs which could only be realized by virtue of the decree made by the court and the claim for the costs is not a claim which arose under the mortgage. The case is in some respects similar to that of *Muhammad Abdul Rashid Khan* v. *Dilsukh Rai* (2). The learned counsel for the appellants also urged that under the terms of the mortgage deed the costs in question might be regarded as part of the mortgage money. We have considered the terms of the mortgage, and it is clear that the costs referred to in that document are costs relating to the redemption of prior mortgages or to the obtaining of mutation of names in respect of the

(1) (1904) I. L. R. 32 Cal. 296: 32 I. A. 23.

(2) (1905) I. L. R. 27 All, 517.

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mortgaged property which the mortgagees might incur as against third parties or in making applications themselves for entry of their names. This document does not contemplate costs of the description of costs now sought to be realized. The costs incurred by a mortgagee [521] which might be deemed to be a part of the mortgage money are the costs referred to in rule 10 of order XXXIV, i. e. the costs of a suit for a decree for foreclosure, or sale or redemption. The costs awarded in the present case are not costs of this description, and therefore they could not be deemed to be a part of the mortgage money which the mortgagees were entitled to realize from the mortgaged property.

Whether the mortgagees should be permitted to bid for and purchase at the sale to be held in execution of their decree, is a matter which the court executing the decree should consider in the event of the mortgagees applying for leave to bid, but in our opinion, their prayer for sale of the mortgagor's rights in the mortgaged property has been rightly allowed, and this appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

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35 A. 521 (=11 A. L. J. 812=21 I. C. 460.)

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Piggot.

UDIT TIWARI (*Plaintiff*) *v.* BIHARI PANDE (*Defendant*).*

[21st July, 1913.]

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 199 —*Civil and Revenue Courts —Jurisdiction—Appeal—Question of proprietary right*

The plaintiff sued in the Revenue Court to eject the defendant alleging that the land in suit was his occupancy holding and that the defendant was his sub-tenant. The defendant pleaded that he was a co-sharer in the village and that the land in suit was his *khud-kasht*. *Held* that no question of proprietary title was raised by the pleadings, and that no appeal therefore lay to the District Judge from the order of the Assistant Collector who had decided the case in the first instance. *Dal Chand* v. *Shamla* (1) dissented from.

[Over. 36 All. 183 (F.B.)]

THE facts of this case were as follows :—

The plaintiff alleged that he was occupancy tenant of a certain plot and that the defendant had taken that plot, for purposes of cultivation, as sub-tenant from him. It was admitted by the plaintiff that the defendant was the proprietor of practically the whole village. The plaintiff brought this suit for ejectment in the Revenue Court. The defendant pleaded that he did not take the land as a sub-tenant of the plaintiff, but that he was cultivating it as a proprietor, as his *khud-kasht*. The Assistant [522] Collector held that the defendant, though a proprietor, had taken the land from the plaintiff as sub-tenant and decreed the claim. On the defendant's appeal to the District Judge the lower appellate court, without deciding the preliminary objection raised by the plaintiff that no appeal lay to that court, reversed the decree, holding that the defendant had not taken

* Second Appeal No. 105 of 1913 from a decree of E. E. P. Rose, Additional Judge of Gorakhpur, dated the 20th of September 1912, reversing a decree of Kamta Prasad Assistant Collector, First Class, of Basti, dated the 7th of June, 1912.

(1) (1905) 2 A. L. J. 176.

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the land under a contract from the plaintiff, but that he had forcibly ejected the plaintiff several years ago and that the plaintiff's occupancy right was extinguished. The plaintiff appealed to the High Court.

The appeal first came before TUDBALL, J., who referred the case to a Bench of two Judges.

The case coming on before a Division Bench.

Babu *Piari Lal Banerji*, for the appellant :—

The learned Judge has erred in deciding the appeal before him, without deciding the plaintiff's preliminary objection that no appeal lay. An appeal would lie to him, if a question of proprietary title was in issue before the court of first instance and before him. In this case, no question of proprietary title was ever in issue. The plaintiff claimed no proprietary title himself nor ever denied the defendant's proprietary title. The plaintiff alleged a specific contract of tenancy and that was the only question that arose in the case. If the tenancy was proved, the plaintiff would succeed. If the tenancy was not proved, the defendant's possession would prevail. The defendant was admittedly in possession and his allegation that he was in possession as proprietor was a mere surplusage. It practically amounted simply to a denial of the alleged tenancy and thus the only question in issue was whether the allged contract of tenancy was proved. No appeal, therefore, lay to the District Judge. The case of *Dal Chand* v. *Shamla* (1) was wrongly decided and should not have been followed.

Pandit *Ladli Prasad Zutshi* (with him Pandit *Mohan Lal Nehru*), for the respondent:—

The case reported in 2 A. L. J. 176, is exactly in point and is a Division Bench ruling. The defendant by pleading that he was in possession as proprietor, did raise a question of proprietary title which the Assistant Collector could have referred to a Civil Court for decision under the provisions of section 199 of the [523] Tenancy Act. If the defendant was directed to bring a suit in the Civil Court for declaration of his proprietary right, he could not have been met by the plaintiff with an allegation that there was no need for such a declaration as his proprietary right was not denied. Possession, as proprietor, was denied and that raised a question of proprietary title.

Babu *Piari Lal Banerji*, not heard in reply.

TUDBALL and PIGGOTT, JJ. :—This is a second appeal by the plaintiff, whose suit for recovery of possession was decreed by an Assistant Collector of the Gorakhpur district, but has been dismissed by the District Judge of Gorakhpur on appeal. The question is whether an appeal lay, under the circumstances, to the court of the District Judge. The plaintiff alleged that the land in suit was his occupancy holding and that he had sub-let it to the defendant, whom he now desires to eject by a suit under the provisions of the Agra Tenancy Act for that purpose. The defendant replied that he was a co-sharer in the mahal and held the land in suit as his *khudkasht*. We cannot see that the defendant's title as proprietor was ever denied by the plaintiff. Certainly the latter never claimed to be himself the proprietor of the land in dispute or to have any right in the same, other than the right of an occupancy tenant. Under the circumstances it appears to us impossible to say that a question of proprietary title was raised by the pleadings. We have been referred in argument to the pro-

(1) (1905) 2 A. L. J. 176.

visions of section 199 of the Tenancy Act. According to that section where, in a suit like the present, a question of proprietary title is raised by the defendant, the Revenue Court may either determine the question of title itself or require the defendant to institute a suit in the Civil Court for the determination of the same. If the Assistant Collector had begun by holding that the present was a case to which the provisions of section 199 aforesaid applied, and had required the defendant to institute a suit in the Civil Court, that suit would have been one for a declaration that the defendant was the proprietor, or one of the proprietors, of the land in suit, in the sense of being a co-sharer in the mahal to which this land appertains. Such a suit, so far as we can gather, would have been met by the present plaintiff with a plea that he never had denied, or was disposed to deny, the defendant's proprietary [524] title. There is a ruling of this Court which is in favour of the respondent in this case, namely, *Dal Chand* v. *Shamla* (1). With all respect to the learned Judges who decided that case, it seems to us that they failed to distinguish between the case of pleadings by which a question of proprietary title is raised and that of pleadings which merely raise a question as to the nature of the defendant's possession. In the present case, what the plaintiff had to prove in order to succeed was that he, as occupancy tenant, let the land in suit to the defendant, and even though the latter be a co-sharer in the mahal to which the land appertains or even the sole proprietor of that mahal, there would be nothing illegal in such a contract of tenancy as was alleged by the plaintiff. The point thus raised was one the decision of which is within the province of the Revenue Court, and, as we are unable to hold that any question of proprietary title was raised before the Assistant Collector, was determined by that court or was in issue before the District Judge, we must hold that no appeal lay in this case to the latter court. We, therefore, accept this appeal, set aside the order and decree of the lower appellate court and direct the District Judge of Gorakhpur in lieu thereof, to return the petition of appeal presented to his court for presentation to the proper court. The appellant will get his costs in this Court and in the lower appellate court.

Appeal allowed.

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35 A. 524 (=21 I. C. 462=11 A. L. J. 815).

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Piggott.

MUMTAZ AHMAD AND ANOTHER (*Judgment-debtors*) *v.* SRI RAM (*Decree-holder*) AND BHAWANI SINGH AND OTHERS (*Judgment-debtors*).*

[22nd July, 1913.]

Act No. XVI of 1908 (*Indian Registration Act*), *sections* 17 (*b*), 49—*Document compulsorily registrable—Assignment of decree for sale of immovable property*

Held that a deed of assignment of a final decree for the sale of mortgaged property under order XXXIV, rule 5, of the Code of Civil Procedure, 1908, is not a document which is compulsorily registrable under the provisions of section 17 (*b*) of the Indian Registration Act, 1908. *Gopal Narayan* v. *Trimbak Sadashiv* (2) and *Mutsaddi Lal* v. *Muhammad Hanif* (3) distinguished. *Abdul*

* Second Appeal No. 386 of 1913 from a decree of Muhammad Shafi, Additional Judge of Meerut, dated the 5th of February 1913, confirming a decree of Muhammad Husain, Additional Subordinate Judge of Meerut, dated the 29th of August, 1912.

(1) (1905) 2 A. L. J. 176.
(2) (1876) I. L. R. 1 Bom. 267.
(3) (1912) 10 A. L. J. 167.

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Majid v. *Muhammad Faizullah* (1) and *Baij Nath Lohea* v. *Binoyendra Nath Palit* (2) followed.

[Fol. 30 I. C. 722=22 A. L. J. 928; 47 All. 86.]

[525] The facts of this case were as follows :—

On the 22nd of June, 1910, Bhawani Singh obtained a decree against Mumtaz Ahmad and others for recovery, by sale of the mortgaged property, of Rs. 2,291-8-0, the amount due on the mortgage. On the 21st of October, 1911, he sold the decree to Sri Ram by an unregistered deed, for Rs. 1,500. Sri Ram applied for substitution of his name in place of the decree-holders, and without any objection on the part of the judgment-debtors, his name was brought on the record under order XXI, rule 16. The assignee applied on the 15th of May, 1912, for execution of the decree transferred to him. The judgment-debtors objected on the ground that the sale-deed, being unregistered, was inoperative and the assignee could not execute the decree. The first court overruled the objection and held that the transfer of a mortgage decree need not be registered. On appeal, the District Judge confirmed the order of the first court. The judgment-debtors appealed to the High Court.

Maulvi *Shafi-uz-zaman*, for the appellants :—

The deed of assignment under which the decree was transferred from the original decree-holders to the present respondents was one which conveyed certain interests in immovable property, for it gave to the vendee the right to get the property sold through the intervention of the court. This right is certainly an interest in immovable property within the meaning of section 17, clause (*b*), of the Registration Act, and, as such, the registration of the sale deed was compulsory under the provisions of that section. He relied on *Gopal Narayan* v. *Trimbak Sadashiv* (3), *Mutwaddi Lal* v. *Muhammad Hanif* (4), *Abdul Majid* v. *Muhammad Faizullah* (1), *Ram Ratan Chakerbutty* v. *Johesh Chandra Bhattacharya* (5), *Ramasami Pattar* v. *Chinnan Asari* (6).

Mr. *Nihal Chand* for the respondents, was not called upon.

TUDBALL and PIGGOTT JJ.:—This appeal arises out of execution proceedings. A final decree for sale was obtained under order XXXIV, rule 5, of the Code of Civil Procedure, in respect of certain property. The decree-holder assigned all his rights and interests under the decree to the present respondent by an unregistered deed. The assignee applied to be brought on the record [526] in place of the decree-holder. Notice was issued to the judgement-debtors. After several attempts to serve them personally had failed, substituted service was allowed and an order under order XXI, rule 16, was passed in favour of the assignee. The assignee then applied for execution of the decree. Thereupon the judgement-debtors raised an objection that the deed of sale being unregistered, the assignee had no title and therefore could not execute the decree. The courts below, relying on the decisions in *Abdul Majid* v. *Muhammad Faizullah* (1) and in *Baij Nath Lohea* v. *Binoyendra Nath Palit* (2) dismissed the objections. Hence the present appeal. On behalf of the appellants it is urged that the deed in question transferred to the assignee an interest in immovable property and therefore in view of section 17 (*b*) and section 49, clause (*a*), of the Registration Act, the assignee has

(1) (1890) I. L. R. 13 All 89.
(2) (1901) 6 C. W. N. 5.
(3) (1876) I. L. R. 1 Bom., 267.
(4) (1912) 10 A. L. J. 167.
(5) (1909) 12 C. W. N. 625.
(6) (1909) I. L. R. 24 Mad. 449.

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no interest. Reliance was placed on *Gopal Narayan* v. *Trimbak Sadashiv* (1) and *Mutsaddi Lal* v. *Muhammad Hanif* (2). Of these two, the former decision was passed in 1876, and the judgement gives no reason for the decision. In regard to the latter, it is not in point at all. That case related to the transfer of the rights of the mortgagees under the mortgage-deed by means of an unregistered document. In our opinion, this appeal must fail. In the first place, the proper occasion for the appellants to take this objection was on the application of the assignee for an order under order XXI rule 16. In the next place in view of the decisions in I. L. R., 13 All., p. 89, I. L. R., 23 Cal., p. 450 and 6 C. W. N. p 5, it seems to us that there is no force in this appeal. The latter case is on all fours with the case now before us. A decree not being immovable property, it has been held in the Calcutta cases noted above that the transfer of a decree does not operate to create an interest in immovable property and the deed of transfer is, therefore, not compulsorily registrable. In our opinion, the appeal must fail, and we dismiss it with costs.

Appeal dismissed.

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35 A. 527 (=21 I. C. 449=11 A. L. J. 883.)

[527] APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Piggott.

PEMA (*Defendant*) *v.* JAS KUNWAR (*Plaintiff*).*

[24th June, 1915].

Act (Local) No. III of 1901 (*United Provinces Land Revenue Act*), *section* 107 *and* 111 *—Partition—Joint Hindu family—Hindu widow—Claim for partitoin by widow in possession in lieu of maintenance merely, though recorded* solatti causa, *as a co-sharer.*

Held that the widow of a member of a joint, Hindu family who is in possession of a portion of the family property under a family arrangement, in lieu of maintenance merely, is not a co-sharer and cannot in virtue of such possession enforce a claim for partition of the share of which she is so in possession, even though her name may be recorded *solatti causa* as a co-sharer *Kailashi Kuar* v. *Badri Prasad* (3), *Bhoop Singh* v. *Phool Kower* (4) and *Jhunna Kuar* v. *Chain Sukh* (3) followed. *Bhupal Sing* v. *Mohan Singh* (5) referred to. *Hajibullah* v. *Musammat Kushimba* (6) distinguished.

[Dist : 68 I. C. 989=20 A. L. J. 780.]

THE facts of the case were as follows:—

Mohan Singh, the ancestor of the parties, was the owner of the property in dispute. He died about thirty or thirty-five years ago. He had three sons, Prem Singh, Gaila Singh and Pema. Prem Singh died during the life-time of Mohan Singh, leaving him surviving his widow, the plaintiff; Gaila Singh died shortly after Mohan Singh's death. On the death of Mohan Singh, his property was recorded in the khewat in the names of the aforesaid Gaila, Musammat Jas Kunwar the plaintiff, and Pema the objector. On the strength of the entry of her name in the khewat, the

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* Second Appeal No 164 of 1913 from a decree of L. Johnston, District Judge of Meerut, dated the 4th of October, 1912, confirming a decree of Muhammad Ghaffur Khan, Assistant Collector, First Class of Meerut, dated the 30th of July, 1912..

(1) (1876) I L. R. 1 Bom. 267.
(2) (1912) 10 A. L. J. 167.
(3) S. A. No. 344 of 1913, decided 17th July, 1913.
(4) (1867) N. W. P. H. C. Rep. 368.
(5) (1881) I L. R. 3 All. 400.
(6) (1897) I. L. R. 19 All. 324.
(7) (1906) 3 A. L J. 481.

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plaintiff applied to the Revenue Court for imperfect partition of her share. Pema and the sons and representatives of Gaila, the deceased brother, objected, saying that the name of the plaintiff was entered by way of consolation, that she was allowed to realize the rents and profits of the particular share in lieu of maintenance allowance, and that she could not have the share partitioned. The Revenue Court disallowed the objections of the defendants, but held that the property in dispute was given to the plaintiff for her support. On appeal, the District Judge confirmed the decree of the Revenue Court on the ground that the plaintiff, being a recorded co-sharer, [528] could claim partition. But he also came to the conclusion that the plaintiff was allowed her husband's share, on the death of Mohan Singh, in lieu of maintenance and by way of consolation. The defendant appealed to the High Court.

Babu *Sarat Chandra Chaudhri* (for Dr. *Satish Chandra Banerji*), for the appellant:—

The finding of the lower appellate court is that the respondent is in possession in lieu of maintenance and by way of consolation. It is submitted that such possession is not enough to entitle her to claim partition under section 107 of the Land Revenue Act. She must not only be 'recorded' but she must be a co-sharer. By the term 'co-sharer' the Legislature intends a 'person' who has absolute control over the share in his or her possession. The respondent in this case is in possession on sufferance, the true owner being the appellant. She is not a co-sharer, *Bhoop Singh* v. *Phool Kower* (1). The applicant's position differs from that of a Hindu widow in possession of her husband's separate share. Such a widow can claim partition because she represents the estate fully and whatever may be the effect of an alienation made by her after her death, there is none to dispute it as long as she is alive.

[Munshi *Parmeshwar Dayal* for the respondent, referred to *Jhunna Kuar* v. *Chain Sukh* (2).]

It is also true that the applicant could maintain a suit for the profits of the share recorded in her name, but that is because of the presumption, which is irrebuttable, created by the provisions of section 201 of the Tenancy Act No such presumption can be imported into the Land Revenue Act. In fact under section 111, the courts are not precluded from inquiring into the question of proprietary title. If she has difficulty in collecting the profits, she may resort to the Civil Court and get her maintenance allowance fixed and declared a charge upon the estate. But she cannot by her act bring about change in the character of the family property. A application for partition under the Land Revenue Act, when objected to, becomes a suit in the Civil Court, and it has been held that a widow in possession in lieu of maintenance cannot sue for partition; *Kathaperumal* v. *Venkabai* (3), *Sundar* v. *Parbat* (4).

[529] In one case also the Privy Council allowed widows, who were jointly in possession, to enter into a partition, but that case was decided upon the principle of the well-known case of *Asher* v. *Whitlock* (5), that possessory title was good as against the whole world except the true owner. Here the true owner has appeared to oppose the application, and as against him the prayer for partition cannot be allowed. There are a series of rulings which go to show that a Hindu widow in the position

(1) (1867) N. W. P. H. C. Rep 368.
(2) (1881) I. L. R. 3 All. 400.
(3) (1880) I. L. R. 2 Mad. 191.
(4) (1889) I. L. R. 12 All. 51.
(5) (1865) L. R. 1 Q. B. 1.

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of the respondent is not a co-sharer to as to put forward a claim for pre-emption; *Bhupal Singh* v. *Mohan Singh* (1), *Phopi Ram* v. *Rukmin Kuar* (2).

It is therefore submitted that the respondent is out of court.

Munshi *Parmeshwar Dayal* (for the Hon'ble Dr. *Tej Bahadur Sapru*), for the respondent: —

The question which has to be decided in this case is whether a Hindu widow who is placed in possession of her husband's share, in lieu of maintenance, is entitled to claim partition under the Land Revenue Act. A partition under that Act is different in effect from a partition by a Civil Court of joint property, under the Hindu Law. The former does not necessarily break the joint character of the family, whereas the only object of the latter is the separation of the family property and dissolution of the joint family. The members of the family would be as much entitled to the profits after a Revenue Court partition as they were before the partition. The only requisite under section 107 of the Land Revenue Act is that the person applying for partition must be a recorded co-sharer. The widow in the present case having been recorded as a co-sharer was entitled to claim partition. Her position, although she was in possession in lieu of maintenance, is analogous to that of a Hindu widow inheriting her husband's separate property under the Hindu Law. The only difference is that the former gets the property by virtue of some grant or family arrangement, whereas the latter gets the property by right of inheritance. In both cases the interest which vests in the widow is for her life. She cannot be ousted during her life-time nor can she be compelled to accept maintenance in any other form, if she is already in possession of her husband's share in lieu of her maintenance; *Yellawa* v. *Bhimangada* (3); Mayne's [530] Hindu Law, 7th Edition, paragraphs 395, 396 and 397. The law applicable to a Hindu widow entitling her to claim partition under the Revenue Law would be quite applicable to a case like the present. This case approaches very nearly the case reported in I. L. R. 3 All. 400, which was a case of a Hindu widow claiming partition under the Revenue Act. The case of *Bhoop Singh* v. *Phool Kower* (4) relied on by the other side, is not to the point, inasmuch as the facts of the case, as set forth in the judgment; do not disclose whether the woman claiming partition in that case, was a "recorded co-sharer." Moreover the law applicable to partition there was materially different from the present law. In Act XIX of 1863, section 3, the words used were "recorded proprietor," and not "recorded co-sharer." The latter terms were brought in for the first time in Act XIX of 1873. A proprietor may be a co-sharer but all co-sharers are not proprietors. Besides, a Hindu widow who is in possession of property in lieu of maintenance, holds a charge over the property in her possession and the charge, will hold good for her life-time; Mayne's Hindu Law, 7th Edition, paragraph 460 In this aspect the present case is governed by the case of *Habibullah* v. *Musammat Kushimba* (5).

Babu *Sarat Chandar Chaudhri* in reply :—

The case of *Habibullah* v. *Musammat Kushimba* was one of a Muhammadan widow in possession of her husband's property in lieu of her dower. Her right was a much higher right than that of a Hindu widow in possession of property in lieu of maintenance. Moreover in Act XIX of

(1) (1897) I. L. R. 19 All. 324.
(2) (1890) Weekly Notes, 1895, 84.
(3) (1893) I. L. R. 18 Bom. 452
(4) (1867) N.-W. P. H. C. Rep. 368.
(5) (1906) 3 A. L. J. 481.

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1863, section 3, the word 'proprietor' was used where the word 'co-sharer' now occurs, and, there being no substantial change in the law on that point, it may be taken that the word 'proprietor' was used synonymously with the word "co-sharer."

RYVES and PIGGOTT, JJ.:—The facts out of which this appeal arises are as follows:—Mohan Singh was the owner of some zamindari property. He had three sons, Prem Singh, Gaila and Pema. Prem Singh died in the life-time of his father, leaving surviving him a widow, Musammat Jas Kunwar (plaintiff respondent). After the death of Mohan Singh, his property was recorded in the [531] names of Gaila, Musammat JasKunwar and Pema. Subsequently Gaila died and the names of his widow and sons were recorded in the khewat instead of his own name. On the 13th of November, 1911, Musammat Jas Kunwar instituted a suit in the Revenue Court for imperfect partition in respect of a one-third share of the property which had originally belonged to Mohan Singh, stating in her plaint that she was "the owner, zamindar and co-sharer of one-third out of one-fourth share in the holdings bearing khewat Nos. 22, 23 and 33 in mauza Nehru," and was in possession thereof. The reason for seeking partition, she alleged, was because there were constant disputes between the parties owing to the property being joint. Pema, defendant appellant, objected under section 111 of the Revenue Act, on the ground that Musammat Jas Kunwar's name had been entered in the Revenue papers merely for her consolation, and that she was not in possession as a co-sharer, but had been receiving maintenance only, and that was all that she was entitled to.

The first court framed, among others, two issues, as to the entry of Musammat Jas Kunwar's name in the khewat and as to her possession. That court decided both these issues in the plaintiff's favour and disallowed Pema's objection. On appeal the learned District Judge found as follows:—

"It appears that Musammat Jas Kunwar has been in possession of her husband's share, and I find accordingly. As her husband predeceased her father-in-law, it appears that she was allowed her husband's share on her father-in-law's death, in lieu of maintenance and by way of consolation and she was recorded at Mohan Singh's death as a co-sharer. She is entitled then to partition of the share recorded in her name. It is clear that Musammat Jas Kunwar has not absolute ownership." He dismissed the appeal.

It has been contended before us that, on the facts found, Musammat Jas Kunwar is not entitled to partition, because she cannot be said to be a co-sharer, and the mere fact that she is recorded in the khewat as such, does not make her a co-sharer. It is argued that she has not even the limited estate of a Hindu widow in possession of her deceased husband's share. As her husband died in the life-time of her father-in-law, the utmost that she was entitled to, [532] was maintenance, and the findings of the court below amount to nothing more than this, that the family, instead of paying her a certain sum annually, put her in possession of a share of the family property in lieu of maintenance.

No doubt her brothers-in-law, the real co-sharers of the property, might have agreed to give her an absolute title to the share which would have belonged to her husband, if he had been living, or any other share, but the finding of the lower appellate court that she has not an absolute ownerships, shows that this was not done.

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In our opinion this contention is correct. Under section 107 of the Revenue Act, a recorded co-sharer of a mahal may apply for partition to the Revenue court. On such application being properly made, the Collector is required to issue a proclamation calling on the other recorded co-shares in the mahal to appear and state their objection, if any, to the partition. If objection is made by a recorded co-sharer the court may: under section 111, if the objection involves a question of proprietary title which has not already been determined by a court of competent jurisdiction, inquire into the merits of the objection. This shows that the mere fact that the applicant for partition is recorded as a co-sharer, and has been in possession of his share, does not entitle him to obtain partition. If a person, although recorded as a co-sharer and in possession, is proved not to be in fact a co-sharer, the court cannot make a partition in his favour. This view was adopted as long ago as 1867 in the case of *Bhoop Singh* v. *Phool Kower* (1). There it was held that the proprietary right to a share in an undivided estate, which includes and carries with it a right to claim and enforce a partition of that share, must be a right of absolute and unlimited nature, and does not belong to a Hindu widow who has been placed in possession of her deceased husband's share for her maintenance. Consequently where the widow is not an absolute proprietor, but simply an assignee of the profits for her maintenance, she cannot claim partition of the share so assigned.

Act No. XIX of 1863 was in force when that case was decided. We have examined its provisions and find that they are substantially the same as in the present Revenue Act; only there the term "proprietor" is used instead of "co-sharer." But in our opinion, [533] more especially having regard to section 111 of the present Act, we think the two words are synonymous. That decision was considered in *Jhunna Kuar* v. *Chain Sukh* (2), where it was affirmed, although a distinction was drawn between a widow who was not an absolute proprietor but simply an assignee of the profits for her maintenance, and a childless Hindu widow who had succeeded to her deceased husband's share in a mahal, such share having been his separate property, and was recorded as a co-sharer in the mahal.

On behalf of the respondent, we were pressed with the decision in *Habibulla* v. *Musammat Kushimba* (3). That case, in our opinion, has no application here. There a Muhammadan widow in possession of her deceased husband's property in lieu of her dower, and who was recorded as a co-sharer, sought partition. An objection was raised by one Habibulla, who was not himself a recorded co-sharer, on the ground that the widow's possession was analogous to that of a mortgagee, and that therefore under the proviso to section 107 she was not entitled to partition. On appeal this Court only decided two points; and that case is therefore only an authority for what it actually decided. It held (1) that Habibulla not being a recorded co-sharer, could not rise objectin under section 111, and (2) that the widow was not a mortgagee within the meaning of section 107. The very point we have to decide has come up for determination before another Bench of this Court since the arguments before us were concluded in *Musammat Kailashi Kunwar* v. *Badri Prasad* [S. A. No. 344 of 1913, decided on the 17th of July, 1913, by the learned Chief

(1) (1867) N. W. P. H. C. R. p. 368.
(2) (1881) I. L. R. 3 All. 400.
(3) (1906) 3 A. L. J. 484.

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Justice and Banerji, J.]. The facts of that case are on all fours with the case before us and we are fortified in our opinion by that decision.

In *Bhupal Singh* v. *Mohan Singh* (1) this Court, relying on two previous decisions of *Phopi Ram* v. *Rukmin Kuar* (2) and *Imam-ud-din* v. *Surjaitn* (3),has held that a Hindu widow in possession in lieu of maintenance, and recorded as a "co-sharer," was not entitled to sue for preemption as a "co-sharer" in the mahal.

The result is we allow the appeal, and, setting aside the decrees of the courts below, dismiss the plaintiff's suit with costs in all courts.

Appeal allowed.

35 A. 534 (=11 A. L. J. 829=21 I. C. 253).

[534] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.

BALWANT SINGH AND ANOTHER (*Plaintiffs*) *v.* GAYAN SINGH AND OTHERS (*Defendants*).*

[1st August, 1913].

Mortgage—Interest—Construction of document—Mortgage by conditional sale with no provision for post diem *interest*—Post diem *interest not allowed.*

A mortgage executed in 1869 provided for the payment of the sum of Rs. 300 with interest at Rs. 1-8 per mensem in one lump sum upon a certain specified date four years from the date of the mortgage. It further provided that, if the money was not paid upon that date, the property mortgaged should become the absolute property of the mortgagee. There was no stipulation of any kind as to the payment of interest after the date fixed.

Held that the mortgagee was not entitled to *post diem* interest. *Mathura Das* v. *Raja Narindar Bahadur* (4) distinguished. *Gudri Koer* v. *Bhubaneswari Coomar Singh* (5) and *Moti Singh* v. *Ramohari Singh* (6) followed.

[Dist. 24 I. C. 674; Ref. 63 I. C. 533; 76 I. C. 1053 ; 79 I. C. 69].

THE facts of this case were as follows :—

Dharam Singh and Sundar Singh, the predecessors in title of defendants, executed a mortgage by conditional sale in favour of Towri Singh, the ancestor of the plaintiffs, on the 9th of March, 1869. The mortgage purported to have been executed to pay off a prior mortgage of the 14th of January, 1864, in favour of one Pem Singh. The defendants pleaded payment and absence of legal necessity to make the mortgage, but both the pleas were decided against them. The Subordinate Judge decreed the suit, giving six months' time to the defendants to redeem. Interest was to be calculated up to six months from the date of decree. The District Judge, however, modified the decree only allowing interest for four years, from the date, of the bond.

The terms of the bond were as below :—

"In order to pay off a previous mortgage deed I have borrowed Rs. 300 from the mortgagee and hypothecated the share of which I am the owner as security. I will repay and liquidate the loan with interest at 1-8 per mensem in one lump sum within four years. If I fail to do this, after the expiration of the appointed period, the hypothecated property may be foreclosed and sold outright."

* Second Appeal No. 174 of 1913 from a decree of E C. Allen District Judge of Mainpuri, dated the 14th of August, 1912, modifying a decree of Pratap Singh. Additional Subordinate Judge of Mainpuri, dated the 20th of January, 1912.

(1) (1897) I. L. R. 19 All 324.
(2) Weekly Notes, 1895, p. 84.
(3) Weekly Notes, 1895, p. 85.
(4) (1896) I. L R 19 All 39.
(5) (1891) I. L.R. 19 Cal. 19.
(6) (1897) I. L. R. 24 Cal. 699.

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The learned Judge held that the intention of the parties was that no interest was to be paid after four years from the date of the bond. The plaintiffs appealed to the High Court.

[535] *Babu Sital Prasad Ghose*, for the appellant:—

The relation of mortgagor and mortgagee subsists so long as the mortgage is not foreclosed, and so long as that relation subsists interest is payable. The interest is a charge upon the property. In all cases of redemption interest runs up to the date of payment and in cases of foreclosure up to the date the property is foreclosed, *Mathura Das* v. *Raja Narindar Bahadur* (1), *Gudri Koer* v. *Bhubaneswari Coomar Singh* (2). The case of *Bikramjit Tewari* v. *Durga Dyal Tewari* (3) is against me, but that does not lay down the correct law. In fact a subsequent case, *Moti Singh* v. *Ramohari Singh* (4), does not follow that case. Even though the courts are not bound to allow the stipulated rate of interest, they have inherent power to allow interest under the Interest Act. In this case such a power should be exercised. Order XXXIV, rule 2, of the Code of Civil Procedure also contemplates that interest should be allowed up to the date of redemption.

The Hon'ble Dr. *Sundar Lal* (with him The Hon'ble Mr. *Abdul Raoof*), for the respondents:—

The question is whether interest is payable on this mortgage. The question of intention is material. The intention was that the property was to be absolutely conveyed if principal and interest was not paid by the end of four years. This is no contract for payment of any interest after four years, at the end of which period the property was to become the property of the mortgagee and the debt wiped off. The contract of mortgage contemplated that the debt will be extinguished either by payment or by transfer of property in lieu thereof, at the end of the term. The payment of interest *post diem* was not contemplated. The mortgage in question is the creation of a contract and in the absence of a stipulation in the mortgage the interest *post diem* (even if it were payable by way of compensation or under the provisions of Act XXXII of 1839 (Interest Act), could not be made a charge upon the property. There is no statutory provision creating such a charge for any interest payable as compensation.

RICHARDS, C.J. and PIGGOTT, J:—This appeal arises out of a suit for foreclosure. The mortgage is a very old one, being dated the 9th of March, 1869. The mortgage provided for the payment [536] of the sum of Rs. 300 with interest at 1-8 per cent. per mensem, in one lump sum upon a certain specified date, four years from the date of the mortgage. It then provided that if the money was not paid on that date the property should be the absolute property of the mortgagee. There was no stipulation of any kind for the payment of interest after the date fixed; and the mortgage, as mentioned above, was made before the passing of the Transfer of Property Act. Numerous defences were raised in the courts below.

The court of first instance gave a decree for foreclosure ascertaining the interest at the sum of Rs. 3,178-4-7 together with the Rs, 300 for principal, and provided that if payment was not made on the 20th day of July, 1912, the defendants should be absolutely debarred from all right to redeem the mortgaged property.

(1) (1896) I. L. R. 19 All. 39.
(2) (1891) I. L. R. 19 Cal. 19.
(3) (1893) I. L. R. 21 Cal. 274.
(4) (1897) I. L. R. 24 Cal. 699.

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The lower appellate court modified the decree of the court below to this extent that it ascertained the amount due as being Rs. 300 principal together with interest at 1-8 per cent. per mensem for four years, that is to say, Rs. 300 for principal, and Rs. 216 for interest making a total of Rs. 516. Six months were allowed for payment, during which period of six months interest at the rate of 6 per cent. per annum should run.

The plaintiffs come here in second appeal contending that the decree of the court of first instance was correct and that the interest should have been allowed at the contractual rate during the whole period up to the time fixed for payment. In the course of the argument the learned vakil on behalf of the appellants contended that, even if he was not allowed the contractual rate of interest he should be allowed some rate of interest under the provisions of the Interest Act.

The main proposition of the appellants is that in all cases of mortgage by conditional sale, interest at the contractual rate runs up to the time fixed for payment and that this is the necessary consequence of the relationship of mortgagor and mortgagee whether the payment of interest is or is not provided for by the deed. The question is by no means free from difficulty. In the case of *Gudri Koer* v. *Bhubaneswari Coomar Singh* (1) it was held, under [537] circumstances which we cannot distinguish from the present, that *post diem* interest was not recoverable. This case was referred to and approved by the majority of the Court in the Full Bench ruling of *Moti Singh* v. *Ramohari Singh* (2). The question of *post diem* interest came before their Lordships of the Privy Council in the case of *Mathura Das* v. *Raja Narindar Bahadur* (3). In that case (which was one of a simple mortgage) this High Court had refused to allow *post diem* interest. This decision was overruled by their Lordships of the Privy Council: but a perusal of the judgment shows that their Lordships based their judgment on the particular terms of the mortgage deed and in particular upon a covenant in that deed which provided that the mortgagor would not transfer the mortgaged property until the full principal and interest had been paid. The stipulations in that deed upon which their Lordships relied are entirely absent from the mortgage in the present case. Under these circumstances, we see no sufficient reason to interfere with the decision of the court below.

With regard to the point that interest should be allowed under the Interest Act, it seems extremely doubtful, having regard to the time which has elapsed since the deed was entered into, whether any interest could be reasonable under that Act, but in any event we do not think that the sum which could be awarded under that Act would be a charge on the property. In the present case, the duty of the court is to ascertain what sum is now charged on the property for principal and interest.

Under these circumstances, we think that the decision of the court below was correct, and we accordingly dismiss the appeal with costs. The time for payment is enlarged so as to run for four months from the date of this decree. Simple interest at 6 per cent. per annum will continue to run as decreed by the court below. The decree will not issue until the appellant or respondent has made good the deficiency.

Appeal dismissed.

(1) (1891) I. L. R. 19 Cal. 19.
(2) (1897) I. L. R. 24 Cal. 699.
(3) (1896) I. L. R. 19 All. 39.

35 A. 538 (=21 I. C. 915=11 A. L. J. 924.)

[538] APPELLATE CIVIL.

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APPELLATE CIVIL.

35 A. 538=21 I. C. 915=11 A. L. J. 924.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

MAHENDRA GOPAL MUKERJI (*Applicant*) *v.* LACHMAN PRASAD AND ANOTHER (*Opposite parties*).*

[19th May, 1913.]

Company—Winding up—Shares applied for subject to a condition, and partly paid for—Condition not fulfilled—Resolution of company to refund part-payment—Position of applicant as regards winding up proceedings.

A company started in Meerut in 1904, with objects of a very general nature, proposed in 1906 to erect a mill at Fyzabad, and accordingly issued a prospectus and invited the public to subscribe the necessary capital. On the faith of this prospectus one M. applied for shares, but added to his application a condition to the following effect:—"These shares are only subscribed on the condition that any mill is started in the suburbs of Fyzabad." The company, however, found that they could not raise the necessary funds to start a mill at Fyzabad, and therefore passed a resolution that the money already subscribed for that purpose should be refunded. But before this was done the company went into liquidation.

Held that M. was in the circumstances not a member of the company, but a creditor and entitled to get back what he had already paid.

THE facts of this case were as follows :—

A company was started in Meerut in 1904, which was called the Ganga General Mills Company, Limited. Its object apparently was to carry on business of any and every description. Apparently in 1906 this company considered the advisability of starting a branch mill at Fyzabad or its suburbs. It accordingly issued a prospectus and invited the public to subscribe the necessary capital. The present applicant put in an application in the ordinary form in which the following condition was entered :—" These shares are subscribed only on condition that any mill is started in the suburbs of Fyzabad." The application was entertained by the Directors and shares were allotted, but no mill was started at Fyzabad. Subsequently, on the 27th of September, 1909, a resolution was passed by the company that " as there was no prospect of starting a branch factory at Fyzabad, the conditional share-holders may be paid." After this the company failed and went into liquidation. The present appellant's name was on the register of members, and he was called upon to pay the balance due on the shares. The court of first instance held that he was a member of the company and therefore must pay the balance due from him. The applicant thereupon appealed to the High Court.

[539] Dr. *Surendra Nath Sen*, for the appellant.

Mr. *Nihal Chand* and the Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—These four appeals are all connected and are governed by this judgment. The facts are very briefly as follows:—A company was started in Meerut in 1904, which was called the Ganga General Mills Company, Limited. Its object apparently was to carry on business of any and every description that can be done under the sun. Apparently in 1906 this company considered the advisablity of starting a branch mill at Fyzabad or its suburbs. It accordingly issued a

* First Appeal No. 17 of 1913, from an order of L. Johnston, District Judge of Meerut, dated the 11th of October, 1912.

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APPELLATE CIVIL.

35 A. 538=
21 I. C. 915
=11 A. L. J.
924.

prospectus and invited the public to subscribe the necessary capital. The present appellant put in an application in the ordinary form in which the following condition was entered:—"These shares are subscribed only on condition that any mill is started in the suburbs of Fyzabad." The application was entertained by the Directors and shares were allotted, but no mill was started at Fyzabad. Subsequently on the 27th of September, 1909, a resolution was passed by the company that "as there was no prospect of starting a branch factory at Fyzabad, the conditional share-holders may be paid." In other words, the company, finding that it could not raise sufficient funds to carry on the business of the company at Fyzabad, made up its mind to take the only course that it could honestly take, i.e., to refund the sum it had already taken from the applicant. After this the company failed and went into liquidation. The present appellant's name was on the register of members and he was called upon to pay the balance due on the shares. The court below has held that he is a member of the company and therefore must pay the balance due from him. Hence the appeal. A preliminary objection is taken that the notice required by section 169 of the Companies Act, has not been given within the time prescribed by law, and the time has not been extended. On it being pointed out that the learned Judge of this Court before whom the appeal was presented extended the time for service of notice, it was urged that it was an *ex parte* order and the present case was not a fit one for the granting of such an extension. An affidavit was filed by the appellant to the effect that he had been misled by the legal advice given to him and hence the delay in [540] making the appeal and application. We do not deem it necessary to go in detail into this question. The circumstances are peculiar, and in our opinion in such circumstances extension of time ought to be granted and has properly been granted.

In regard to the merits of the case the decision depends upon the question as to whether the condition on which the present appellant applied for shares was a condition precedent to his becoming a share-holder in the company. We have little hesitation, looking to the facts of the case and the subsequent conduct of the company itself, that it was clearly understood by the present appellant and the company that it was a condition precedent that a branch mill should be started at Fyzabad or its suburbs. If it had been otherwise, there would have been no necessity for the company to pass the resolution of the 27th of September, 1909. It appears that the company wished to raise funds locally and the persons living in Fyzabad were willing to subscribe provided that a mill was started there. The learned advocate for the respondents admits that if the condition is a condition precedent, as stated above, the appellant is entitled to succeed. In view of the facts stated above we have no hesitation in saying that the condition was a condition precedent. The appellant is not a member of the company, but apparently is a creditor and entitled to get back what he has already paid. We allow the appeal and set aside the order of the court below. His name will be removed from the list of contributories. The appellant will get his costs in both courts.

Appeal allowed.

35 All. 541 (=11 A. L. J. 746=21 I. C. 654.)

[541] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Sir Pramada Charan Banerji.

RANDHIR SINGH (*Plaintiff*) v. BHAGWAN DAS (*Defendant*).*

[5th June, 1913.]

1913 JUNE 5.

APPELLATE CIVIL.

35 A. 541=11 A. L. J. 746 21 I. C. 654.

Act (Local) No. III of 1901 (*United Provinces Land Revenue Act*), *section* 111—*Plaintiff referred to Civil Court—Suit filed within time but subsequently withdrawn—Second suit filed after prescribed period.*

Where a Revenue Court, acting under section 111 of the United Provinces Land Revenue Act, 1901, required a party to the case before it to institute a suit in the Civil Court within three months, and the plaintiff did so, but for some technical reason had to withdraw it with permission to bring a fresh suit, which was in fact filed without delay, but after the three months had expired: *held* that the second suit must be considered to be a continuation of the first suit, and it could not, therefore, be held that the plaintiff had not complied with the order of the Revenue Court.

[Fol: 25 I. C. 188=12 A. L. J. 989; Dist; 23 A. L J. 529;]

THE facts of this case, so far as they are material for the purposes of this report, were as follows :—

The plaintiff brought a suit in the Civil Court for a declaration of his title to certain immovable property in pursuance of an order of a Revenue Court under section 111 of Act No. III of 1901. The suit was instituted within the three months allowed, but was withdrawn on account of a technical defect, with liberty to bring a fresh suit. The present suit, which has given rise to this appeal, was accordingly filed, but beyond the three months allowed by the Revenue Court. The court below decreed the suit in part. Both parties appealed, the plaintiff contending that the whole suit should have been decreed, and the defendant that the entire suit should have been dismissed.

Munshi *Gulzari Lal*, for defendant respondent, contended that the suit, not having been filed within three months, was barred by time. He relied on *Banwari Lal* v. *Gopi* (1). The mere facts that originally the suit was instituted within three months did not help the plaintiff, inasmuch as the present suit was not filed within three months. The permission granted by the court to file a fresh suit was subject to the time limitation for the filing of the suit.

Babu *Piari Lal Banerji* (for Babu *Durga Charan Banerji*), for the plaintiff appellant, urged that the present suit should be [542] deemed to be a suit in continuation of the first suit, which was filed within three months, and the present suit was filed on the very next day after the first suit was withdrawn.

Munshi *Gulzari Lal* was heard in reply on other points arising in the cross appeal filed by the defendants appellants.

RICHARDS, C. J. and BANERJI, J.—This and the connected appeal No. 765 of 1912 arise out of the same suit. The suit was brought by the plaintiff for a declaration of his title in respect of a three anna two pie odd share in mauza Manjaba Hardaspur. It appears that on the 10th of

* Second Appeal No. 663 of 1912 from a decree of E. E P. Rose, Additional Judge of Gorakpur, dated the 22nd of February, 1912, modifying a decree of Kesri Narain Chand, Munsif of Basti, dated the 20th of September, 1911.

(1) (1907) 4 A. L. J. 713.

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APPELLATE CIVIL.

35 A. 541=11 A. L. J. 746=21 I. C. 654.

June, 1901, Bhagwan Das, the respondent in this appeal and the appellant in the connected appeal, and five other persons, who were defendants to the suit, sold a six anna eight pie share in the village in question to the predecessor in title of the plaintiff. At that time, however, mutation could only be obtained in respect of a three anna five pie odd share. In the year 1908, Bhagwan Das applied for partition, alleging himself to be entitled to certain shares in the village. The plaintiff contested the share claimed by Bhagwan Das. Thereupon the Revenue Court directed the plaintiff in the present suit to institute proceedings in the Civil Court, within three months, to establish his title. A suit was instituted within the prescribed period, but for some technical reason the suit had to be withdrawn with leave to bring a fresh suit. The court of first instance decreed the plaintiff's claim to the extent of a two anna six pie odd share against Bhagwan Das and his co-defendant of the first party. The defendant, Bhagwan Das, appealed to the lower appeliate court. The lower appellate court has given a judgement which we feel great difficulty in understanding. In the first place, the learned Judge seems to think that he was entitled to apportion the liability of Bhagwan Das and his co-vendors. We think that this was quite incorrect. All the vendors were jointly liable to make good the property which they purported to sell out of any property which they had at the time of the sale or which they subsequently acquired. If we were to accept the finding of the learned Additional Judge that Bhagwan Das acquired an eight pie share after the date of the purchase, it might possibly be a reason for giving the plaintiff a decree to the full extent claimed. However, the plaintiff did not [543] appeal to the court below and does not appeal to this Court on this point.

A technical objection has been raised by Bhagwan Das in this appeal. He contends that, although a suit was instituted within the three months prescribed by the order of the Revenue Court under section 111 of the Land Revenue Act, that suit was withdrawn and the present suit was not instituted within the three months prescribed. We think that there is no force in this objection. In the first place, according to the record as it stood while the case was in the court below, it did not appear that the proceedings in the Revenue Court were in existence. As a matter of fact, at one time at least they had been struck off. It is alleged that these proceedings have been restored. Assuming this to be so, the present suit was practically a continuance of the suit which was instituted within time. In any event, the plaintiff did comply with the order of the court and the terms of the section, because he did institute a suit within the three months. We think this technical ground fails. We allow this appeal, set aside the decree of the court below and restore the decree of the court of first instance with costs.

Appeal allowed.

1898

35 A. 543 (=21 I. C. 734=11 A. L. J. 916).

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APPELLATE CIVIL.

35 A. 543=21 I. C. 734=11 A. L. J. 916.

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Piggott.

SUNDAR LAL AND OTHERS (*Defendants*) *v.* BRIJ LAL (*Plaintiff*) AND BHAIRON PRASAD, AND OTHERS (*Defendants*).*

[16th July, 1913.]

Joint Hindu family—Mortgage—Mortgage by two brothers of undivided shares, each assenting to the other's mortgage—Partition—Entire mortgaged property falling to the share of one brother—Effect of partition on rights of mortgagee.

Two brothers constituting a joint Hindu family jointly mortgaged in 1879 a ten biswa share in village Chauwar. In 1881, in substitution for this mortgage, each brother mortgaged to the same mortgagee a five biswa undivided share in Chauwar, and each brother also signed the mortgage executed by the other. In 1888 the family property was partitioned and the whole ten biswas of Chauwar fell to the share of one brother.

Held on suit by the son of the mortgagee for sale that the plaintiff was entitled to bring to sale a five biswa share in Chauwar under the mortgage executed by the brother who had lost possession of the village and not merely [544] to have recourse against such portion of the family property as he had taken in exchange therefor. *Byjnath Lall* v. *Ramoodeen Chowdry* (1) distinguished.

THE facts of this case were as follows:—

Bhagirath and Baldeo, two brothers, formed a joint Hindu family, and owned, amongst other zamindari property, a ten biswa share in mauza Chauwar. They jointly executed a mortgage in favour of the plaintiff's father, on the 8th of November, 1879, of this ten biswa share in Chauwar. On the 16th of November, 1881, the two brothers executed two separate mortgages, in favour of the same mortgagee, in each of which each brother hypothecated a five biswa share in Chauwar for half the amount then due under the original mortgage deed of 1879. These two mortgage bonds were signed by both brothers. On the 16th of October, 1888, the joint family property was partitioned privately and the whole ten biswa share in Chauwar was allotted to Baldeo's share, and it became his separate property. Baldeo's mortgage was subsequently discharged, under circumstances related later on. The plaintiff, who was the son of the original mortgagee, sued to recover Rs. 4,326-4-0 on foot of the mortgage executed by Bhagirath on the 16th of November, 1881, and prayed that, in default of payment, the mortgaged property, namely, a five biswa share of Chauwar, be put up for sale, or if the court considered that on account of the partition of the 16th of October, 1888, the plaintiff was not entitled to have the mortgaged property in Chauwar sold, then the other property allotted to Bhagirath in lieu of his share in Chauwar might be sold by auction. The representatives of the original mortgagors, who, however, had no longer any interest in the property, and their various transferees were made defendants. Both the lower courts decreed the suit, and directed that in default of payment of the mortgage money, a five biswa share in Chauwar be sold. The present appeal was preferred by some of the defendants to the suit, who were in possession of the property both as purchasers of a portion thereof and as mortgagees under a possessory mortgage of the whole ten biswas executed by Baldeo after the partition of the family property.

* Second Appeal No. 1340 of 1912 from a decree of H. Nelson Wright, District Judge of Bareilly, dated the 31st of July, 1912, confirming a decree of Baijnath Das, officiating Subordinate Judge of Bareilly, dated the 8th of May, 1911.

(1) (1874) L. R. 1 I. A. 106.

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APPELLATE CIVIL.

35 A. 543=21 I. C. 734=11 A. L. J. 916.

Mr. *M. L. Agarwala*, Dr. *Satish Chandra Banerji* and Munshi *Gobind Prasad*, for the appellants.

[545] Mr. *B. E. O'Conor*, The Hon'ble Dr. *Sundar Lal*, The Hon'ble Dr. *Tej Bahadur Sapru* and *Babu Lalit Mohan Banerji*, for the respondents.

RYVES, J.—This appeal arises out of the following facts:—Bhagirath and Baldeo, two brothers, formed a joint Hindu family, and owned, amongst other zamindari property, a ten biswa share in mauza Chauwar. They jointly executed a mortgage in favour of the plaintiff's father, on the 8th of November, 1879, of this ten biswa share in Chauwar.

On the 16th of November, 1881, the two brothers executed two separate mortgages, in favour of the same mortgagee, in each of which each brother hypothecated a five biswa share in Chauwar for half the amount then due under the original mortgage deed of 1879. These two mortgage bonds were signed by both brothers.

On the 16 of October, 1888, the joint family property was partitioned privately and the whole ten biswa share in Chauwar was allotted to Baldeo's share and it became his separate property. Baldeo's mortgage was subsquently discharged, under circumstances related later on.

The plaintiffs, who is the son of the original mortgagee, has now sued to recover Rs. 4,326-4-0 on foot of the mortgage executed by Bhagirath on the 16th of November, 1881, and prayed that, in default of payment, the mortgaged property, namely, a five biswa share of Chauwar be put for sale, or if the court considered that on account of the partition of the 16th of October, 1888, the plaintiff was not entitled to have the mortgaged property in Chauwar sold, then the other property allotted to Bhagirath in lieu of his share in Chauwar might be sold by auction. The representatives of the original mortgagors, who, however, have no longer any interest in the property, and their various transferees were made defendants.

Both the lower courts decreed the suit, and directed that in default of payment of the mortgage money, a five biswa share in Chauwar be sold. The present appellants are in possession of this property. They acquired their title under the following circumstances:—

On the 11th November, 1892, they took a prossessory mortgage from Baldeo of his ten biswa share in Chauwar of which he [546] was then the sole owner. I may observe that the mortgage deed, which is on the record, shows that although Baldeo's own mortgage was mentioned, and a sum of money with which it was discharged, was left in the hands of the mortgagee, it was not stated in the deed that there were no other incumbrances on the property. On the contrary there was a covenant in the deed, that if any other incumbrances should be found to exist, then Baldeo would be responsible for their discharge.

Later on a four biswa share of this property was put up for sale in execution of a decree held by one Lalta Prasad, and was purchased by Dhanpat Rai and another person, who in turn, on the 6th of September, 1893, sold it to the present appellants.

The appellants' main contention throughout has been that, the mortgaged property having gone on partition to Baldeo's share, the property which had been received by Bhagirath in exchange for his five biswas in Chauwar should be made liable for this mortgage.

Great stress has been laid in argument on the case of *Byjnath Lall* v. *Ramoodeen Chowdry* (1). It seems to me that the exceptional rule applied in that case is only applicable in similar circumstances.

(1) (1874) L. R. 1 I. A. 106.

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38 A. 543=21 I. C. 734=11 A. L. J. 916.

In that case one of several joint owners mortgaged for his own personal benefit, without the knowledge or consent of his co-sharers, his undivided rights in certain properties, alleging that they were his own, when as a matter of fact they were portions of a joint estate. A partition had already been commenced, and on its completion, the estate was split up and the mortgagor received in his separate share some only of the properties mortgaged and other property which had not been included in the deed. The mortgage was by way of conditional sale, and the mortgagee sued to get possession of the property which was allotted to the mortgagor on partition, and it was held that he could do so.

The Lordships say :—" It is clear that the mortgagor had power to pledge his own undivided share in these villages, but it is also clear that he could not, by so doing, affect the interest of the other sharers in them, and that persons who took the security, took it subject to the right of those sharers to enforce a [347] partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty."

Their Lordships go on to say :—" In the present case there is not a suggestion of fraud, nor is there any ground to suppose that the partition was other than fair and equal. The mortgagee is content to accept what has been allotted in substitution of the undivided interest (of the mortgagor) as the fair equivalent of it. Their Lordships are of opinion, not only that he has a right to do so, but that this, in the circumstances of the case, was his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers."

That rule is, I think, applicable mainly to protect co-sharers from being saddled with the liability of a mortgage created by another co-sharer, without their knowledge and for which they have received no benefit, on an undivided portion of the joint estate, which on partition falls to their separate possession. And in such a case the mortgagee " who has no privity with the other co-sharers, would have no recourse against the lands allotted to such co-sharers ; but must pursue his remedy against the lands allotted to the mortgagor . . . He would take the subject of the pledge in the new form which it had assumed."

Now what are the facts in this case ?

The mortgage was dealing with all the co-sharers. The two mortgages of 1881, one of which is now in suit, were made with the knowledge and consent of both co-sharers, and were in substitution of the prior joint mortgage of 1879.

Could Baldeo himself, after partition, have claimed the benefit of the rule in *Byjnath's* case ? I think not. He knew that his brother was mortgaging his undivided five biswa share in Chauwar, and when, at the time of the partition, he accepted ten biswas in Chauwar in exchange for something else, he knew perfectly well how it was incumbered.

If he could not, I do not think his representatives in interest can. In paragraph 7 of their written statement, the appellants do not state that when they took the ten biswas in Chauwar in mortgage from Baldeo, they believed there were no other mortgages on it other than Baldeo's, which was discharged. Similarly, [348] when they bought the four biswa share in 1893, they do not even allege that they believed it was unincumbered. If they had taken the trouble to examine the registration records, which, as prudent men they should have done, they would have discovered that

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the mortgage of Bhagirath executed in 1881 was still outstanding. I would dismiss the appeal with costs.

PIGGOTT J.—I concur generally. The rule laid down in *Byjnath's* case obviously can have no application to transactions entered into with the general body of co-parceners. In the present case I look on the transaction of the 16th of November, 1881, as little more than a novation of the older contract of 1879, and seeing that each of the brothers signed the other's mortgage deed as a witness, it is obvious that the mortgagee was dealing with the two of them and had the consent of both to the transaction then entered into. under the circumstances, the rights of the mortgagee and the liability of the mortgaged property could not, in my opinion, be affected by the subsequent partition.

BY THE COURT:—The appeal is dismissed with costs.

Appeal dismissed.

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39 A. 548 (=11 A. L. J. 849=21 I. C. 49).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Sir Pramada Charan Banerji.

KAILASHI KUNWAR (*Defendant*) *v.* BADRI PRASAD (*Plaintiffs*).*

[17th July, 1913.]

Act (Local) No. III of 1901 (*United Provinces Land Revenue Act*), *sections* 107, 111 *and* 112—*Partition—Joint Hindu family—Hindu widow—Claim for partition by widow in possession in lieu of maintenance merely, though recorded, solatii causa, as a co-sharer.*

Held that the widow of a member of a joint Hindu family who is in possession of a portion of the family property under a family arrangement, in lieu of maintenance merely, is not a co-sharer and cannot in virtue of such possession enforce a claim for partition of the share of which she is so in possession, even though her name may be recorded, *solatii causa* as a co-sharer. *Bhoop Singh* v. *Phool Kower* (1) and *Jhumna Kuar* v. *Chain Sukh* (2) referred to.

[Ref. 68 I. C. 187; 68 I. C. 989=20 A. L. J. 780.]

THE facts of this case are fully set forth in the judgment. Briefly stated, they were these:—The appellant was a Hindu widow in a joint family and had a right to maintenance. Under [549] a compromise effected with the members of the family, she was put in possession, for life, of a certain share of the property, the profits which were to be taken by her in lieu of maintenance. Her name was recorded in the revenue papers in respect of that share. She applied for partition of the share. Her claim was allowed by the Assistant Collector, but, on appeal, was disallowed by the District Judge. Hence this appeal.

Munshi *Parmeshwar Dayal*, for the appellant:—

A Hindu widow who is in possession of specific property for her life in lieu of maintenance, whose name is recorded as that of a co-sharer and who is in sole enjoyment of the profits, realizing them by bringing suits and obtaining decrees when necessary, is a person who comes within the term "recorded co-sharer" as used in section 107 of the Land Revenue Act, and is entitled to obtain partition under that Act. A partition under

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* Second Appeal No. 344 of 1913 from a decree of Austin Kendall, District Judge of Cawnpore, dated the 5th of December, 1912, reversing a decree of Dina Nath Tandan, Assistant Collector, First Class of Cawnpore, dated the 8th of May, 1912.

(1) (1867) N. W. P. H. C. Rep., p. 368. (2) (1881) I. L. R. 3 All. 400.

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the Hindu Law is very different from a partition under the Land Revenue Act. Under the former, no doubt, she must fully prove her title, but under the latter it is enough if she is a "recorded co sharer." The term used in section 107 of the Land Revenue Act is "co-sharer" and not "proprietor;" and the inference is that it was intended to give a right of partition to persons in possession who exercised some rights of ownership and who were co-sharers in the liability to pay the revenue assessed on the mahal, although their status might fall short of absolute proprietorship. By a family arrangement the appellant was put in possession of the share in lieu of maintenance ; she cannot be ousted during her life ; her maintenance forms a charge upon that share, and the case comes within the ruling in *Habib-ullah* v. *Musammat Kushimba* (1).

[Munshi *Iswar Saran*, for the respondent, mentioned the cases of *Bhoop Singh* v. *Phool Kower* (2) and *Jhunna Kuar* v. *Chain Sukh* (3).]

The first of these cases was decided under Act XIX of 1863, in which the words used were "recorded proprietor." Secondly, the respondent's objection was time-barred, as it was filed after the date fixed by the proclamation. No fresh proclamation was [550] issued after the appellant's application was filed ; all objections had to be filed within the date fixed by the first and only proclamation.

Munshi *Iswar Saran* (for the Hon'ble Dr. *Tej Bahadur Sapru* with him Mr. *S. N. Mushran*) for the respondent, was not called upon.

RICHARDS, C. J., and BANERJI, J.—An application for partition was made to the Revenue Court by Lalta Prasad and others. A proclamation was issued as required by section 110 of the Land Revenue Act, and on the date fixed in the proclamation the appellant, Musammat Kailashi Kunwar, made an application praying that a four annas share, of which she was in possession and in respect of which her name was recorded, should be formed into a separate mahal. This application was opposed by the respondent, Badri Prasad, who contended that Musammat Kailashi Kunwar was not a co-sharer entitled to partition, but was merely in possession in lieu of maintenance. The court of first instance (the Assistant Collector) determined the question of Kailashi Kunwar's right to obtain partition and decided in her favour. On appeal from its decision, the learned District Judge found that Kailashi Kunwar's possession was not as a co-sharer, that is, as a Hindu widow who had succeeded to the separate estate of her husband, but that under a compromise she had been put in possession in lieu of her maintenance by her husband's brother, and in view of this finding the learned Judge held that Kailashi Kunwar was not entitled to claim partition.

In our opinion this view of the learned Judge is correct. Kailashi Kunwar, although recorded as a co-sharer, could not claim partition unless it could be proved that she was in fact a co-sharer. This is manifest, as the learned Judge points out, from the provisions of section 111 and 112 of the Act. As we have stated above the learned Judge has found that Kailashi Kunwar was in possession, not as a co-sharer but in lieu of her maintenance. This being so, she was not a co-sharer and was not therefore entitled to claim partition. This was held in *Bhoop Singh* v. *Phool Kower* (2) and the same view was affirmed in *Jhunna Kuar* v. *Chain Singh* (3).

(1) (1906) 3 A. L. J 481.
(2) (1867) N. W. P. H. C. Rep. 368.
(3) (1881) I. L. R. 3 All. 400.

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35 A. 548=11 A. L. J. 849 =21 I. C. 49.

[551] It is next contended that the respondent's objection was time-barred. This contention is also incorrect. The application of Kailashi Kunwar was under clause (2) of section 110, and, as it was filed on the date fixed in the proclamation and not before the date fixed, it must be deemed to be a first application for partition, and as apparently no fresh proclamation was issued the respondent could come in with his objections and the court was entitled to adjudicate upon it. On this point we may refer to the case of *Khasay* v. *Jugla* (1).

The appeal fails and is dismissed with costs.

Appeal dismissed.

[See also the case of *Pema* v. *Jas Kunwar*, *supra* p. 528.—Ed.]

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35 A. 551 (=11 A. L. J. 856=21 I. C. 91).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

WAHID ALI KKAN (*Defendant*) v. TORI RAM AND ANOTHER (*Plaintiffs*).*

[28th July, 1913.]

Hindu law—Hindu widow—Investments by widow from income of husband's estate—Whether or not such investments become accretions to the husband's estate.

Where immovable property is purchased by a Hindu widow in possession as such of the estate of her late husband out of the income of that estate, such property does not necessarily become an accretion to the husband's estate. The widow has full power to dispose of it during her life-time, and it is only when she manifests during her life-time a clear intention to treat it as an accretion to her husband's estate, or allows it at her death to remain undisposed of, that such property will become part of that estate.

[Ref : 53 I. C. 905=37 M. L. J. 627; 64 I. C. 531.]

THE facts of this case were, briefly, as follows :—

One Than Chand died leaving two widows, who succeeded to his estate. The survivor of them, Musammat Lachman Kunwar, acquired by purchase in 1874, many years after Than Chand's death, the property in dispute in this appeal, consisting of a share in a village in which Than Chand had never owned any share. Thereafter the property was mortgaged by her; and in 1888 she made a gift of it to her brother, Chhidammi Lal. The property passed from Chhidammi Lal's heirs to the appellants through a series of transactions. Musammat Lachman Kunwar died in [552] 1905. The reversioners brought a suit for recovery of the property, alleging that it had been acquired out of the savings of the income of Than Chand's estate and that it formed part of the *corpus* of that estate. The Subordinate Judge decreed the claim. The defendants appealed.

Dr. *Satish Chandra Banerji* (with him Mr. *Ibn Ahmad*), for the appellant :—

The lower court is wrong in presuming that the property was acquired out of the income of the husband's estate and that it formed part of that estate. There is no presumption of law that property acquired by a Hindu widow forms part of her husband's estate. The question from

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* First Appeal No. 255 of 1911 from a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 10th of May, 1911.

(1) (1906) I. L. R. 28 All. 432.

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what source the purchase money came is one of fact; and it was for the plaintiffs to start their case with evidence sufficient to shift the onus of proof; *Dakhina Kali Debi* v. *Jagadishwar Bhuttacharjee* (1); *Diwan Ran Bijai Bahadur Singh* v *Indarpal Singh* (2). The plaintiffs advanced no evidence to prove that the purchase money came out of the savings of the income of Than Chand's estate. On the other hand, the appellant gave evidence to show that the money was advanced by Chhidammi Lal. Secondly, assuming that the property was purchased with the savings of the income, it is abundantly clear that the widow never intended that this property should form part of her husband's estate. She appropriated the property to herself, dealt with it by mortgaging it, and finally disposed of it by gift. Under such circumstances the property must be deemed to be her *stridhan*, and she was fully competent to dispose of it; Trevelyan: Hindu Law, page 458. The question is one of intention to be judged by the widow's conduct and mode of dealing with the property; *Bhagabati Koer* v. *Sahodra Koer* (3).

Pandit *Ramakant Malaviya*, (for The Hon'ble Munshi *Gokul Prasad*; with him Babu *Girdhari Lal Agarwala*), for the respondent:—

The leading case on the subject is that of *Isri Dutt Koer* v. *Hansbutti Koerain* (4). The circumstances of the present case are very similar to those of that case. Here, too, the widow has made a gift and other transfers to her relatives, not only of the property [553] in dispute, but also of other property which formed part of her husband's estate. She was attempting to change the succession, irrespective of whether the property was acquired by her or formed part of the original estate, and to give them inheritance to her own relatives. She was dealing alike with the property in dispute and property forming part of the original estate. Under such circumstances little value is to be attached to the fact of her alienation of the property in dispute as furnishing evidence of her intention to keep this property separate and apart from the *corpus* of her husband's estate. So, in the absence of satisfactory proof of such intention, the general rule must hold, namely, that property acquired with the accumulations of the income of her husband's estate would not constitute her *stridhan* but would form part of the *corpus* of that estate; Guru Das Banerji: *Hindu Law of Marriage and Stridhan*, second edition, page 309; Mayne: *Hindu Law*, seventh edition, page 846.

Dr. *Satish Chandra Banerji* was not heard in reply.

RICHARDS, C. J., and TUDBALL, J.—This appeal arises out of a suit for possession of immovable property. In the present appeal we are only concerned with a five biswa share in mauza Keiwali Abdullahganj. The claim is made by reversioners, who claimed that the shares in this village formed portion of the estate of Than Chand. Than Chand died very many years ago, leaving him surviving two widows, Musammat Dhan Kunwar and Musammat Lachman Kunwar. Musammat Lachman Kunwar survived Musammat Dhan Kunwar. Musammat Lachman Kunwar died on the 18th of March, 1905, and the present suit was instituted on the 6th of August, 1908.

The title to the property now in dispute is shortly as follows:—It originally belonged to a man called Dulli; and here we may mention that it is not contended that Than Chand ever owned this property or indeed

(1) (1897) 2 C. W. N. 197.
(2) (1899) I. L. R. 26 Cal. 871.
(3) (1911) 16 C. W. N. 834.
(4) (1888) I. L. R. 10 Cal 824.

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any share in this village. One Sheikh Muhammad Sharf-ud-din had a decree against Dulli, and the property was put up for sale in execution of this decree. It was purchased by one Baldeo, otherwise Badlu, a Brahman. He was not the actual purchaser, but he acquired the rights of the purchaser through pre-emption. Baldeo, otherwise Badlu, having thus become possessed of the property, sold it to Musammat Lachman Kunwar in the [554] year 1874, many years after her husband's death. Musammat Lachman Kunwar mortgaged the property; the exact date is not shown. She then on the 27th of November 1888, made a deed of gift in favour of Chhidammi Lal, her brother, who entered into possession. After the death of Chhidammi Lal, his sons, Sham Lal, Hoti Ram and others, sold three biswas out of the five biswas to the appellant. A suit was then brought upon foot of the mortgage which Musammat Lachman Kunwar had made, but the appellant redeemed the mortgage before allowing the property to be put up to sale. He then brought a suit claiming to have the remaining portion of the property sold, basing his claim on the fact that he had redeemed the property and paid the whole of the mortgage debt. The remaining portion of the property was sold and purchased by the appellant. The title of the appellant to the property is thus abundantly clear, unless it can be shown that the purchase by Musammat Lachman Kunwar in 1874 was a purchase made for he benefit of her husband's estate, and that she intended that the property should form portion of his estate. Some evidence was given on behalf of the appellant toshow that the purchase money which Musammat Lachman Kunwar gave for the property was actually lent to her by Chhidammi. No evidence was given by the other side to show where the money came from. The learned Subordinate Judge disbelieved the evidence that Chhidammi Lal had advanced the purchase money, and he says at page 17 of the judgment:—"Musammat Lachman was then in possession of her husband's property and therefore the presumption is that she acquired this property with the income arising out of her husband's estate. It is laid down in Siromoni's *Hindu Law*, page 372, 2nd edition:—'Where a widow is in possession of her husband's estate the burden of proving any property to be her own separate property rests on the party calling it as such.' According to that principle it was for the defendants to prove that the share in question was Lachman's separate property and her *stridhan*, but I think that he has failed to do so. I do not believe Dulli and Bhupal's statements that Lachman took the money for this purchase from Chhidammi. I find that Lachman purchased this property out of the income of her husband's property and that she had only a life interest in it and that she had no right [555] whatever to alienate it. The alienations made by her and her transferee's heirs are not binding on the plaintiffs." Even if we assume that the property was purchased out of the savings of the income of Than Chand's estate, the widow was entitled to deal with those savings as she thought fit. Now if it could be shown that at the time of the purchase it was her intention that the property should become an accretion to her husband's estate, she might not afterwards perhaps have been able to take it away from the husband's estate and change the devolution of the title thereto. In the present case, however, we find that not very long after the acquisition of the property she mortgaged it, thus dealing with it as her own property. We have already mentioned that her husband had never owned the property or any shares in this village. Subsequently, in the year 1888, she made a deed of gift. We do not think, under these circumstances, that we ought to hold that it was the intention of Mussam-

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mat Lachman Kunwar to buy this property as an accretion to her husband's estate. It seems to us that the matter is well put in Mr. Trevelyan's work on Hindu Law at page 458 : —"Should she invest the income in such a way as to indicate her intention that it was not to form part of her husband's estate, but to remain at her disposal, whether such investment be of a temporary or permanent nature, she can deal with it, at any rate, during her life-time. Should she not dispose of property during her life-time, it does not pass to her heir, but is treated as a portion of her husband's estate." Under these circumstances, we think that the appeal ought to be allowed.

We accordingly allow the appeal, set aside the decree of the court below and as against the present appellant, dismiss the plaintiff's claim with costs in all courts.

Appeal allowed.

35 A. 556 (=11 A. L. J. 875=21 I. C. 614.)

[556] APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.

MAKHAN DAS (*Defendant*) *v.* MANNU LAL AND ANOTHER (*Plaintiffs*) AND KALLU DAS (*Defendant*).*

[29th July, 1913].

Civil Procedure Code (1908,) *order V, rule* 15—*Summons—Question of sufficiency of service of summons.*

The summons in a suit was served on the paternal uncle of the defendant, who was a member of the same joint family and lived in the same house with the defendant.

Held that such service was insufficient in the absence of evidence that the defendant himself could not be found.

[Dist : 65 I. C. 44.]

THE facts of the case were as follows :—

A suit was instituted against Kalka and his nephew, Makhan. The summons was served on Kalka personally. The summons issued to Makhan was also handed over to Kalka, who wrote on the back of the summons, "Signature of Makhan by the pen of Kalka." Neither of the defendants appeared to defend the suit, and it was decreed *ex parte*. Thereafter Makhan applied to have the *ex parte* decree set aside. He stated that the the summons had not been served on him; that he had no knowledge of the suit and that his uncle Kalka was a man not in his senses. It appeared that Kalka and Makhan were members of a joint Hindu family. It did not appear that Kalka had ever been authorized by Makhan to accept service of summons for him. It was neither proved nor alleged that at the time when the summons was handed over to Kalka Makhan could not be found, or that any attempt was made to find him and serve the summons on him personally. The lower court, in disposing of Makhan's application, held that he had failed to prove that Kalka was not in his senses, or that he had not been informed of the institution of the suit, and dismissed his application. The defendant appealed to the High Court.

Mr. *Muhammad Ishaq Khan*, for the appellant :—

Under order IX, rule 13, it was sufficient for the applicant to show that the summons was not duly served. He need not prove anything

* First Appeal No. 100 of 1913 from an order of Murari Lal, Subordinate Judge of Cawnpore, dated the 19th of April, 1918.

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more. Admittedly, the summons was not served on him personally; the question is whether under the circumstances of the case the service was proper and sufficient. It is submitted that it was not, for the conditions laid down for service in the mode [557] prescribed by order V, rule 15, were not proved to have existed. Substituted service had not been ordered or applied for.

Pandit *Vishnu Ram Mehta* (with him The Hon'ble Dr. *Sundar Lal*), for the respondents:—

Makhan and Kalka were members of the same family and lived jointly. The presumption arises that Makhan must have had actual notice of the institution of the suit from his uncle who accepted service of the summons of Makhan. Under the circumstances it was for Makhan to show that he had, as a matter of fact, no knowledge of the suit. Service on the head of a joint family is *prima facie* sufficient.

Mr. *Muhammad Ishaq Khan* was not heard in reply.

RICHARDS, C. J., and PIGGOTT, J.—This appeal arises out of an order of the court below refusing to set aside an *ex parte* decree. The applicant in the court below swore that he had never been served with the summons. There was no affidavit contradicting this statement. The learned Judge says "the summons was delivered to the own paternal uncle of the applicant. Now the applicant pleads that the paternal uncle is not in his senses, but he gives no proof of it, nor does he give any proof to show that he was not informed of the institution of the suit." The service of the summons in suits is a very important part of the procedure. The Code itself provides that as far as possible service must be personal. Order V, rule 15, provides that "where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him." If it had been shown to the complete satisfaction of the court that the present appellant could not be found and that service for that reason had been made upon his paternal uncle, who lived with him, the court would have been entitled to have held the service sufficient. But there appears no evidence whatever that there was any difficulty in finding the appellant. It appears to have been considered that it was quite sufficient to hand the summons to his paternal uncle. This view of the law is not correct. We must allow the appeal, set aside the order of the court below, grant the application to set aside the decree and [558] remand the case with directions to readmit the case upon its file of pending cases and proceed to dispose of it according to law.

Appeal decreed and cause remanded.

35 A. 558 (=21 I. C. 878=11 A. L. J. 854).

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APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.

BALGOBIND AND ANOTHER (*Plaintiffs*), *v.* BHAGGU MAL (*Defendant*).*

[31st July, 1913.]

35 A 558=
21 I C. 878=
11 A L J.
854.

Act No. I of 1872 (*Indian Evidence Act*), *section* 92, *proviso* 1—*Evidence—Proof of failure of consideration—Promissory note given partly on account of a gambling debt.*

The defendant, who had been gambling with the plaintiffs and had lost, gave the plaintiffs two promissory notes partly for his gambling losses and partly on other accounts, but it could not be ascertained what proportion of the total sum secured was represented by the gambling debts.

Held, on suit to recover on these notes, that it was open to the defendants to prove that the consideration was in part at least money lost in gambling; and that the court below was justified, on its finding that the part of the consideration represented by gambling debts could not be separated from the rest, in dismissing the whole suit. *Juggernauth Sew Bux* v. *Ram Dayal* (1) distinguished.

THE facts of this case were as follows:—

The defendant had been gambling with the plaintiffs at their house during the *Dewali* and had lost. Partly on account of these losses the defendant executed two promissory notes in the plaintiffs' favour. When, however, the plaintiffs sued on these notes the defendant pleaded want of consideration, also that the consideration was void, because it represented gambling losses. The court of first instance decreed the plaintiffs' claim; but on appeal the lower appellate court, after referring an issue, dismissed the suit *in toto*. The plaintiffs thereupon appealed to the High Court.

Dr. *Satish Chandra Banerji* and Dr. *Surendra Nath Sen*, for the appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent.

RICHARDS, C J. and PIGGOTT, J.—This appeal arises out of a suit on foot of two promissory notes. The defendant pleaded want of consideration, and also that the consideration was void because it represented gambling losses. The court of first instance decreed the plaintiffs' suit. The lower appellate court, after referring an [559] issue, dismissed the plaintiffs' claim. We think that we must accept the facts of the case as found by the court below which are as follows:—

The plaintiffs, the defendant and others were gambling at the house of the plaintiffs, during the *Dewali*. The defendant incurred losses, partly to the plaintiffs and partly to other persons. It is impossible to say exactly how much his losses were, and how much of those losses were losses to the plaintiffs, but there can be no doubt that the finding of the court is to the effect that the consideration for the promissory notes was at least in part losses to the plaintiffs in respect of gambling debts. The court below was unable to ascertain (chiefly because the plaintiff would not come forward with a true and accurate statement) how much of the alleged consideration represented money which had been borrowed from the plaintiffs by the defendant. Under the circumstances he dismissed the

*Second Appeal No. 141 of 1913, from a decree of L. Johnston, District Judge of Meerut, dated the 30th of September, 1912, reversing a decree of Sumair Chand, First Additional Munsif of Meerut, dated the 15th of April, 1912.

(1) (1883) I. L. R. 9 Cal. 791.

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35 A. 558=21 I. C. 878=11 A. L. J. 854.

suit, and we think under the circumstances he was quite justisfied in so doing.

Illegal consideration is no consideration, and in the present case, even if part of the consideration was losses to third parties, the consideration was not severable. The learned advocate on behalf of the appellants quotes the decision in *Juggernath Sew Bux* v. *Ram Dyal* (1) and contends that it was not open to the defendant to show that the consideration for the promissory notes was money lost in gambling. In that case it was sought by oral evidence to show that a certain contract was of an entirely different nature from what it appeared to be on the face of it. Section 92 of the Evidence Act, after providing for the exclusion of oral evidence in respect of certain contracts, provides that "any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law." In our opinion, where it can be shown that the consideration was losses in gaming, this is "want or failure of consideration" within the meaning of *proviso* (1) to section 92 of the Evidence Act. We dismiss the appeal with costs.

Appeal dismissed.

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35 A 560 (=21 I. C. 1005=11 A. L. J. 926=14 Cr. L. J. 685).

[560] APPELLATE CRIMINAL.

Before Mr. Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.

EMPEROR *v.* HANUMAN AND OTHERS.*

[5th August, 1913.]

Act No. XLV of 1860 (*Indian Penal Code*), *sections* 37, 302, 304—*Murder—Culpable homicide not amounting to murder—Fatal assault with* lathis *by several persons acting in concert.*

Five men—members of the same family—assaulted an unarmed man and beat him with their *lathis*. They knocked him down and continued beating him with the result that he died then and there. Another man, who came to the rescue of the first, was also knocked down and beaten by the same five men with a similar result.

Held that all five men were in each case guilty of the offence of murder. *Dhian Singh* v. *King-Emperor* (2) dissented from.

[Fol. 74 I. C. 858=24 Cr. L. J. 826; Ref. 83 I. C. 636=26 Cr. L. J. 76.]

THIS was an appeal from jail by three persons out of four who had been convicted by the Sessions Judge of Mirzapur of the offence of culpable homicide not amounting to murder, under section 304 of the Indian Penal Code and sentenced to seven years rigorous imprisonment. On this appeal coming up for hearing before a single Judge, notice had been served on all four men to show cause why they should not be convicted of murder under section 302 of the Indian Penal Code and sentenced accordingly.

The facts of the case are fully set forth in the judgment of the Court.

The Government pleader (Babu *Lalit Mohan Banerji*), for the Crown.

The appellants were not represented.

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* Criminal Appeal No. 493 of 1913, from an order of I. B. Mundle, Sessions Judge of Mirzapur, dated the 24th of May 1913.

(1) (1883) I. L. R. 9 Cal. 791. (2) (1912) 9 A. L. J. 180.

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35 A. 560=21 I C. 1005=11 A L. J. 926 =14 Cr. L. J. 685.

BANERJI and RYVES, JJ.—In this case four persons, Hanuman, Tippal, Sheoraj and Shankar, were convicted by the learned Sessions Judge of Mirzapur, under section 304 of the Indian Penal Code, and sentenced to transportation for seven years on two counts; the sentences were to run concurrently. All of them, except Shankar, appealed from their convictions and sentences to this Court. The learned Judge before whom the appeal came for hearing directed that notice should issue to all four of them to show cause why their conviction should not be altered to one under section 302 of the Indian Penal Code, and why they should not be sentenced to [561] death or to transportation for life. Notice has been served on all four. The facts of the case are very simple. Tippal and Sheoraj are the sons of Bori, who has absconded, and Shankar and Hanuman are their first cousins. Early in August, 1912, there was a dispute between Bori on the one hand and Sheoratan and Madhwa, the deceased, on the other, about some mangoes, and, as was natural, a good deal of abuse was exchanged. On the evening of the 17th of August last, Sheoratan was returning to his home shortly before sunset. As he passed Bori's house, Sheoraj caught hold of him round the waist. Sheoratan struggled to get free and abused Sheoraj. Thereupon Bori called out to the four accused to beat Sheoratan. Bori, Tippal, Hanuman and Shankar came out of the inclosure in which all five lived, with *lathis*, and all of them beat Sheoratan who was unarmed. They felled him to the ground and went on beating him as he lay there. Madhwa, cousin of Sheoratan, came running up with a *lathi* to help him. He struck Shankar a blow on the head, but was knocked down and beaten by all five. Gauri, the father of Sheoratan, then came up and was also knocked down and beaten and left unconscious. Musammat Maiki, the wife of Madhwa, threw herself on her husband's body and was also beaten, although not severely. Sheoratan, and Madhwa died on the spot. The assailants then ran away. This version of the story is that generally given by the prosecution witnesses, and particularly by Puni, who is the brother of Bori, and, therefore, the uncle of all the four appellants. Nothing has been shown, in his cross-examination or otherwise, to indicate any bias or hostility against any one of the accused, and we agree with the assessors and the learned Judge in accepting his evidence as substantially true. It amounts to this. Five men armed with *lathis* assaulted Sheoratan, a young man of some thirty-three years of age, who was unarmed, and beat him with their *lathis*. They knocked him down and continued beating him, with the result that he died then and there. The medical evidence shows that his breast-bone was fractured and that injury was also caused to the pericardium, the result of *lathi* blows. The body was so decomposed when the *post mortem* examination was made that external marks of bruises could not be detected. While the accused were thus assaulting Sheoratan, Madhwa came up to the rescue of [562] his cousin. He also was beaten to the ground and so severely belaboured that he died. The medical evidence shows that his skull was fractured, and so was his breast-bone, and that death was due to the fracture of the skull. It is thus clear that all the accused brought about the death of Sheoratan and Madhwa. The learned Sessions Judge on these facts has convicted them under section 304 of the Indian Penal Code. He says:—"Though the four accused can be imputed with knowledge of the likelihood that death might be caused, yet I think no intent can be presumed. Another reason why I think the charge of murder cannot be sustained is that it is not proved which of the five men,

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35 A. 560=21 I. C. 10.5=11 A. L. J 926 =14 Cr. L. J. 685.

Shankar, Hanuman, Tippal, Sheoraj and Bori dealt the fatal blows that resulted in actual death."

We are unable to agree with either proposition of law. Under section 299 of the Indian Penal Code, a person is guilty of culpable homicide who causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death. Under section 300, except in the cases hereinafter excepted, culpable homicide is murder if the act by which the death is caused is done with the intention of causing death, or (4thly), if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

It seems to us that the case falls clearly within the 4th clause of section 300 of the Indian Penal Code. It cannot be said that any of the exceptions takes the case out of the section. The only exception which could possibly be suggested is exception No. 4, but here, even if there was no premeditation, which may be granted, there was no sudden fight, as Sheoratan was unarmed and taken by surprise. But even if we take it that in the case of Madhwa there was a sudden fight, the accused cannot take the benefit of the exception, because they took an undue advantage of their victim and acted in a cruel manner. Sheortan was unarmed, Madhwa, although armed, was one against five Both were instantly felled to the ground, and in this defenceless condition were beaten with [563] such violence that they died on the spot. It is impossible to prove by direct evidence the intention of a particular individual. The intention can only be inferred from the reasonable and probable result of his act or conduct. The learned Judge seems to confuse the meaning of the term intention with desire. It is quite possible that these persons had no wish either collectively or individually to kill Sheoratan (as is indicated by the fact that no wound was discovered on his head), but nevertheless, if they beat him in the way it is proved that they did, they must be taken to have had knowledge that their act must in all probability cause death or such bodily injury as was likely to cause death, and if so, they are guilty of murder. Under circumstances such as these, it is quite immaterial to ascertain whose blow was the immediately fatal one. In the case of Sheoratan no single blow need necessarily have been the actual cause of death, which may have been due to the shock resulting from the many severe blows he received. They were all taking part in the beating, and all must be presumed to have known that the probable result of such a beating was that at least, such bodily injury would be caused as was likely to cause death. It did in fact cause the death of two persons in the prime of life. We cannot agree with the rule of law laid down in *Dhian Singh* v. *King-Emperor* (1). We, therefore, convict the four accused under section 302 of the Indian Penal Code. We set aside their conviction under section 304 of the Indian Penal Code and we sentence them under both charges with respect to the death of Sheoratan and Madhwa to transportation for life (to run concurrently) with effect from the 24th of May, 1913.

Appeal dismissed.

(1) (1912) 9 A. L. J. 180.

35 A. 564 (=91 I. C. 12=11 A. L. J. 910.)

[564] APPELLATE CIVIL.

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APPELLATE CIVIL.

35 A. 564=21 I. C. 13=11 A. L. J. 910.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.

KUNDAN LAL (*Plaintiff*) *v.* SHANKAR LAL AND ANOTHER (*Defendants*).*

[6th August, 1913]

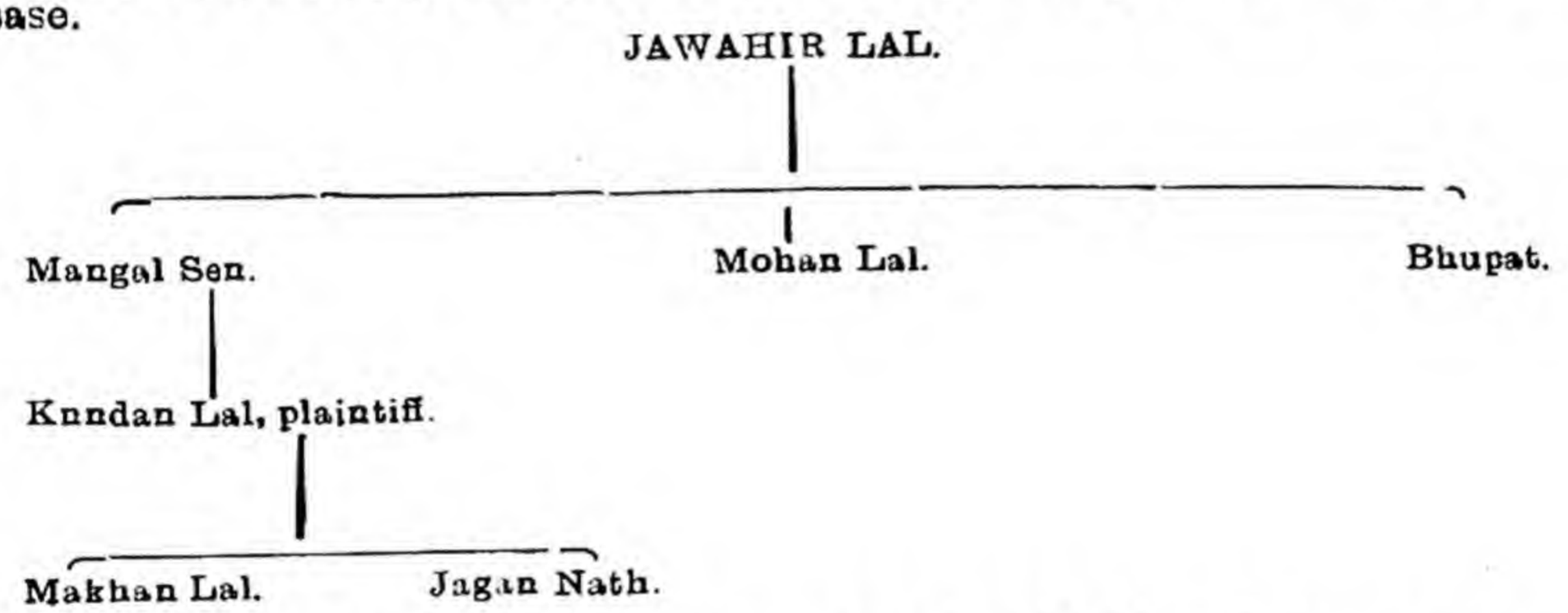
Hindu law—Joint Hindu family—Presumptions as to property in the possession of members of a joint family.

Property in the possession of a joint Hindu family should be presumed to be joint family property until the contrary is shown, even though it may have been acquired in the name of a particular member of the family.

The fact that property stands in the individual name of one or other member of a joint Hindu family does not of itself give rise to the presumption that it is the separate property of that member, *Gurumurthi Reddi* v. *Gurammal* (1), *Shiu Golam Sing* v. *Baran Sing* (2) and *Taruck Chunder Totudar* v. *Joodheshteer Chunder Kundoo* (3) referred to. *Ram Kishan Das* v. *Tunda Mal* (4) discussed.

[Ref. 71 I. C. 130=16 L. W. 936=1923 M. W. N. 57.]

The following genealogical tree will help to explain the facts of this case.



One Shankar Lal obtained a decree against Makhan Lal, a son of the plaintiff, and in execution of the decree had Makhan Lal's share in three houses attached. Kundan Lal objected to the attachment under order XXI, rule 58, of the Code of Civil Procedure; his objection was summarily disallowed, and he brought the present suit under order XXI, rule 63, for a declaration that the houses, being the self-acquired property of Kundan Lal, could not be attached and sold in execution of the personal decree passed against Makhan Lal. The court of first instance dismissed the claim, holding that [565] the houses being the joint family property were liable to attachment and sale to the extent of the share of Makhan Lal, *viz.*, one-third. Kundan Lal appealed to the District Juge, who confirmed the decree; but his findings material to the case were as follows:—

1. Jawahir Lal left three sons, namely, Mangal Sen, the father of the plaintiff, Mohan Lal, and Bhupat, and he left no ancestral property in fact.

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* Second Appeal No. 1322 of 1912 from a decree of H. M. Smith, District Judge of Agra, dated the 7th of September, 1912, confirming a decree of Raja Ram, Munsif of Agra, dated the 10th of June, 1912.

(1) (1903) I. L. R. 32 Mad. 88.
(2) (1868) 1 B. L. R. A. C. 164.
(3) (1873) 19 W. R C. R. 178.
(4) (1911) I. L. R. 33 All. 677.

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2. Mohan Lal purchased the first house in 1839 in his own name and the second in 1860, and Kundan Lal the plaintiff purchased the third in 1890. Bhupat and Mohan Lal had both died childless, and the plaintiff succeeded to them.

4. The family of the three brothers was joint, and after the death of Bhupat the house passed by survivorship to the plaintiff. The plaintiff appealed.

Pandit *Mohan Lal Sandal*, for the appellant :—

As the houses devolved from his uncle to the plaintiff, the houses were his self-acquired property. Reliance was placed on *Gurumurthi Reddi* v. *Gurammal* (1) and *Garur Prasad* v. *Ram Partap* (2). He submitted that only property inherited directly from the father or grandfather was ancestral property in which the sons had a vested interest by birth ; *Mitakshara*, chap. 1, sec. 11, pla. 3,27 and 33, sec. 5, pla. 3; *Kanhya Lal* v. *Lal Bahadur* (3); *Mayne's Hindu Law*, S. 275. As there was no ancestral property, and as there is no evidence that the houses were purchased from joint family funds or with joint labour, the houses were the self-acquired property of Kundan Lal ; *Shiu Golam Singh* v. *Baran Singh* (4): *Radhika Prasad* v. *Mt. Dharma Das* (5); *Babu Nand Coomar Lal* v. *Moulvie Razeeooddeen Hossen* (6); *Chatturbhooj Meghji* v. *Dharamsi Naranji* (7) ; *Ram Kishan Das* v. *Tunda Mal* (8). When a property is purchased in the name of a person the presumption is that it is his self-acquired property, and the onus is on the party asserting the contrary ; *Radha Rumon Koondoo* v. *Phool Koomaree Bibee* (9); *Khelut Chunder Ghose* v. *Koong Lall Dhur* (10). The property may be joint without being [566] ancestral and it is only in the ancestral property that the sons have vested interest.

Munshi *Benode Behari* (with him Pandit *Sham Krishna Dar*) for the respondents :—

The family being joint the houses passed by survivorship to Kundan Lal. So it cannot be said that the property descended collaterally on Kundan Lal. Reliance was placed on the remarks of Bhashyam Iyyangar, J. in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (11). He referred to Mayne's Hindu Law as showing that there are many kinds of property in which sons have vested interest. He further invited the attention of the Court to the remarks of the Munsif in his judgment, in which he passed stricture on the plaintiff for having colluded with his son to defraud his creditor.

Pandit *Mohan Lal Sandal*, was heard in reply.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiff sought a declaration that certain house property which had been attached in execution of a decree against his son, Makhan Lal, was the sole property of the plaintiff and therefore not liable to attachment and sale.

The facts as found by the court below are as follows. Jawahir Lal had three sons, Mangal Sen, Mohan Lal and Bhupat Lal. Mangal Sen died first, leaving a son, Kundan Lal, the plaintiff in the present suit. Mohan Lal died next and then Bhupat. Neither Mohan Lal nor Bhupat

(1) (1908) I. L. R 32 Mad. 88.
(2) (1907) I. L. R. 29 All. 667.
(3) Weekly Notes, 1902, p 20.
(4) (1868) 1 B L. R. A. C. 164.
(5) (1869) 3 B. L. R. 124.
(6) (1872) 10 B. L. R. 183.
(7) (1884) I. L. R. 9 Bom. 438 (445).
(8) (1911) I. L. R. 33 All. 677.
(9) (1868) 10 W. R C. R. 28.
(10) (1868) 10 W. R. C. R. 333.
(11) (1901) I. L. R. 25 Mad. 149 (156).

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left issue. Two of the houses were acquired in the name of Mohan Lal. The third house was acquired in the name of Kundan Lal, the plaintiff, in the year 1890. The court below has found, and in second appeal we are bound by its finding, that Mangal Sen, Mohan Lal, Bhupat and the plaintiff, Kundan Lal, constituted a joint undivided Hindu family. The next finding is not very clear, but we take it to be this, that there was no evidence given that the ancestor Jawahir Lal had any ancestral property, or that Mangal Sen, Mohan Lal and Bhupat took any property by survivorship upon the death of Jawahir Lal. Under these circumstances the lower appellate court affirmed the decree of the court of first instance and dismissed the [567] plaintiff's suit, holding that the property attached was joint family property.

The appellant contends that from the mere fact that Mangal Sen, Mohan Lal, Bhupat and Kundan Lal constituted a joint Hindu family, it must not be presumed that the property which was acquired in the name of Mohan Lal was joint property; and that therefore it must be taken that Kundan Lal *inherited* the houses which were acquired in the name of Mohan Lal and did not take them by survivorship, and that therefore the property was in his hands not as ancestral or joint family property in which his son took any interest. In support of this contention the case of *Gurumurthi Reddi* v. *Guvammal* (1) is cited, also the cases of *Ram Kishan Das* v. *Tunda Mal* (2) and *Shiu Golam Sing* v. *Baran Sing* (3) and several other cases. In the case of *Ram Kishan Das* v. *Tunda Mal* the facts were not unlike the facts of the present case except that in that case it was the decree-holder who brought the suit for a declaration that the property which he had attached was liable to attachment and sale.

The respondent contends that on the finding that Mangal Sen, Mohan Lal, Bhupat and Kundan Lal constituted a joint Hindu family, it ought to be presumed that the property which was acquired in the name of Mohan Lal was joint family property.

In the absence of authority to the contrary, it seems to me that on principle there ought to be a presumption that property in the possession of a joint Hindu family, even though acquired in the name of a particular member of that family, is joint family property. The very idea, it seems to me, of a joint undivided Hindu family is complete unity of interest and joint possession of all property. No doubt members of a joint Hindu family can acquire and own separate property, but it would seem to me that this is somewhat abnormal and exceptional condition of things which ought to be proved. It must be remembered that there can be joint family property which is not ancestral. Such seems to have been the opinion of Sir RICHARD COUCH in the case of [568] *Tarruck Chundar Totadar* v. *Joodhesh-teer Chundar Kundoo* (4). However this may be, the case of *Ram Kishan Das* v. *Tunda Mal* (2) is an authority that where it is not proved that there was any nucleus of ancestral property, there is no presumption that property acquired in the name of any individual member, or in his possession, is joint family property, and some dissent is passed against the view taken by RICHARD COUCH in the case already mentioned. It seems to me, however, that it is unnecessary in the present case to express any view on the correctness of the decision of *Ram Kishan Das* v. *Tunda Mal*, because I think that in the present case it is necessary for the plaintiff to estabilish the proposition that where property has been

(1) (1908) I. L. R. 32 Mad. 88.
(2) (1911) I. L. R. 33 All. 677.
(3) (1868) 1 B. L. R. A. C. 164.
(4) (1873) 19 W. R. C. R. 178.

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acquired in the name of a member of a joint and undivided Hindu family, there is not only no presumption that the property is joint, but that there is actually a presumption the other way, *viz*, that the property is separate. This, I think, would be a very great expansion of the decision of *Ram Kishan Das* v. *Tundamal*. It seems to me that the plaintiff coming into court and seeking a declaration that property which was acquired at the time the family was joint, it lay upon him to show that the property was the separate property of the individual member of the family in whose name it was acquired. It may be urged that the mere fact that the property was acquired in his name raises some presumption that it was his separate property. It seems to me that such a contention has no force. It is well known that property which is undoubtedly joint is acquired in the name of individual members of the family. A joint family frequently consists of a large number of members, many of whom may be infants of tender years or absent. In many cases it would be practically impossible to acquire the property in the names of all the family. It is common knowledge that joint property is seldom acquired in the names of all the members and not always in the name of the manager. This being so, and the normal and natural condition of the family being one of complete unity of interest, I cannot hold that any presumption arises from the mere fact that the property has been acquired in the name or names of one or more members of the joint family. If this view be correct, the plaintiff ought to have proved that the property was acquired [569] with the separate property of Mohan Lal, or at least that after its acquisition he held it as separate property excluding the other members. I may mention here that it was assumed in the arguments that if the houses acquired in the name of Mohan Lal were joint, the property in the other house was joint also.

For these reasons I would confirm the decision of the court below and dismiss the appeal.

PIGGOTT, J.—I should like to add a few words. There are three houses in dispute, one purchased in the name of Kundan Lal in the year 1890 and two purchased in the name of Mohan Lal in the years 1839 and 1860. With regard to the first of these houses there is a plea in the memorandam of appeal that, inasmuch as this house was purchased by a father during the minority of his sons, they cannot possibly have any share therein. It seems to me worth pointing out that no attempt has been made to support by argument the proposition of law here suggested. There seems on the contrary a clear presumption, unless and until the contrary is proved, that the property purchased by Kundan Lal during the minority of his sons was purchased by him out of funds which formed the joint family property of himself and of his sons.

As regards the two houses acquired in the name of Mohan Lal I wish to say only this much, that I might have found some difficulty in distinguishing the present case from that reported in I. L. R., 33 All., 677, if this were a suit in which Mohan Lal himself, or a transferee from Mohan Lal, was contesting a claim based upon a plea that the said houses had all along been the property of the joint family of which Mohan Lal was a member. As the facts stand, all that we know is that these houses have belonged, for over seventy years and over fifty years respectively, to persons who were members of the same joint family and have devolved amongst members of that family with nothing to show that anyone of them ever, expressly or by implication, claimed them as his self-acquired property.

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It seems to me that there is a presumption that the property thus devolved by survivorship and not by inheritance, and that this presumption is not rebutted by the mere fact that the purchase deeds of 1839 and 1860 stand in the name of Mohan Lal alone. I agree with the learned Chief Justice that some further evidence should have been tendered by the plaintiff, [570] in order to entitle him to succeed in this suit. I concur in the proposed order.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

35 A. 570 (=11 A. L. J. 930 =14 Cr. L. J. 654 =21 I. C. 894).

APPELLATE CRIMINAL.

Before Mr. Justice Sir George Knox and Mr. Justice Ryves.

EMPEROR *v.* MAN SINGH AND OTHERS.*

[17th September, 1913.]

Criminal Procedure Code, section 284—Assessors—Trial with only one duly appointed assessor—Trial illegal.

Of two assessors assisting the Sessions Judge in the trial of a sessions case, one only had been duly summoned to act as an assessor in that case. The other was a gentleman of some position who had formerly been on the list of assessors but had been exempted on the recommendation of the District Magistrate. *Held* that in these circumstances there was no lawful trial before a lawfully constituted tribunal, and that a new trial must be ordered. *Queen-Empress* v. *Badri* (1) followed.

[Ref. 3 Pat. L. J. 141=44 I. C. 587.]

THIS was an appeal against a conviction and sentence had and passed at a sessions trial. At the hearing a preliminary objection was taken that the tribunal by which the appellant had been tried was not lawfully constituted, inasmuch as there was only one properly appointed assessor. The other assessor was in fact a gentleman who was at one time on the list of assessors, but whose name had been removed therefrom on the recommendation of the District Magistrate upon the ground that he was a large zamindar and his position in life and status were much better than those of persons of the class from which assessors were ordinarily selected.

Babu *Girdhari Lal Agarwala*, for the appellants.

The officiating Government Advocate (Mr. *W. Wallach*), for the Crown.

KNOX and RYVES, JJ.—On this appeal being called on for hearing Mr. *Girdhari Lal Agarwala*, who appeared for the appellant, called out attention to the fact that out of the two assessors who [571] sat with the learned Judge, one assessor, namely, Thakur Dirgbijoy Singh, had not been summoned as an assessor for the purposes of this trial. We ordered an inquiry to be made, and we find that Thakur Dirgbijoy Singh was up till 1910 on the list of assessors, but since that date he had been removed from the list. As a reason for his removal, the learned Sessions Judge gives that the Magistrate recommended this on the ground that he was a large zamindar and his position in life and

*Criminal Appeal No. 642 of 1913 from an order of E. C. Allen, Sessions Judge of Mainpuri, dated the 16th of August 1913.

(1) Weekly Notes, 1894, p. 207.

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35 A. 570 =11 A. L J. 930 =14 Cr. L. J. 554=21 I. C. 894.

status were much better than those of persons of the class from which assessors are ordinarily selected. If this be the case, we are surprised to find that this recommendation should have been made and should have met with approval. It is surely not too much to ask from Indian gentlemen of position and rank that they should assist in the administration of justice, as the sitting as an assessor can, if the list be properly prepared, occur very rarely, and probably only once in the course of three or four years. However this may be, there is no doubt that the trial of these accused persons, when one of the assessors only was an assessor summoned for the particular session is illegal, as has been pointed out in *Queen-Empress v. Balri* (1). In such a case there has been no lawful trial before a lawfully constituted tribunal. We set aside the trial, conviction and sentences and direct that the accused be retried by the court of session according to law.

Appeal allowed.

35 A. 571 (=21 I. C. 830=11 A. L. J. 451).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggot.

NARAIN DAS (*Defendant*) *v.* HAR DAYAL (*Plaintiff*) AND RUP NARAIN (*Defendant*).*

[29th July, 1913.]

Hindu Law—Joint Hindu family—Mortgage—Guardian ad litem *—Suit on mortgage executed by father prior to birth of son—Father appointed son's guardian* ad litem.

Held that, inasmuch as an after-born son cannot on a suit on mortgage made by his father set up the defence of the immoral nature of the debt on account of which the mortgage was executed, it cannot be said that the [572] appointment of the father as guardian *ad litem* in such suit would be necessarily prejudicial to the interests of the son.

[Ref. 78 I. C. 260; Cf; 33 All. 315=14 A. L. J. 363; 25 I. C. 620; 15 C. L. J. 446=14 I. C. 845.]

THE facts of this case are fully set out in the judgment. Briefly stated, they were as follows:—

The plaintiff's father made a mortgage. At the time of making the mortgage he was the sole owner of the property, as no sons had then been born to him and there were no co-parceners. In the suit brought by the mortgagee the plaintiff was also made a defendant and his father was appointed his guardian *ad litem*. The father admitted execution of the mortgage and its validity; a decree was passed, and the mortgaged property was sold. Subsequently the plaintiff brought a suit for recovery of possession of the property on the allegations that the mortgage debt had been incurred for immoral purposes and that he had not been properly represented in the mortgage suit, as his father was a person of immoral habits and not a proper person to represent his interests. The court of first instance dismissed the suit, on the ground that the plea set up by the plaintiff was not available to him, as he had not been born at the date of the mortgage. The lower appellate court remanded the suit holding that the first court should have received evidence as to the alleged immoral habits of the father in order to ascertain whether he was a fit person

* First Appeal No. 111 of 1913 from an order of Kunwar Sen, Additional Judge of Moradabad, dated the 8th of April, 1913.

(1) Weekly Notes, 1894, p. 207.

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to have been appointed guardian of the plaintiff. The defendant appealed against the order of remand.

Dr. *Satish Chandra Banerji*, for the appellant :—

The question, whether the plaintiff was properly represented or not by his father in the mortgage suit, is quite immaterial in this case. Not having been born at the date of the mortgage he had no right to question its validity. It is well-settled law that an after-born son cannot raise the plea of immorality of the mortgage debt. He had no defence whatsoever to the suit on the mortgage; so any want of proper representation cannot have prejudiced him at all. The first court rightly refused to take evidence as to the alleged immoral livelihood of the father. In fact, the son was not a necessary party to the mortgage suit at all.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent :—

The mortgage suit was brought in 1890. At that time the rule of law laid down in the case of *Bhawani Prasad* v. *Kallu* (1) [573] was in full force. At that time the son of the mortgagor was regarded as a very necessary party to a mortgage suit. If the plaintiff was not properly represented in the mortgage suit he would have a right to bring a fresh suit. It is necessary, therefore, to decide whether his father was a fit person to represent the plaintiff. His defence would be based on the fact that at the date of the suit he had acquired an interest in the property. At that time this defence would have a fair chance of success. The law as it now stands is of later development.

Dr. *Satish Chandra Banerji* referred to *Chattarpal Singh* v. *Natha* (2).

RICHARDS, C. J., and PIGGOTT, J:—This appeal arises out of a suit in which the plaintiff sought to set aside a decree obtained in the year 1899 against him and his father. The decree in question was on a mortgage made in the year 1896, admittedly some two years before the birth of the plaintiff. It is admitted also that at the time of the mortgage the mortgagor had no other son and was in that sense the sole owner of the property mortgaged. When the suit was brought the present plaintiff had been born, and he was made a party to the mortgage suit under the guardianship of his father. A decree was obtained upon foot of the mortgage and the property was sold. Subsequently the father died, and, the proceeds of the sale of the mortgaged property proving insufficient, a further decree was obtained under section 90 of the Transfer of Property Act and certain other property was sold. In these proceedings the plaintiff's mother was substituted as his guardian for his deceased father. The court of first instance dismissed the plaintiff's suit. The lower appellate court has reversed that decision and remanded the case, holding that the plaintiff ought to have been allowed an opportunity to call evidence to show that his father was a man of immoral livelihood and that the mortgage debt had been incurred for immoral purposes. The present appeal is against this last mentioned order of remand.

It seems to us that there can be no question but that the plaintiff in the present suit was a party to the original mortgage suit. It is possible that his father was a person whom the court [574] might under certain circumstances not have appointed guardian. We have, however, to consider, before interfering with the proceedings of the year 1899, whether the irregularity, if such it was, caused any damage to the plaintiff. We have therefore to consider what possible defence could

(1) (1895) I. L. R. 17 All. 537.

(2) Week Notes, 1906, p. 26.

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have been set up in the mortgage suit. It is suggested that he might have made the defence that the debt was incurred for immoral purposes. This no doubt would be a defence which the father as guardian might find a difficulty in setting up on behalf of his son. It is now settled law that such a defence cannot be set up where the mortgage was made whilst the mortgagor was the sole owner. It must be assumed that this was always the law, and indeed it has not been shown to us that it was not the accepted law in the year 1899. We may mention here that the present suit seeks to set aside the decree of 1899, but not the decree under section 90. We cannot see that the plaintiff has suffered any damage whatever by reason of the fact that he was represented by his father in the litigation of 1899. That the mortgage was not duly executed, failure of consideration and such like were all defences which the father could have set up on behalf of his son. With regard to the decree which was subsequently made under section 90, it may be pointed out that at that time the plaintiff was represented by his mother, who was undoubtedly able to put forward any possible defence that could be made including, if necessary, the immorality of her husband. For these reasons we think that the appeal must prevail.

We accordingly allow the appeal, set aside the order of the court below and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

35 A. 575 (=22 I. C. 163=15 A. L. J. 933=11 Cr. L. J. 19.)

[575] REVISIONAL CRIMINAL.

Before Mr. Justice Ryves.

EMPEROR *v.* SAYEED AHMAD.*

[25th September, 1913.]

Act (Local) No. IV of 1910 (*United Provinces Excise Act*), *section* 60—*Unlawful possession of excisable article—Search warrant—Act No. X of* 1873 (*Indian Oaths Act*), *section* 13—*Presumption that oath was duly administered.*

An excise inspector searched the house of a person suspected to be in illicit possession of an excisable article, namely cocaine, and cocaine was found in the house.

Held that the subsequent conviction of the person in possession of the said house was rendered illegal by the fact that the excise inspector had not previously obtained a search warrant.

Emperor v. *Allahdad Khan* (1) and *Emperor* v. *Hargobind* (2) referred to.

Held also, that it is a reasonable presumption that an oath has been duly administered to a witness appearing before a court although the record of the court may contain no reference to that fact.

[Appl: 47 All. 575 ; Ref: 28 A. L. J. 364.]

THIS was a reference from the Sessions Judge of Saharanpur recommending that the conviction of and sentence upon one Sayeed Ahmad, who had been convicted by a Magistrate of the first class, of an offence under section 60 of the United Provinces Excise Act, 1913, and sentenced to a fine of Rs. 30, should be set aside. The facts of the case and the reasons for the learned Sessions Judge's recommendation are set forth in the order of the High Court.

The applicant was not represented.

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* Criminal Reference No. 856 of 1913.

(1) (1918) 11 A. L. J. 442 : I. L. R. 35 All. 358. (2) (1912) I. L. R. 35 All. 1.

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35 A. 575=22 I. C. 163=13 A. L. J. 933 =15 Cr. L. J. 19.

The Assistant Government Advocate (Mr. *R. Malecomson*), for the Crown.

RYVES, J.—This is a reference by the learned Sessions Judge of Saharanpur recommending that the conviction of Sayeed Ahmad under section 60 of the Excise Act be set aside. Sayeed Ahmad and Amir Ahmad were tried together under the same section. Both were convicted. Amir Ahmad was sentenced to rigoroua imprisonment for three weeks and to a fine of Rs. 1,000 and Sayeed Ahmad was fined Rs. 30 only. Amir Ahmad appealed and the learned Sessions Judge accepted his appeal and acquitted him. His judgment in that case forms part of the record in this reference and I have examined it carefully. I am, however, not concerned with the case of Amir Ahmad. One reason for [576] acquitting him was that the learned Sessions Judge was of opinion that the cocaine which was admittedly found on his premises was found in a place where it could easily have been planted and that there was evidence to show that certain enemies of Amir Ahmad might well have so planted it. The only reason why I refer to that judgment at all is because many of the points taken in this reference have been dealt with more elaborately in that case. The first ground taken by the learned Judge is that the search was illegal in that the Excise Inspector, although he had full opportunity of getting a search warrant, did not do so. I do not think that the absence of a search warrant affects the legality of the trial. This point was raised very recently in the case of *King Emperor* v. *Allahdad Khan* (1). In that case also there was no search warrant, nevertheless the Magistrate convicted the accused. On appeal the Additional Sessions Judge held that the search was illegal and that the absence of a search warrant was fatal to the case for the prosecution. He therefore acquitted the accused. Against this order of acquittal the Local Government appealed. The Bench which heard the appeal did not decide this point and the head-note to the case of *King-Emperor* v. *Allahdad Khan* is in this particular wrong. In the course of their judgment the learned Judges say that they would have some hesitation in holding that the search was legal. They do not say that the search was illegal and in the concluding words of the judgment they add "we think that it was the intention of the Legislature that in a case under section 63, where it is necessary to search a house, a search warrant should be obtained beforehand." But it will be noted that in spite of this observation this Court held the order of acquittal was wrong and the conviction of the accused was maintained. In another portion of his order of reference the learned Sessions Judge says "the question is whether in the absence of a warrant the whole search is not illegal and null and void and no conviction is legally sustainable as in analogous cases under the Gambling Act." The case just quoted is an authority for the proposition that whether the search was legal or not the conviction of the accused depended, not on the legality of the search, but on the fact that cocaine was found illegally in his [577] possession. I do not understand what the learned Sessions Judge means by the latter portion of the sentence quoted above. There is no analogy that I can see, between the Excise Act and the Gambling Act. In any case, a conviction under the Gambling Act is by no means necessarily invalid even if the search of the premises is made without a proper warrant. If a search under the Gambling Act is made illegally the only result is that certain presumptions which can be drawn under the Act, if the search

(1) (1913) 11 A. L. J. 442 ; I. L. R. 35 All. 358.

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was made in accordance with a properly obtained warrant, do not arise. If authority is wanted see *Emperor* v. *Hargobind* (1).

The next point taken by the learned Judge is that the record does not show that any witness was examined on oath and the trial was therefore apparently illegal. Again I cannot follow the learned Sessions Judge. The trial was held by the late Mr. Clement Wright, a Magistrate of the first class. It appears from the judgment in the other case that on this occasion and apparently this occasion for the first time, Mr. Wright recorded the evidence with his own hand and did not have it recorded in the vernacular as is the usual practice. It is true that the record does not show that an oath was administered to any of the witnesses, but I am not aware of any provision of law which requires a court examining a witness to record the fact that an oath was administered. At any rate, I do not think that the proper conclusion for the Sessions Judge to arrive at, because no note was made that an oath was administered to each witness, was that the whole trial was illegal. I may point out that in the case of Amir Ahmad, his counsel begged the court not to dispose of the appeal on that point. No suggestion was made, apparently, either in the grounds of appeal or otherwise, by any body, that as a matter of fact no oath was administered. I think the reasonable presumption would be, in the absence of any suggestion to the contrary, that proper procedure was followed. The learned Sessions Judge might have examined Mr. Wright before coming to the conclusion at which he arrived. He says that he did think of doing so, but thought it was impossible for Mr. Wright to remember whether an oath was administered in any particular case. But the learned Sessions Judge has pointed out that on this particular case Mr. Wright adopted an. [578] unusual procedure. He might therefore very well have been able to remember whether or not he administered an oath to each witness. Having regard to the care with which he seems to have tried the case, I do not think it at all likely that he, a Magistrate of the first class, would omit to administer the oath before recording a witness's deposition. I would also refer the learned Judge to section 13 of the Indian Oaths Act.

The third ground is that the finding of the small packet of cocaine is most suspicious. This is a question of fact, and after examining the record carefully I am not in agreement with the learned Sessions Judge.

The fourth ground taken is that the search was conducted in accordance with law. This is based on the finding that one of the search witnesses remained outside the shop while the other stood at the threshold while the search was being conducted. I see nothing improper in this, having regard to section 103 of the Code, of Crminal Procedure. The shop apparently was quite a small one and I have no doubt that the witnesses could see perfectly well what was going on, in fact perhaps better than if they had gone inside. In my opinion the trial was properly conducted and the conclusion arrived at by the Magistrate was right. I decline to interfere. Let the record be returned.

Record returned.

(1) (1912) I. L. R. 35 All. 1.

35 A. 578 (=11 A. L. J. 945=21 I. C. 575).

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FULL BENCH.

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

NAND RAM (*Defendant*) *v.* CHOTE LAL AND ANOTHER (*Plaintiff*)*
[24th October, 1913.]

35 A. 578=11 A. L. J. 945 =21 I. C. 575.

Act (Local) No. I of 1900 *(United Provinces Municipalities Act), section* 187 (1) *(h)—Municipal election—Rules framed by the Local Government for regulation of elections—Validity of rules—Petition against successful candidate—Appeal.*

Held (1) that the provisions of section 187 of the United Provinces Municipalities Act which gave power to the Local Government to make rules "generally for regulating all elections under the Act," were wide enough to include rules for the filing and decision of election petitions; and (2) that no [579] appeal lies from the order of a "competent court" passed on an election petition under rule 42 of the rules framed by the Local Government under section 187 (1), clause *(h)* of the Act. *Khunne Lal* v. *Raghunandan Prasad* (1) followed. *Sundar Lal* v. *Muhammad Faiq* (2) approved.

[Fol. 21 I. C. 655=12 A. L. J. 459.]

THIS was a petition asking for a declaration that the election of one Babu Nand Ram to the Municipal Board of Shahjahanpur was invalid. The Munsif before whom the petition was filed declared the election to be invalid, The defendant preferred an appeal to the District Judge, who held that no appeal lay from the Munsif's order and dismissed the appeal. The defendant thereupon appealed to the High Court. The case came up before the Hon'ble the Chief Justice and Mr. Justice Tudball who made the following orders and referred the case to a Full Bench.

RICHARDS, C. J.—This appeal arises out of a municipal election petition. The petition came before the Munsif of Shahjahanpur, who declared the election to be invalid. An appeal was preferred to the learned District Judge, who held that no appeal lay and dismissed the appeal on this ground.

Under section 187 of the Municipalities Act, I of 1900, the Local Government have power to make rules in the manner therein prescribed for various matters connected with municipal elections. Clause *(h)* is as follows:—"Generally for regulating all elections under this Act." In pursuance of the powers conferred or supposed to have been conferred under the section, the Local Government made the following rule:—"The validity of an election made in accordance with these rules shall not be questioned except by petition presented to a competent court within fifteen days after the day upon which the election was held by a person or persons enrolled in the Municipal electoral roll." When the draft rules were published the words were "presented to a District Magistrate" instead of "to a competent court." The question, therefore before us is whether, assuming the rule to have been duly made under section 187 of the Municipalities Act, an appeal lies. In the case of *Khunni Lal* v. *Raghunandan Prasad* (1) a Bench of this Court held that no appeal lay in a municipil election petition. It is quite obvious that if an appeal does lie, there can be in all municipal election cases at least one appeal, and in all cases where the petitioner goes in the first instance to the Munsif there can be two appeals. In almost all cases this would mean that the parties would be involved and the time of the court taken up in more or less useless litigation, because by the time the matter was finally decided the term of the election might easily have expired. Great confusion might also arise having regard to the provisions of Rule 42 and Rule 43. It seems to me that, whatever our decision on the question raised in the present appeal ought to be, the Government ought to seriously consider an amendment to Rule 42, by laying down in clear language the tribunal intended to try election petitions and

*Second Appeal No. 242 of 1913, from a decree of F.S. Tabor, District Judge of Shahjahanpur, dated the 13th of February, 1913, confirming a decree of Priya Nath Ghose, Munsif of Shahjahanpur dated the 16th of September, 1912.

(1) (1913) I. L. R. 35 All. 450. (2) (1912) 16 Oudh Cases, 36.

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prescribing such rights of appeal, if any, as are intended to be given. I feel, [580] however, that our decision upon the present question might possibly decide important questions of principle arising perhaps under totally different circumstances. I therefore think that the present appeal ought to be referred to a larger Bench.

TUDBALL, J.—I fully agree with the learned Chief Justice that the case does involve certain questions of principle which are of considerable importance and a decision on the point by a larger Bench is a necessity in the case. I therefore agree in the order proposed.

The case coming on before the Full Bench,

Babu *Purushottam Das Tandan* (with whom Dr. *Satish Chandra Banerji*), for the appellant, contended that, even if there were no rules framed by the Government in that behalf, under the common law a suit would lie to set aside an election, and wherever a suit was allowed there was an appeal allowed also under the rules of procedure prescribed for the Civil Courts. The rules made by the Government in regard to elections, which took away a right of appeal militated against the common law and were therefore *ultra vires*. Section 187 of the Municipalities Act conferred power on the Government to frame rules for the conduct of elections only up to the election stage and not beyond that. There was no statutory provision taking away the jurisdiction of the Civil Court. Every election petition was in effect a suit. A decree had been passed against the appellant and there must be some remedy provided to set it aside. Assuming that the rules were not *ultra vires*, there was an appeal allowed from the decree made by the Munsif. The Civil Procedure Code allowed an appeal from every decree and the order passed by the first court was in the nature of a decree. The court that exercised jurisdiction in such cases was a Civil Court. The Munsif was a Civil Court and a competent court. The word petition had been used in the rules, but no difference between a suit and petition appeared to have been intended. What was to be taken into consideration was the nature of the relief claimed and not merely the words used. The order of the Munsif was a final adjudication and was therefore a decree. Against a decree an appeal was allowed. The object of Rule 42 was to cut short the period of limitation and not to make any difference between a suit and a petition.

Munshi *Gobind Prasad* (with him Munshi *Lachmi Narain*) was not heard in reply.

[581] RICHARDS, C.J., BANERJI and TUDBALL, JJ.:—This appeal arises out of an election for the municipality of Shahjahanpur. It appears that Lala Nand Ram was a candidate for election and was declared duly elected. Chote Lal and Lachmi Narain presented a petition, under rule 42 of the election rules framed by the Local Government, in the Munsif's court. The result of the petition was that the election of Lala Nand Ram was declared void. Nand Ram, thereupon, presented an appeal to the District Judge. The District Judge held that he had no jurisdiction and dismissed the appeal. Nand Ram has now appealed to this Court.

It is argued on his behalf, first, that the rules framed by the Local Government are *ultra vires*; and, secondly, that even if these rules are valid, the order of the Munsif was a "decree" from which an appeal lay to the District Judge. Section 187 of the Municipalities Act, I of 1900, provides that the Local Government may frame forms for any proceeding of a "Board for which it considers that a form should be provided and may after previous publication make rules consistent with the Act and applicable to all Municipalities." Clause (*h*) provides for the making of rules "generally for regulating all elections under the Act."

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The contention of Nand Ram is that the powers of the Government are confined to making rules regulating matters up to election, but that for matters arising after the election there is no power conferred by the Act upon the Local Government to make rules. In our opinion, although the clause is not very happily expressed, the words used are wide enough to permit of the Local Government framing rules connected with elections, whether before or after the counting of votes and declaration of the poll, and that it was within the power of the Government to frame rules providing for the decision of questions relating to the validity of municipal elections. In pursuance of the powers conferred by section 187 the Local Government framed the following rule:—"The validity of an election made in accordance with these rules shall not be questioned except by a petition presented to a competent court, within fifteen days after the day on which the election was held, by a person or persons enrolled in the municipal election roll." Clause (2) of this rule is as follows:—"If the election be declared void, the person whose election was questioned [582] shall, as from the date of the decision of the Court trying the petition, vacate his office as member of the Board, and shall, if the court which tried the petition so direct, be disqualified for any period not exceeding five years from being elected as member of the Board." This rule is very vague and unsatisfactory. To refer the parties to a "competent court," without giving any definition of that tribunal, was certainly calculated to create great confusion and uncertainty, as also was the omission to provide expressly that the decision of the tribunal should be final. We are glad to say that the Government contemplate an alteration of the rules, which in our opinion is very much needed. Giving the best construction we can to this rule, we consider that it was intended to provide that the validity of municipal elections should only be tested by an election petition presented to one tribunal, and that the decision of that tribunal should be final. The same view has been taken by a Bench of this Court in the case of *Khunni Lal* v. *Raghunandan Prasad* (1). The Second Additional Judicial Commissioner of Oudh took a similar view in the case of *Sundar Lal* v. *Muhammad Faiq* (2). If this view be correct (and on the whole we think it is) then the decision of the Munsif was final and no appeal lay to the lower appellate court, and the appeal was properly dismissed. We dismiss the appeal. We direct the parties to bear their own costs.

Appeal dismissed.

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35 A. 582 (=11 A. L. J. 950=21 I. C. 585).

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

SURANJAN SINGH AND ANOTHER (*Plaintiffs*) *v.* RAM BAHAL LAL AND OTHERS (*Defendants*).*

[24th October, 1913.]

Civil Procedure Code (1908), *sections* 2, 104, 148—*Pre-emption—Decree in pre-emption suit fixing time for payment—Order extending time—Appeal—"Decree"—"Order."*

* Appeal No. 27 of 1913 under section 10 of the Letters Patent.

(1) (1913) I. L. R. 35 A. 450.

(2) (1912) 16 Oudh Cases, 36.

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Held that section 148 of the Code of Civil Procedure (1908) does not entitle the court to extend the time fixed by the decree for payment of the purchase-money in pre-emption cases.

Held, also, that an order made under section 148 of the Code of Civil Procedure (1908) is not a decree within the meaning of section 2 of the Code, nor is it appealable as an order under section 104. *Rahima* v. *Nepal Rai* (1) distinguished :

[Dist : 36 A. 77 ; 22 I C. 926=12 A. L. J. 12; Ref: 64 I. C. 242; Foll. 18 A. L. J. 826 =57 I. C. 16; Ref: 78 I. C. 387; 67 I. C. 772=3 Lah. L. J 310 (F. B.;) 71 I. C, 35 ; 71 I. C. 401 ; 73 I. C. 891; 74 I. C. 575=37 C. L. J. 395=27 C. W. N. 720.]

[583] THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of the case appear sufficiently from the judgment under appeal, which was as follows :—

" These appeals arise out of cross suits for pre-emption. In each case, the plaintiffs were given a decree for pre-emption of half of the property, and the decree went on to provide that if they did not pay the price within a month their claim would stand dismissed and, in that event, the plaintiffs in the other case were allowed a further period of fifteen days within which to pay in the price, so that if either set of plaintiffs failed to pay in the price, the other set would be entitled to take the whole of the property on complying with the terms of the decrees. The decrees in both cases were made on the 17th of June, 1911, and the period of one month expired on the 17th of July, No money was a paid into court in either case by that date.

" On the 19th of July Kirat Singh and others, the plaintiffs' in one case, petitioned the court to grant an extension of the time limited by the decree, and by an order of the 25th of July time was extended to the 4th of August, Each set of plaintiffs paid into court the price specified in their decree before the 4th of August The purchaser objected, but his objection was overruled. He then appealed to the District Judge in both cases and it was held that the first court had no power to extend the time limited by the decrees. The plaintiffs have appealed to this Court contending that there was no right of appeal to the District Judge against the orders of the first court, and that if the appeals were in order, the District Judge should have upheld the orders of the first court on the merits.

"The purchaser has applied in each case for revision of the orders of the first court in case it is held that those orders were not appealable.

"The plaintiffs rely upon section 148 of the Code of Civil Procedure as authorising the Munsif to extend the time fixed in the decrees. In *Jug Ram* v. *Jewa Ram* (2) BANERJI and TUDBALL JJ., expressed grave doubts whther this section applied to suits for pre-emption, and in *Hukam Chand* v. *Hayat* (3), REID, C. J., held that this section did not apply to periods fixed by a decree. To the same effect is the decision of Messrs. EVANS and PIGGOTT in *Narendra Bahadur* v. *Ajudhya Prasad* (4). I agree with the views expressed in these cases. It appears to me that the payment of money into court within a fixed time in pursuance of a decree is not an act prescribed or allowed by the Code within the meaning of section 148. According to the decision in *Rahima* v *Nepal Rai* (5), which is binding upon me. I must hold that the orders of the Munisif were appealable. In my opinion the District Judge was right in setting those orders aside. The two appeals to this Court are dismissed with costs."

The pre-emptors appealed under section 10 of the Letters Patent.

[584] Mr. *M. L. Agarwala*, for the pre-emptors appellants, contended that the order under section 148, Civil Procedure Code, not being a decree, was not appealable : the case of *Rahima* v. *Nepal Rai* (1) was under section 87 of the Transfer of Property Act. There the order was a decree and therefore was appealable. An order for the extension of time does modify a part of the decree, but does not come within the definition of decree, which is a limited one in its nature. A revision would have to be filed against the order of amendment when the court had no power to make such amendment. An order under section 148 of the Code of Civil Proce-

(1) (1892) I. L. R. 14 A, 520.
(2) (1909) 6 A. L. J. 647.
(3) (1912) 121 P W. R.
(4) (1909) 13 Oudh Cases 28.

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dure was not of the nature of the amendment of the decree. The decree was in fact never amended. It was submitted that section 148 applied to the case and no appeal lay from the order passed under that section as it could not be deemed to be a decree. If section 148 gave a discretion to the Munsif in pre-emption cases to extend time, it was properly exercised and the District Judge ought not to have interfered with the Munsif's order. If it did not apply, there was no appeal against the Munsif's order. The only remedy was an applicatiou for revlsion whioh had been filed and rejected. Section 148 could apply to such cases as well. Special provision was necessary in mortgage suits, as the Legislature intended that time in those cases should be extended only when there was good cause shown for it. Section 148 of the Code of Civil Procedure gave a discretion even when no good cause was shown. Order XX, rule 14, of the Code of Civil Procedure prescribed or allowed the payment into court of the purchase money, and when any period was fixed or granted by the court for the doing of any act prescribed or allowed by the Code, the court could extend the time under section 148. The words used in the section were "prescribes" or " allows " and when the court allowed time for payment it was the act of payment that was the act allowed.

Dr. *Surendra Nath Sen*, for the vendees respondents, submitted that an appeal lay from the order as that order was substituted for the original decree. Mr. Amir Ali's Civil Procedure Code, p. 837, was cited. Further the order for extension of time was in effect an order in execution and was, therefore, appealable. The respondent [585] then might be allowed to apply for a review of the order rejecting the revision.

RICHARDS, C. J., BANERJI and TUDBALL, J.J.:—The facts out of which this and the connected appeal, No. 28 of 1913 under the Letters Patent, arise, are shortly as follows:—Two suits for pre-emption were brought by rival pre-emptors. These suits resulted in decrees by which the pre-emptors obtained the property in equal shares, conditional upon their paying their half shares of the purchase money into court, within the time specified in the decrees. The time specified elapsed without the purchase money having been paid by either pre-emptor.

Applications were thereupon made, purporting to be under section 148 of the Code of Civil Procedure, asking the court to extend the time of payment of the purchase money. The learned Munsif granted the application and extended the time. The purchase money was paid into court within the extended time.

Appeals were preferred by the defendants vendees against the order of the Munsif extending the time. Afterwards the decrees were put into execution. The appeal against the order of the Munsif extending the time coming before the District Judge, he held that section 148 did not apply and accordingly set aside the orders of the Munsif.

Second appeals were then preferred to this court by the decree-holders on the ground that the decision of the Munsif was correct and ought not to have been interfered with by the District Judge, and, secondly, on the ground that no appeal lay to the District Judge. The vendees filed applications in revision contending that the Munsif had no jurisdiction under section 148 to extend the time. The second appeals and the applications in revision came before a learned Judge of this Court, who held that an appeal did lie to the District Judge and that his orders setting aside the orders of the Munsif were correct, and dismissed the second

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appeals. The applications for revision were dismissed because the learned Judge thought that there was no necessity for revision.

The plaintiffs have appealed under the Letters Patent.

The first question which we propose to deal with is whether the learned Munsif was right in extending the time for the payment of the purchase money under the provisions of section 148 of [586] the Code of Civil Procedure. That section is as follows:—" Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Code, the court may in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

It is contended on behalf of the appellant that order XX, rule 14, "prescribes" or" allows" the payment into court of the purchase money by the successful pre-emptor. On reading order XX, rule 14, it will at once appear that all that is " prescribed" by the Code is the form which the decree in a pre-emption suit is to take where the plaintiff is successful and has not paid the money into court before decree. It nowhere prescribes or allows the payment into court of the purchase money. Such payment is in reality an incident of the claim for pre-emption. All that the order provides for is uniformity in the form of the decree which the courts make. We agree with the view taken by the learned Judge of this court that section 148 does not entitle the court to extend the time fixed by the decree for the payment of the purchase money in pre-emption cases.

The next question is whether an appeal lay from the decision of the Munsif to the District Judge. Appeals only lie from decrees as defined by section 2 of the Code of Civil Procedure and from orders as specified in section 104. It seems to us that an order made under section 148 is clearly not an appealable order and is not a decree within the definition in section 2, nor is it an order covered by section 104. The only way therefore in which this order could have been set aside was by an application in revision to this Court. We at present have no application in revision before us.

The learned Judge of this Court was of opinion that he was bound by the ruling in *Rahima* v. *Nepal Rai* (1). In that case it was held that an order under section 87 of Act No. IV of 1882 extending the time for payment of the mortgage money by a mortgagor was a decree within the meaning of sections 2 and 244 of the Code of Civil Procedure of 1882. We may point out that that case entirely proceeded under the rulings of this Court in which it had been held that proceedings under the Transfer of [587] Property Act, subsequent to decree, were questions relating to the execution, discharge or satisfaction of the decree. This is certainly not so under the new Code. Special provision is, however, made for mortgage decrees and orders refusing to extend the time are expressly made appealable under order XLIII, rule 1, clause (*o*).

Under these circumstances we must allow the appeal, and set aside the decree of this Court and also of the District Judge. The parties will pay their own costs.

Appeal allowed.

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S. 366—*Kidnapping—Taking out of custody.*—Where two girls under the age of 16 years ran away from their houses and remained for nearly one or two days in the house of a woman, who belonged to the caste of *Naiks* in Kumaun and no report was made to the padhan or the patwari ; *held* that the woman in whose house the girls stayed was properly convicted of an offence under s. 366 of the Penal Code. *Queen v. Gunder Singh*, W. R., CR., R., 6, dissented from. EMPEROR *v.* JASAULI, 34 All. 340 ... 778

S. 379—*Theft—Removal of goods from a person's custody—Larceny.*—In order to constitute larceny there must be an intention to take entire dominion over the property, i. e., the taker must intend to appropriate the property to his own use ; but there may be theft without an intention to deprive the owner of the property permanently. Hence, where a person snatched away some books from a boy as he came out of school and told him that they would be returned when he came to his house, *held*, that the offence of theft had been committed. *R.* v. *Dickinson*, R. and R. 420 ; *Prosonno Kumar Patra* v. *Udoy Sant*, I. L. R. 22 Cal. 669, and *Queen-Empress* v. *Agha Muhammad Yusuf*, I. L. R. 18 All. 88, referred to. EMPEROR *v.* NAUSHE ALI KHAN, 34 All. 89 ... 609

Ss. 406 *and* 408—*Criminal breach of trust—Water Works Inspector misappropriating water—Money realised as water tax not credited to the municipality.*—Where a Municipal Water Works Inspector, being the lessor of a house within Municipal limits which he had sub-let, had such house connected with a municipal water main and accepted a yearly payment as water tax from his tenants but neither informed the municipal board that the connection had been made nor credited to the board the money which he received as water tax from his tenants, it was *held* that he was properly convicted under ss. 406 and 408 of the Indian Penal Code, whether or not he might have been

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punishable under the United Provinces Water Works Act, 1891. EMPEROR *v.* BHIMALA CHARAN ROY, 35 All. 361... 1271

S. 409—*Criminal breach of trust—Charge—Criminal Procedure Code, s.* 222 (2)—An accused person was charged under s. 409 of the Indian Penal Code with having embezzled an aggregate sum of Rs. 208-12-0 on various dates between the 1st July and the 1st November, 1909. *Held* that the charge so framed was not open to objection, notwithstanding that evidence was available as to the various items of which the aggregate sum charged was composed. *Emperor* v. *Gulzari Lal*, I. L. R. 24 All. 254; *Emperor* v. *Ishtiaq Ahmad*, I. L. R. 28 All. 69; *Samiruddin Sarkar* v. *Nibaran Chandra Ghose*, I. L. R. 31 Cal. 928; *Sat Narain Tewari* v. *Emperor*, I.L.R. 32 Cal. 1085, and *Thomas* v. *Emperor*, I.L.R. 29 Mad. 558, followed. *Subramania Ayyar* v. *King Emperor*, I.L.R. 25 Mad. 61, distinguished. EMPEROR *v.* IBRAHIM KHAN, 33 All. 36 ... 25

S. 409—*Criminal misappropriation—Evidence—What prosecution has to prove.*—On a charge under s. 409 of the Indian Penal Code it is not necessary for the prosecution to prove in what manner money alleged to have been misappropriated has actually been disposed of by the accused. If it is shown that money entrusted to the accused was not accounted for nor returned by him in accordance with his duty, if unspent, it lies on the accused to prove his defence. EMPEROR *v.* KADIR BAKHSH, 33 All. 249 ... 167

S. 415, 34 All. 93 ... 612

S. 426, 34 All. 210 ... 691

S. 434, 33 All. 771 ... 516

S. 498—*Enticing away a married woman—Marriage—Hindu law—Whether marriage legal between a Bania and the illegitimate daughter of a Brahman and a Banya woman.*—*Held* that there was no reason why a marriage between a Banya and the illegitimate daughter of a Brahman father and Banya mother should not be valid according to Hindu law, especially when the marriage was recognized by the caste to which the husband belonged. *Padam Kumari* v. *Suraj Kumari*, I. L. R. 28 All. 458, and *In the matter of Ram Kumari*, I. L. R. 16 Cal. 264, referred to. EMPEROR *v.* MADAN GOPAL, 34 All. 589 ... 950

——1865—X (Indian Succession Act)

S. 244—*Civil Procedure Code* (1908), *s.* 2—*Will—Probate—Application for probate dismissed—"Decree"—"Order"—Appeal.*—*Held* that the order of a District Judge granting or refusing probate of a will on an application made under the provisions of s. 244 of the Indian Succession Act, 1865, is a decree within the meaning of s. 2 of the Code of Civil Procedure, 1908, and appealable as such. *Held* also that the court fee payable on such an appeal is Rs. 10 under art. 17, clause vi, of the second schedule to the Court Fees Act, 1870. *Umrao Chand* v. *Bindraban Chand*, 17 All. 475, *Esoof Hasshim Dooply* v. *Fatima Bibi*, 24 Cal. 30, and *Sheikh Azim* v. *Chandra Nath Namdas*, 8 C. W. N. 748, referred to. MOUNTSTEPHENS *v.* GARNETT-ORME, 35 All. 448 ... 1332

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Acts—1867—III (Public Gambling Act).

Ss. 3 and 4—Presumption—Warrant not in accordance with provisions of Act.—*Held* that a warrant authorizing the search of any house which the police officer to whom it has issued might think proper to search was not a legal warrant within the provisions of the Public Gambling Act, 1867. EMPEROR *v.* HARGOBIND, 35 All. 1 ... 1021

S. 5—*Jurisdiction—Power to issue search warrant—"Officer invested with the full powers of a Magistrate"—Sub-divisional officer issuing warrant for search outside his sub-division.*—*Held* that a search-warrant issued under s. 5 of the Public Gambling Act, 1867, by a first class magistrate was not invalid by reason of the fact that the house to be searched was situated outside the limits of the tahsils in respect of which such magistrate had been appointed sub-divisional officer. EMPEROR *v.* ABBU SINGH, 34 All. 597 ... 956

S. 12—"*Mere game of skill*"—*Game of chance.*—*Held* that a game which is in fact only to a very slight extent a game of skill and almost entirely a game of chance is not a game which is excluded by reason of s. 12 of the Gambling Act, 1867, from the previous provisions of that Act, *Hari Singh* v. *King Emperor*, 6 C. L.J. 708, distinguished. EMPEROR *v.* AHMAD KHAN, 34 All. 96. 614

——1869—I (Oudh Estates Act).

Will of taluqdar—Sanad executed by taluqdar through the medium of family friends—Whether document was testamentary or non-testamentary—Registration of document—Act No. III of 1877 (*Indian Registration Act*), *sections* 17 *and* 49 *—Instrument affecting immovable property—Ground not specially taken in argument in courts below—Costs.*—A taluqdar in 1862, in compliance with the directions issued by the Government, made a declaration that, "I wish to file this application, that after my death Umrao Singh the eldest son (*sic*) may estate should continue in my family undivided in accordance with the custom of the *rajgaddi*, and that the younger brothers shall be entitled to get maintenance from the *gaddinashin*." *Held* (affirming the decision of the Courts in India) that it was a valid testamentary disposition by the taluqdar of his estate in favour of his eldest son. The same taluqdar, having three sons, with one of whom he was on bad terms, executed in 1884 the following document, which he called a sanad:—"For Prithipal Singh, who is my son, I fix Rs. 300 annually, so that he may maintain himself. Besides this whatever I may give I will give equally to the three sons except provisions which they may take from my godown (*kothar*). The marriage and *gauna* expenses of the sons and daughters shall be borne by me. After me the three sons are to divide the property moveable and immoveable. This has been settled through the mediation of Thakur Jote Singh of Bihat, and Thakur Ratan Singh of Rojah." *Held* (reversing the decision of the Judicial Commissioner's Court) that it was a non-testamentary instrument. It was a family arrangement arrived at by the mediation or arbitration of two gentlemen, friends of the

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family and interested in its honour, and it was plainly intended to be operative immediately and to be final and irrevocable. *Held* also that it required to be registered under s. 17 of the Registration Act (III of 1877) in order to make it effective as regards immoveable property, and being unregistered, was, so far, void. On an objection that it was not open to the appellants to contend that the document was not a will, the fact that they had, throughout the proceedings in the Courts below, taken conflicting views as to the nature of the document, was held not to preclude their Lordships from considering and determining the real question in the case, and that they were bound to give effect to the real character of the document. Neither party had pursued a consistent course in the matter. Their Lordships permitted the appellants, therefore, to raise that contention, but in allowing the appeal on that ground they did so without costs to the appellants on this appeal or in the Courts below. UMRAO SINGH *v.* LACHMAN SINGH, 33 All. 344. 232

Ss. 2, 3, 8, 10 *and* 22—*Summary and regular settlement of Oudh—Villages settled on grantee whose name was entered as owner in Lists* 1 *and* 2 *of those prepared under s.* 8--"*Taluqdar*"--"*Estate*" *under s.* 2—*Impartible property*—Kabuliat *executed by grantee after the time limit specified in s.* 3—*Suit for partition—After-acquired properties held to be partible, there being no intention shown to incorporate them with the impartible property.*—At the summary settlement of Oudh an order was made on the 5th of October, 1859, for the settlement of certain villages with the ancestor of the parties to these appeals, who, however, did not execute his *Kabuliat* until the 13th of October, 1859, and so not within the time limit specified in s. 3 of the Oudh Estates Act (I of 1869), namely " between the 1st of April, 1858, and the 10th of October, 1859." At the regular settlement, shortly afterwards, the grantee recovered decrees for possession of other villages; and subsequently acquired other properties by purchase. In respect of all the settled villages his name was entered in Lists 1 and 2 prepared under the statutory provisions of s. 8 of the Act. In a suit for partition to which the defence was that all the property was impartible. *Held* (affirming the decisions of the Courts in India) that the grantee (the defendant was on the construction of the provisions of Act I of 1869 relating there to, a " taluqdar," and the villages so settled with him formed, within the meaning of the Act, an "estate" which was impartible and descendible to a single heir. On a question whether the delay in executing the *kabuliat* deprived the taluqa of the character of an "estate" defined in s. 2 of the Act, the Judges of the Judicial Commissioner's Court differed in opinion. *Held*, in the absence of an express declaration that non-execution within the time specified would be fatal to the right given to the grantee by s. 3, that no such construction could be put on that section; but the execution of the *kabuliat* related back to the date of the settlement, namely, the 5th of October, 1859. As to the after-acquired properties the defendant contended that by the custom of the family they became part of the original

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estate and were therefore not subject to the ordinary Hindu law of inheritance. *Held* (affirming the decisions of both Courts below) that the evidence was insufficient to establish that custom: that no intention of the taluqdar was shown to incorporate the subsequently acquired properties with the taluqa, as was necessary on the authority of the case of *Parbati Kumari Debi* v. *Jagdis Chunder Dhabal*, I. L. R. 29 Cal. 433 (453); L. R. 29 I. A. 82 (98), and that the plaintiff was therefore entitled to a decree for his share (one half, of such properties as being partible. JANKI PRASAD SINGH *v.* DWARKA PRASAD SINGH, 35 All. 391 ... 1292

S. 6, See TALUQDAR, 33 All. 125 ... 84

——1869—IV (Indian Divorce Act).

S. 23—*Discretion of Court—Petitioner's adultery a ground for refusing a decree for judicial separation.*—Where the petitioner (the wife) in a suit for divorce or in the alternative for a judicial separation was found to have herself committed adultery, to which the conduct of the respondent had in no way conduced, it was *held* that this was a good ground for the refusal of a decree for judicial separation. *Otway* v. *Otway*, L. R. 13 P. D. 141, followed. *Constantinidi* v. *Constantinidi*, (1903) P. D. 248, distinguished. RHINE v. RHINE, 33 All. 500 ... 336

S. 57—*Marriage—Remarriage of petitioner in divorce proceedings within six months of the decree becoming absolute.*—Where the successful petitioner in a suit for dissolution of marriage entered into a second marriage within six months of the decree for dissolution of marriage becoming absolute, it was *held* that the second marriage was void. *Warter* v. *Warter*, L.R. 15 P.D.152; 59 L.J.P. and M. 87 followed. JACKSON *v.* JACKSON, 34 All. 203. 686

——1870—VII (Court Fees Act).

Ss. 5 and 7—*Court fee—Objections by mortgagee asking for sale of a portion of the mortgaged property exempted by the Court from sale—Reference by Taxing Judge to a Division Bench—Jurisdiction.*—*Held* that where a party objects by way of appeal or under the provisions of order XLI, rule 22, of the Code of Civil Procedure to a decree of the subordinate Court excluding from liability a portion of certain property, the whole of which he claims to be liable for a mortgaged debt, and while accepting the correctness of the amount found due asks that the excluded portion of the property may be also declared liable, court fees should be paid with reference to the value of the property sought to be rendered liable. *Kesavarapa* v. *Kotta Reddi*, I. L. R. 30 Mad, 96, followed. Where the Taxing Judge referred to a Division Bench a question relating to court fees referred to him by the Taxing Officer ; *Held* that the Bench had no authority to entertain such reference. KACHERA *v.* KHARAG SINGH, 33 All. 20 ... 14

S. 7, *Cl* V (*b*)—*Court fees—Appeal—Suit for possession—Decree for qualified possession—Appeal seeking to remove the qualification contained in the decree.*—Plaintiff brought a claim for possession of certain property as transferee from a Musammat Gomi, to whom the property had been bequeathed by one Musammat

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Gomti Kunwar, who had acquired it under a will executed by her husband. The Court of first instance granted him a decree for possession, but limited to the life-time of Musammat Gomi. The defendant appealed, and the plaintiff also appealed, seeking to have this condition removed from the decree, and paid a court fee of Rs. 10 on his memorandum of appeal. *Held* that the court fee was sufficient, the plaintiff appellant being in the position of a person in possession of property who sought to clear his title and to obtain a declaration that he had the full right of ownership to the property. RUP CHAND v. FATEH CHAND, 33 All. 705 ... 472

S. 7, *Clause V (d)—Court fee—Suit to recover a two-thirds share in certain specific plots sold—Court fee payable on market value.*—Where a Hindu widow possessed of certain zamindari property of the total area of 17 bighas 6 biswas assessed to a revenue of Rs. 19-7-0, sold 11 bighas and 11 biswas out of the same, which was practically two-thirds of what she possessed and specified the actual plots sold ; *Held* in a suit by two out of three reversioners to recover two-thirds of the property thus alienated that, the claim being for specified plots and not a definite share of the whole estate paying revenue, the court fee should be paid on the market value of the property in suit not on five times the Government revenue. CHANDHAN *v.* BISHAN SINGH, 33 All. 630 ... 423

S. 7, *clause IX—Decree on mortgage—Separate liabilities of distinct properties—Appeal in respect of distinct properties.*—In a suit for sale on a mortgage a decree was passed declaring the separate liabilities of the different properties mortgaged. One of the defendants, whose property was held liable for specific sums of money, appealed. *Held* that the proper court fee payable on the memorandum of appeal was a fee calculated on the sum of money for which the defendant's property was held liable and not one calculated on the full amount of the decree. CHHABRAJI KUNWAR *v.* THE COURT OF WARDS, 35 All. 92... 1084

S. 7, *clause IX—Suit for sale on a mortgage—Court fee payable in appeal—Value of the subject matter—Amount declared due on date fixed for payment.*—A decree for sale on a mortgage declared that on the date fixed for payment a specified sum would be due from the mortgagor, which included interest *pendente lite*. *Held* that the court fee payable in appeal from such decree was to be assessed, not on the amount claimed in the suit but upon the amount with interest *pendente lite* found due by the court of first instance at the date fixed for payment. BALDEO SINGH *v.* KALKA PRASAD, 35 All. 94 ... 1086

Sch. *I, Art.* 1 : *Sch. II, Art.* 11.—*Civil Procedure Code* (1908), *Order XXXIV, rule* 5—*Court fee—Appeal from final decree in a mortgage suit.*—*Held* that an appeal from the final decree passed under order XXXIV, rule 5, of the Code of Civil Procedure, 1908, requires *ad valorem* court fee and cannot be stamped as an appeal from an order. BAJRANGI LAL *v.* MAHABIR KUNWAR, 35 All. 476 ... 1351

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Sch. II, Art. 17 (*vi*)—*Court fee--Suit for restitution of conjugal rights.*—*Held* that the court fee payable in respect of a suit for restitution of conjugal rights is a fee of ten rupees under article 17, clause vi, of the second schedule to the Court Fees Act, 1870. *Zair Husain Khan* v. *Khurshed Jan*, I. L. R. 28 All. 545, referred to. AISHA *v.* FAIYAZ HUSAIN, 33 All 767 ... 513

Sch. II, Art. 17 (*vi*)—*Court fee payable on plaint—Suit by plaintiff in joint possession to have share partitioned—Fixed fee ten rupees.*—In a suit for partition, where the plaintiff alleges that he is in possession and merely claims partition of the property and separate possession of his share, a court fee stamp of 10 rupees is sufficient. *Reoti* v. *Lachhman*, Weekly Notes, 1900, p. 90, *Wali-ullah* v. *Durga Prasad*, I. L. R. 28 All. 340, and *Bidhata Rai* v. *Ram Charitar Rai*, 12 C. W. N. 37, followed. TARA CHAND MUKERJI *v.* AFZAL BEG, 34 All. 184 ... 673

——1871—IX (Indian Limitation Act).

S. 21—*Act No. IX of* 1908 (*Indian Limitation Act*), *s.* 31—*Limitation—Mortgage with possession—Realization of rents and profits equivalent to receipt of interest as such under the terms of the mortgage.*—Under the terms of a mortgage deed executed in 1850 the mortgagee was to take possession of the mortgaged property and appropriate the rents and profits in lieu of interest. The mortgagee remained in possession up to 1889 when he was dispossessed. In 1910 he brought a suit for sale. *Held*, that the realization of rents and profits in lieu of interest was equivalent to the receipt of interest as such under the terms of the mortgage and therefore under s. 21 of Act No. IX of 1871 the mortgagee was entitled to compute limitation from the year 1889, Act No. XV of 1877 having by that time come into operation, the plaintiff was in 1910 entitled to bring his suit within the limitation provided by s. 31 of Act No. IX of 1908. INDARJET *v.* GAJADHAR SAHAI, 35 All. 270 ... 1208

——1871—XXI—(Pensions Act).

Ss. 3, 4, 6, *and* 8—*Pension—Definition—Grant of Village by Government revenue free—Wajib-ul-arz—Construction of document—Condition purporting to restrain alienation.*—*Held* that a grant of zamindari the revenue of which is remitted by the Government is not a pension within the meaning of s. 3 of the Pensions Act, 1871, and no certificate is necessary under s. 6 to institute a suit with respect to it. Nor can an entry in the *wajib-ul-arz* to the effect that " no co-sharer is competent to transfer property " standing by itself, have the effect of making such property untransferable. *Ganpat Rao* v. *Anant Rao*, I. L. R. 28 All. 104; 32 All. 148; and *Lachmi Narain* v. *Makund Singh*, I. L. R. 26 All. 617, referred to. MANNU LAL *v.* FAZAL IMAM, 33 All. 580 ... 389

——1872—I (Indian Evidence Act).

Ss, 11 *and* 32—*Evidence—Admissibility—Statements of deceased persons.*—*Held* that if the terms of a deposition made by a person since deceased do not fall within the provisions of s. 32 of the Indian Evidence Act, 1872, the provisions of s. 11 of the

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Act will not avail to make such deposition evidence.—BELA RANI *v.* MAHABIR SINGH, 34 All. 341 ... 779

Ss. 14, 15—*Act No. XLV of* 1860 (*Indian Penal Code*), *s.* 415—*Cheating—Evidence to show instances of cheating other than those charged inadmissible.*—A person employed as a clerk in charge of the renewal of licences for hand-carts received Rs. 2 for each such renewal, whereas he ought to have taken Rs. 1-14-0. He was charged with cheating, and evidence was produced showing that he had taken 2 annas in excess from persons other than those named in the charge. *Held* that such evidence was inadmissible either under s. 14, or under s. 15 of the Evidence Act. *Emperor* v. *Debendra Prasad*, I. L. R. 36 Cal. 573, distinguished. *Empress* v. *M. J. Vyapoory Moodeliar*, I. L. R. 6 Cal. 655 referred to. EMPEROR *v.* ABDUL WAHID KHAN, 34 All. 93 ... 612

S. 44—*Res judicata—Fixed rate tenancy—Partition—Power of joint tenants to partition—Suit to recover joint possession.*—A certain holding owned jointly by tenants at fixed rates was partitioned by an award. One party sued on the award to recover exclusive possession of certain plots and obtained a decree for possession and mesne profits, which was executed. Subsequently the other party sued to regain joint possession of these plots and pleaded that the former decree was by a court not competent to pass it and therefore not binding on them. There was nothing to show whether the former suit was filed before or after the coming into force of the Agra Tenancy Act, 1901, or whether the landlord had or had not assented to the partition *Held* that the plaintiffs had failed to show that the former decree was passed by a court which had not jurisdiction, and that the present suit was barred. *Achhey Lal* v. *Janki Prasad*, I. L. R. 29 All. 66, explained. RAGHUNATH KALWAR *v.* BALA DIN KALWAR, 33 All. 143 ... 96

S. 44—*Compromise decree—Suit to set aside decree on the ground that the agreement was caused by undue influence—Jurisdiction.*—A decree obtained by consent or on a compromise can be attacked in a separate suit, not only upon the ground of fraud but upon any ground which would be a sufficient reason for invalidating the agreement upon which the decree was based. *The Huddersfield Banking Company, Limited* v. *Henry Lister and Son, Limited*, L. R. 2 Ch. 273, followed. *Musammat Gulab Kuar* v. *Badshah Bahadur* 13 C.W.N. 1197 and *Sarbesh Chandra Basu* v. *Hari Dayal Singh*, 14 C. W. N. 451, referred to. SHAMI NATH CHAUDHRI *v.* RAMJAS, 34 All. 143 ... 646

S. 68—*Mortgage—Evidence of execution—Attesting witness—Scribe.*—*Held* that the scribe of a mortgage deed cannot be counted as an attesting witness merely because he has signed the deed, even though the deed may in fact have been executed in his presence. To be an "attesting witness" within the meaning of section 68 of the Indian Evidence Act, 1872, the witness must have seen the document executed and have signed it as a witness. *Ranu* v. *Laxmanrao*, I. L. R. 33 Bom. 44; *Burdett* v. *Spilsbury* 10 C. and F. 340, and *Shamu Patter* v. *Abdul Kadir Ravuthan*, 35 Mad. 607, followed. *Radha Kishen* v. *Fateh Ali Khan*, 20

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All. 532; *Raj Narain Ghosh* v. *Abdur Rahim*, 5 C. W. N. 554; and *Muhammad Ali* v. *Jafar Khan*, Weekly Notes, 1897, p. 146, discussed. BADRI PRASAD *v.* ABDUL KARIM, 35 All. 254 ... 1196

S. 69—*Proof of document—Document required by law to be attested—Death of attesting witness—Hindu law—Joint Hindu family—Parties.*— On execution of a deed of mortgage the names of two out of the four attesting witnesses were written by the scribe, who also signed the document himself. *Held* that, it being necessary to prove the deed of mortgage after the death of all the attesting witnesses and the scribe, it was sufficient to prove the handwriting of the scribe. *Radha Kishen* v. *Fateh Ali Ram*, I. L. R. 20 All. 532, referred to. Where all the adult members of a joint Hindu family appear on the record as plaintiffs or defendants, it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit. *Hori Lal* v. *Munman Kunwar*, I..L. R. 34 All. 549, and *Nathu Lal* v. *Lala*, I. L. R. 34 All. 572, referred to. KRISHNA JIVA TEWARI *v.* BISNATH KALWAR, 34 All. 615 ... 968

Ss. 69 *and* 70—*Evidence—Mortgage—Proof of execution of mortgage—Mortgagors illiterate, and both they and the attesting witnesses dead before suit brought.*—A mortgage deed was on the face of it executed in 1899 by three illiterate mortgagors, who affixed their marks, and was attested by more than two witnesses. At the time of the institution of a suit for sale thereon, all the executants and the attesting witnesses were dead, and the evidence tendered in proof of the mortgage consisted of (1) the statement of a witness who professed to be acquainted with the handwriting of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executants of the mortgage in suit and by the representative of the two other executants, which referred to and recognized the genuineness of the mortgage in suit, and (3) a deed of sale executed in 1902 by the representatives or some of the representatives of the executants of the deed in suit, which recognized the genuineness of the usufructuary mortgage mentioned above. *Held* that, having regard to sections 69 and 70 of the Indian Evidence Act, 1872, this evidence was not sufficient to prove the mortgage in suit. GOBARDHAN DAS v. HORI LAL, 35 A. 364 ... 1273

S. 91—*Evidence, admissibility of—Confession made to inquiring magistrate, but not recorded by him in writing—Criminal Procedure Code, ss.* 364 *and* 533.—*Held* that a confession of an accused person made to a magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of s. 91 of the Indian Evidence Act, 1872, and that no evidence can be given of the terms of such a confession except the record, if any, made under s. 364 of the Code of Criminal Procedure. S. 533 of the Criminal Procedure Code has no application to a case where no record whatever has been made of such a confession. EMPEROR *v.* GOLABU, 35 All 260 ... 1201

S. 91—*Suit on promissory note—Note inadmissible in evidence—Plaintiff entitled to fall back on original cause of action.*—If a

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creditor has a cause of action for the recovery of money for which his debtor has executed a promissory note, separate from and independent of the note, he can recover upon such cause, in case the note for any reason cannot be put in evidence. Nor is the creditor necessarily debarred from suing on the original cause of action by the fact that it arose out of the same transaction in the course of which the promissory note was executed, *Parsotam Narayan* v. *Taley Singh*, I. L. R. 26 All. 178, overruled. *Sheikh Akbar* v. *Sheikh Khan*, I. L. R. 8 Cal. 256, *Krishnaji* v. *Rajmal*, I. L. R. 24 Bom. 360, *Virbhadrapa* v. *Bhimaji*, I.L.R. 28 Bom. 432, *Banarsi Prasad* v. *Fazl Ahmad*, I.L.R. 28 All. 298 and *Sri Nath Das* v. *Angad Singh*, 7 A.C.J. 459, referred. RAM SARUP *v.* JASODHA KUNWAR, 34 All 158... 656

S. 92—*Admissibility of evidence to show that a document purporting to be a sale deed is in reality a deed of gift.*—In the appeal their Lordships were of opinion that the decree to the High Court in *Faiz-un-nissa* v. *Hanif-un-nisa*, I. L. R. 27 All. 612, could not be supported and remitted the case to the High Court to be dealt with on the evidence. HANIF-UN-NISSA *v.* FAIZ-UN-NISSA, 33 All 340 ... 229

S. 92, *Proviso 1—Evidence—Proof of failure of consideration—Promissory note given partly on account of a gambling debt.*—The defendant who had been gambling with the plaintiffs and had lost, gave the plaintiffs two promissory notes, partly for his gambling losses and partly on other accounts, but it could not be ascertained what proportion of the total sum secured was represented by the gambling debts. *Held*, on suit to recover on these notes, that it was open to the defendants to prove that the consideration was in part at least money lost in gambling; and the court below was justified, on its finding that the part of the consideration represented by gambling debts could not be separated from the rest, in dismissing the whole suit. *Juggernauth Sew Bux* v. *Ram Dayal*, I L. R. 9 Cal 791 distinguished. BALGOBIND *v.* BHAGGU MAL, 35 All. 558 ... 1409

S. 108—*Evidence—Presumption of death—Burden of proof.—Held* that the presumption which it is permissible to make under s. 108 of the Indian Evidence Act, 1872, does not go further than the mere fact of death. If the period which has elapsed since the time that the person whose death is in question was last heard of is more than seven years, there is no presumption that such person died during the first period of seven years and not at any subsequent period. *Dharup Nath* v. *Gobind Saran* I. L. R. 8 All. 614, discussed. *In re Phene's Trusts* L. R 5 Ch. A. 139, *Narayan Bhagwant* v. *Shriniwas*, 8 Bom. L. R. 226, *Fani Bhushan Banerji* v. *Surjya Kanta Ray Chowdhury*, I. L. R. 35 Cal 25 and *Srinath* v. *Probodh Chunder Das*, 11 C. L. J. 580, referred to. MUHAMMAD SHARIF *v.* BANDE ALI, 34 All. 36 ... 574

S. 114—*Burden of proof—Suit on mortgage bond—Production by plaintiff of copy of bond on the ground of loss of the original—Defendant's admission of execution and production of original*

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with payment of debt endorsed by agent of mortgagee—Rebuttal of defendants' evidence by plaintiff with false story.—In a suit for money due on a mortgage bond, the plaintiff produced only a copy of the document, alleging in his plaint that it had been lost. The defendant admitted its execution, but alleged that the debt had been discharged; and in support of his allegation he produced the original document containing the endorsement of the mortgagee through her agent of payment of the debt. The Subordinate Judge, relying on s. 114 of the Evidence Act, put the *onus* on the plaintiff, who to account for the possession of the bond by the defendant, set up a case supported by witnesses which both courts below held to be false. The Subordinate Judge dismissed the suit. The Judges of the Judicial Commissioner's Court disbelieved the evidence on both sides, set aside the presumption under s. 114 of the Evidence Act, and endeavoured to make out a case for the plaintiff based on a theory of their own. *Held* (reversing that decision) that the first Court was right in holding that the production by the defendant of the bond with the endorsement of payment cast on the plaintiff the burden of proving that the debt was still outstanding; and that the appellate Court should not have disregarded the presumption under s. 114 in favour of a "possibility" based on surmise. Suspicion, though a ground for scrutiny, could not be made the foundation of a decision. MUHAMMAD MEHDHI HASAN KHAN *v.* MANDIRDAS, 34 All. 511 ... 897

S. 114, *See* ACT NO. III OF 1877, SS. 32, 70, 75, 34 All. 253 ... 719

——IX (Indian Contract Act).

Ss. 10 *and* 11—*Guardian and minor—Sale of his own property by guardian to minor—Sale valid if for benefit of minor.*—A certificated guardian transferred some immovable property belonging to himself to his minor wards in satisfaction of money which he owed to them. After the guardian's death the minors sued his heirs for possession of the property. *Held* on the finding that the transaction was *bona fide* and for the benefit of the minors, that the transfer in their favour was valid and could be enforced by them as against the heirs of their late guardian. ULFAT RAI *v.* GAURI SHANKAR, 33 All. 657 ... 441

S. 11—*Minor—Sale—Minor vendee subsequently dispossessed by third party—Right of vendee to recover purchase money from vendor.*—Where certain zamindari property was sold to persons who were minors at the time of sale, and the purchasers were subsequently ousted on suit by third parties, it was *held* that the purchasers were at any rate entitled to recover from the vendors the sum which they had paid as purchase money. *Mir Sarwarjan* v. *Fakhr-ud-din Mahomed Chowdhuri*, 9 A. L. J. 33; L. R 39 I A.; I. L. R. 39 Cal. 232 and *Mohri Bibee* v. *Dharmodas Ghose*, I. L R. 30 Cal. 539, distinguished. WALIDAD KHAN *v.* JANAK SINGH, 35 All. 370 ... 1277

Ss. 23, 27—*Agreement between several firms to fix rates for ginning and baling cotton and to share profits—Agreement neither in restraint of trade nor against public policy.*—*Held* that an agree-

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ment, whereby certain firms fixed the rates to be charged for ginning and baling cotton, and further as to the manner in which the profits should be shared by the parties thereto, was an agreement neither in restraint of trade nor opposed to public policy. *Haribhai Manek Lal* v. *Sharafali Isabji*, I.L.R. 22 Bom., 861, and *Frazer & Co.* v. *The Bombay Ice Manufacturing Co.*, I. L. R., 29 Bom., 107, followed. KUBER NATH *v.* MAHALI RAM, 34 All. 587 ... 949

S. 30—*Contract collateral to a wagering contract not unenforceable.*—Where an agent has incurred losses on behalf of his principal he is not disentitled to recover as against the principal by reason of the contract in respect of which such losses were incurred being a wagering contract. *Shibbo Mal* v. *Lachman Das*, I.L.R. 23 All. 165, followed. *Thacker* v. *Hardy*. L. R. 4 Q. B. D. 685, referred to. JAGAT NARAIN *v.* SRI KISHAN DAS, 33 All. 219 ... 147

S. 39—*Contract—Mortgage—Part of consideration unpaid—Effect of such non-payment.*—Where on execution and registration of a mortgage an interest in the mortgaged property has vested in the mortgagee the fact that part of the mortgage money as specified in the deed of mortgage has not been paid neither renders the mortgage invalid nor entitles the mortgagor to rescind it at his option. *Gokal Chand* v. *Rahman*, Punj. Rec., 1907, 274, dissented from. *Tatia* v. *Babaji*, I. L. R., 22 Bom., 176, *Subba Rau* v. *Devu Shetti*, I.L.R. 18 Mad., 126, *Bajrangi Sahai* v. *Udit Narain Singh*, 10 C. W. N., 932. and *Baij Nath Singh* v. *Paltu*, Weekly Notes, 1908, p. 38, referred to. RASHIK LAL *v.* RAM NARAIN, 34 All. 273 ... 732

S. 43, *See* LAND-HOLDER AND TENANT 34 All. 604 ... 961

S. 212, *See* CIVIL PROCEDURE CODE (1908), s. 20 (*c*), 34 All. 49... 583

S. 235—*Principal and agent—Untrue representation by agent as to extent of his authority—Liability of agent.*—*Held* that s. 235 of the Indian Contract Act, 1872, applies as much to the case of a person who untruly represents the extent of the authority given to him by another as to that of a person who represents himself to be the agent of another when in fact he has no authority from him whatever. *Collen* v. *Wright*, 27 L. J. Q. B., 215; 7 E. & B., 301, referred to. GANPAT PRASAD *v.* SARJU 34 All. 168 ... 662

——1873—X (Indian Oaths Act.)

S. 13, *See* ACT (LOCAL) NO. IV of 1910, s. 60, 35 All. 575 ... 1420

——1873—VIII (Northern India Canal and Drainage Act).

Ss. 7, 70—*Act No. XLV of* 1860 (*Indian Penal Code*). s. 426—*Cutting walls of canal—Mischief—Penal provisions of the Canal Act not exclusive of the Indian Penal Code.*—*Held* (1) that s. 70 of the Northern India Canal and Drainage Act, 1873, does not bar the prosecution of an accused person under any other law, for any offence punishable under the Canal Act, (2) that it is an act of wilful mischief punishable under the Indian Penal Code for any person to make a breach in the wall of a canal. EMPEROR *v.* BANSI 34 All. 210 ... 691

——1873—(North—Western Provinces and Oudh Land Revenue Act.)

Ss. 146, 148 *and* 167—" *Proprietor* "—*Mortgage by* maufidar—*Sale of mahal for default in payment of Government revenue*—*Rights of purchaser and mortgagees of the* muafi. Where certain *Muafidars*, whose rights as such accrued before the year 1870, and were not shown to have been created by the zamindars of the *mahal* in which the *muafi* land in question was situate, executed a usufructuary mortgage of such land, and thereafter the *mahal* was sold for default in payment of Government revenue, it was *held* that the rights of the mortgagees were not extinguished in favour of the purchaser. KUNWAR SEN *v.* JWALA PRASAD, 35 All. 190 ... 1153

——1785—IX (Indian Majority Act).

Ss. 2, 3—*Hindu law—Majority—Testamentary capacity of Hindus.*—*Held* that a Hindu domiciled in the United Provinces cannot execute a valid will until he has reached the age of majority as prescribed by the Indian Majority Act, 1875. HARDWARI LAL *v.* GOURI, 33 All 525 ... 352

S. 3—*Guardian and minor—Effect of appointment of Hindu widow as guardian of her minor sons—Sale of minor's property.*—A Hindu died leaving a widow and two minor sons. The widow was appointed in 1890 guardian of the two sons, and in 1891 obtained sanction from the District Judge for the sale of half of the property of the minors. In 1906, the widow and the elder son, who had then attained majority sold part of the property of the sons amounting to somewhat less than half. Within three years of his coming of age the younger son sued for a declaration that the sale of 1906, and mortgage executed in 1902 were not binding on his interest in the property purporting to be dealt with thereby. *Held* (1) that the appointment of the mother as guardian had the effect of prolonging the minority of both sons until they reached the age of twenty-one years and (2) that the sanction of the Judge given in 1891 could not validate a sale which was not made until 1906. *Gharib-ullah* v. *Khalak Singh* 25 All. 407 distonguished SHAMI NATH SABI *v.* LALJI CHAUBE, 35 All. 150 1124

——1877—I (Specific Relief Act).

Ss. 8 *and* 9.—*Suit for ejectment based on title—Court not competent in such a suit to grant a decree on the basis merely of previous possession.*—Where a plaintiff sues for possession on the basis of title and fails to establish his title, he cannot be granted a decree for possession under the first paragraph of s. 9 of the Specific Relief Act. *Ram Harakh Rai* v. *Sheodihal Joti*, I.L.R. 15 All., 384 and *Mousi* v. *Kashi* Weekly Notes, 1897, p. 145, overruled. *Ramasami Chetty* v. *Paraman Chetti*, I.L.R., 25 Mad., 448, followed. *Wajid Ali* v. *Ram Saran* Weekly Notes, 1884 p. 39 and *Chuthan Rai*, v. *Sheo Ghulam Rai*, Weekly Notes, 1889 p. 89, referred to LACHMAN *v.* SHAMBHU NARAIN 33 All. 174 ... 117

S. 9—*Possessory suits dismissed—Application by plaintiff for revision rejected.*—When the plaintiff's suit under s. 9 of the

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Specific Relief Act, 1877, was dismissed, the High Court declined to interfere in revision upon the ground that it was open to the plaintiff to take another remedy and bring a regular suit on title. *Jwala* v. *Ganga Prasad*, I. L. R. 30 All. 331, followed. RAM KISHAN DAS *v.* JAI KISHAN DAS, 33 All. 647 ... 434

S. 21— *Arbitration—Reference to arbitration pleaded in bar of suit—Effect of reference having become unenforceable before suit.*—Held that an agreement to refer to arbitration which has not been acted upon and which has become from lapse of time unenforceable cannot be set up as a bar to a suit respecting matters which had been included in the agreement, *Atma Rai* v. *Sheobaran Rai*, Weekly Notes, 1882, p. 58, *Tahal* v. *Bisheshar*, I. L. R. 8 All. 57, and *Adhibai* v. *Cursandas Nathu*, I. L. R. 11 Bom. 199. RAM KUMAR SINGH *v.* JAG MOHAN SINGH, 33 All. 315 ... 213

S. 30—*Specific performance—Award—Suit to recover money payable under an award—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, articles* 113, 116 120—*Limitation.*— By the terms of an award it was provided, *inter alia*, that the defendants should pay to the plaintiff the sum of Rs. 350 on or before the 27th of June 1904, and in default of such payment the plaintiff could recover from the defendants Rs. 350 with interest at 12 per cent. per annum. *Held* that a suit to recover on default of payment by the stipulated date, the sum abovenamed with interest was not a suit for specific performance of a contract, and as such governed by article 113 of the first schedule to the Indian Limitation Act, 1908, but was governed by either article 116 or article 120. *Sukho Bibi* v. *Ram Sukh Das*, I. L. R. 5 All. 263, *Raghubar Dial* v. *Madan Mohan Lal*, I. L. R. 16 All. 3, *Sheo Narain* v. *Beni Madho*, I. L. R. 23 All. 285, *Sornavalli Ammal* v. *Muthayya Sastrigal*, I. L. R. 23 Mad. 593, *Tulewar Singh* v. *Bahori Singh*, I. L. R. 26 All. 497, and *Bajahari Saha Banikya* v. *Behary Lal Basak*, I. L. R. 33 Cal. 881. KULDIP DUBE *v.* MAHAUL DUBE 34 All. 43 ... 579

Ss. 39 and 42, *See* CIVIL PROCEDURE CODE (1908), order XLI, rule 22, 34 All. 140 ... 644

S. 42, *See* MINOR, 35 All. 487 ... 1359

1877—III (Indian Registration Act).

Ss. 32—*Registration*—"*Presentation*".—Where the executants of a document which it is desired to register are present acquiescing in the handing over of the document to the Registrar for registration, the fact that the physical act of handing the document to the Registrar is performed by a person who is not authorized to 'present' the document for registration will not render the presentation invalid. NATH MAL *v.* ABDUL WAHID KHAN, 34 All. 355 ... 789

Ss. 32, 33—*Registration—Evidence—Presumption of validity of registration— Presumption rebutted by evidence showing document to have been presented by an unauthorized person.*— Although, when the validity of the registration of a document is in question after the lapse of a considerable period of time, it is to be presumed that the registration was carried out according to law,

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yet when there exists evidence which discloses a fatal defect in procedure, as for instance, that the person who presented the document for registration was not legally authorized to do, so the registration must be held to be invalid. Such a defect as presentation by an unauthorized person cannot be cured by subsequent admission of execution on the part of the executants. *Mohammed Ewaz* v. *Birj Lall*, L. R. 4 I.A. 166, and *Mujib-unnissa* v. *Abdur Rahim*, I.L.R. 23 All. 233, referred to. *Wilaiti Begam* v. *Fazal Husain Khan*, 9 A. L. J. 148, and *Ram Chandra Das* v. *Farzand Ali Khan*. I. L. R. 34 All. 253, distinguished, JAMBU PRASAD *v.* MUHAMMAD AFTAB ALI KHAN, 34 All. 331 ... 772

S. 42—*Hindu law—Reversioner—Suit for declaration of title—Cause of action—Will made by Hindu widow in possession—Limitation.*—D, a separated Hindu, and his son A died in 1891 on the same day the father dying first. A's son, S. M. died a week later leaving his mother H and his grandmother M. The property was then recorded in the name of M and H; but M. got possession, and in 1908 executed a will in favour of her daughter S. The reversioners of D brought a suit in 1908 for a declaration that the will would have no effect on their reversionary right. S set up her right to the property, ignoring that of H. *Held*, that even during the lifetime of H, the plaintiffs were entitled to institute a suit for a declaration only under the provisions of section 42 of the Specific Relief Act. *Held* further that the suit was not barred by limitation. Mutation of names in M's favour was more or less an equivocal act and might possibly have given a cause of action, but when in 1908 M specifically declared that the heir to the property was S and S herself asserted her title, the plaintiffs acquired a cause of action sufficient to entitle them to sue. SHEORAJI *v.* RAMJAS PANDE, 33 All. 430 ... 289

Ss. 17, 49—*Registration—Evidence—Petition of compromise unregistered and not embodied in any decree of court.*—*Held* that a petition containing the terms of a compromise between parties to a Revenue Court suit which had been filed in the Court, but was unregistered and had not been acted upon or embodied in the Revenue Court's decree could not in a subsequent civil suit be used as evidence of the terms of such compromise, the property purporting to be dealt with thereby being above the value of Rs. 100. *Sadar-ud-din Ahmad* v. *Chajju*, I. L. R. 31 All. 13, and *Kashi Kunbi* v. *Sumer Kunbi*, 1. L. R 32 All 206, followed. BHAGWAN SAHAI *v.* HAR CHAIN, 33 All. 475 ... 319

Ss. 17 *and* 49. See ACT NO I OF 1869, 33 All. 344 ... 232

S. 17 (*n*)—*Mortgage—Agreement to relinquish portion of principal and all interest—Acknowledgment—Registration.*—*Held* that an agreement executed by a mortgagee after the date of the mortgage whereby he relinquished a certain part of the principal and all interest, past and future, on the mortgage in lieu of certain services rendered by the mortgagor to the mortgagee was a document which required registration to make it admissible in evidence, and it could not be said to be an acknowledgment of

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payment within the meaning of the exception contained in s. 17, clause (n), of the Indian Registration Act, 1877. GOBARDAN SAHI *v.* JADUNATH RAI, 35 All. 202 ... 1161

S. 21—*Registration—How far a misdescription of property comprised in a deed may invalidate registration.*—Where one of several villages comprised in a registered mortgage deed was described as being in a wrong tappa, the description being, notwithstanding this error, sufficient for identification, it was *held* that misdescription was not sufficient to invalidate the mortgage as regards the village in question. *Beni Madho Singh* v. *Jagat Singh*, 10 A. L. J. 33 referred to. PARSOTAM DAS *v.* PATESRI PARTAP NARAIN SINGH, 35 All. 250 ... 1194

S. 32, 60, 75—*Registration—Presentation—Endorsement of registering officer—Presumption—Evidence Act No I of* 1872 (*Indian Evidence Act*), *s.* 114.—A document was presented to a Sub-Registrar for registration by a *karinda* of the person in whose favour it was executed. It was received for registration. Simultaneously with the presentation an application was made to summon the executants. They failed to appear, and the Sub-Registrar, considering that execution was not admitted, refused to register the document. The matter came up before the District Registrar by means of an application under s. 73 of the Registration Act, and the presence of the executants having been secured, the District Registrar ordered that the document should be registered. The document was apparently then sent by the Registrar to the Sub-Registrar by whom it was registered *Held* that in the absence of evidence to the contrary it must be presumed that the *karinda* who presented the document was duly authorized in that behalf, and further that, even if the Registrar had in fact sent the document direct to the Sub-Registrar, instead of returning it to the person who had presented it for registration, this fact alone was not sufficient to invalidate the registration. *Mohammed Ewaz* v. *Brij Lall*, L. R. 4 I A. 167, referred to *Mujib-un-nissa* v. *Abdur Rahim*, I. L. R. 23 All. 33, and *Ishri Prasad* v. *Baij Nath*, I. L. R. 28 All. 707, distinguished. RAM CHANDRA DAS *v.* FARZAND ALI KHAN, 34 All. 253. ... 719

S. 50—*Registration—Mortgage—Priority between registered and unregistered deeds.*—Property which was the subject of two unregistered mortgages of different dates was sold in execution of a decree on the later of the two mortgages and purchased by the decree-holder, who afterwards sold it by an unregistered deed to Bal Kishan, who in turn sold it by a registered deed without making any mention of the prior unregistered mortgage. *Held* that after such sale no suit would lie on the prior unregistered mortgage. *Sobhagchand Gulabchand* v. *Bhaichand*, I. L. R. 6 Bom. 193, *Baldeo Prasad* v. *Baldeo*, Weekly Notes, 1901, p. 112, and *Ram Lal* v. *Thakur Bachcha Singh*, 10 A. L. J, 114, referred to. ISHRI PRASAD *v.* GOPI NATH, 34 All. 631 ... 980

——(1877)—XV (Indian Limitation Act).

S. 2, See Parties, 33 All. 272 ... 183

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S. 3. *Sch. II, Arts.* 13 *and* 14—*Civil Procedure Code* (1882), *s.* 310-*A*—*Execution of decree—Suit involving the cancellation of an order setting aside a sale—Limitation.*—A Civil Court acting under s 310-A of the Code of Civil Procedure, 1882, set aside a sale on an application made about 14 months after the sale. The auction-purchaser more than a year after this order sued for possession of the property and for a declaration that the order under s. 310-A was passed without jurisdiction. *Held* that the order whether passed rightly or wrongly was not a nullity, and that the order having been passed in a proceeding other than a suit, art. 13 of the second schedule to the Indian Limitation Act, 1877, barred the present suit, inasmuch as the plaintiff could not obtain a decree for possession without first having the order set aside. KISHARI LAL *v.* KUBER SINGH, 33 All. 93 ... 63

S. 9. See ACT NO. XV of 1877, s. 19 and Sch. II, Art. 148, 35 All. 227 ... 1178

S. 19—*Mortgage—Redemption — Limitation — Acknowledgment.*—*Held*, that an acknowledgment of the title of the mortgagor made by only one of two mortgagees would not avail to save the mortgagor's right to redeem being barred by limitation where the mortgage was a joint mortgage and incapable of being redeemed piecemeal. *Dharma* v. *Balmakund*, I. L. R. 18 All. 458, followed. JWALA PRASAD *v.* ACHCHEY LAL, 34 All. 371 800

S. 19 *and sch. II, Art.* 148—*Acknowledgment, effect of—Acknowledgment by widow in possession of husband's estate—Suspension of limitation—Act XV of* 1877, *s.* 9—*Act XIV of* 1859 *s.* 1, *clause* 15—Res judicata—*Contentions raised for the first time on appeal to His Majesty in Council—Practice of Privy Council.*—In a suit brought by the appellant on the 4th of March, 1907, against the respondents for the redemption of a mortgage, dated the 2nd of January, 1842, made between the respective predecessors in title of the parties and in which no date for redemption was specified, acknowledgments of the mortgagor's right had been made by the widow and daughter of a former mortgagee, a predecessor in title of the respondents, which, the appellants contended, extended the period of limitation. *Held* that the law of limitation applicable to the case was not Act XIV of 1859, the law in force at the date of the acknowledgments, but Act XV of 1877, which was in force at the time of the institution of the suit. Under Art. 148 of sch. II, to that Act the period of limitation prescribed for a suit to redeem a mortgage was 60 years from the time when the right to redeem accrued, and by s. 19 an acknowledgment to be effective must be "signed by the party against whom such right is claimed or by some person through whom he claims title." *Held* that the respondents derived title through the last male owner, and not through his widow and daughter, who were therefore not competent under section 19 to make an acknowledgment of the right of redemption so as to bind any interests except their own. To hold otherwise would be to extend the power of a Hindu female in possession of a limited interest to

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bind the estate to an extent which was not sanctioned by authority. An acknowledgment of liability only extends the period of limitation within which the suit must be brought, and does not confer title, and, with reference to section 2 of Act XV of 1877, was not a "thing done" within the meaning of section 6 of the General Clauses Consolidation Act (I of 1868). There was nothing in article 148 of Schedule II of Act XV of 1877 to justify a holding that by reason of the fusion of the interests of the mortgagor and mortgagee (which it was alleged, took place between the years 1883 and 1898) the period of limitation which began to run on the 3rd of January, 1842, was suspended; which would be deciding contrary to section 9 of the Act: this suit not being one to which the proviso to that section applied. *Barrel* v. *Earl of Euremont*, (1) distinguished. The present suit was not barred as *res judicata* by a former suit in 1904. With regard to contentions raised on this appeal which had not been raised before at any stage of the case, and consequently had not been considered by any of the Courts below, nor were even suggested in the reasons in the case of the appellant to England, their Lordships adhered to the established practice of the Board not to allow new cases to be made for the first time on appeal to His Majesty in Council, SONI RAM *v.* KANHAIYA LAL, 35 All. 227 ... 1178

S. 2, *sch. II, art.* 35. See ACT No. IX of 1908, s. 29, 34 All. 412... 829

Sch. II, arts. 44 *and* 144. See MUHAMMADAN LAW, 34 All. 213 ... 692

Sch. II, art. 104 – *Muhammadan law—Dower—Wife put into possession of husband's property in his life-time and subsequently dispossessed—Suit by her heir for balance of dower debt—Limitation.—Held* that article 104 of sch. II of the Indian Limitation Act, 1877 (art. 104, sch. I, Act IX of 1908) does not apply to a suit by one of the heirs of a Muhammadan widow who having been put into possession of her husband's property during his life-time in lieu of her dower is dispossessed thereof subsequently to his death. HAMID-ULLAH KHAN *v.* NAJJO, 33 All. 568 ... 382

Sch. II, arts. 100, 116—*Suit to recover rent on a registered lease—Limitation.—Held* that a suit for the recovery of rent based upon a registered lease is governed as to limitation, not by art. 116, but by art. 110, of the Indian Limitation Act, 1877. *Ram Narain* v. *Kamta Singh*, I. L. R. 26 All. 138, followed. JAGGI LAL *v.* SRI RAM, 34 All. 464 ... 865

Sch. II, art. 116. See CONTRACT, 34 All. 429 ... 841

Sch. II, arts 137, 142, 144—*Adverse possession—"Defendant"—Successive but independent trespasser.*—Plaintiffs purchased certain property at an execution sale on the 20th November 1891, the property being at the time of purchase in the possession of trespassers, and formal possession was given to them on the 25th November 1892. In 1897 other persons, also trespassers, obtained possession of the property, against and not through the persons originally in possession. In 1908, the plaintiffs sued the second set of trespassers for possession. *Held* that article 144 of the second schedule to the Indian Limitation

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Act, 1877, applied and the suit was not time-barred. *Ram Prasad Jannu* v. *Lakhi Narain Pradhan*, L. R. 12 Cal. 197, followed. RAM LAKHAN RAI *v.* GAJADHAR RAI, 33 All. 224 .. 150

Sch. II, art. 141—*Hindu law—Suit by reversioner for possession—Adverse possession by widow of predeceased son of last male owner—Limitation.*—A separated Hindu died leaving him surviving two widows and a daughter-in-law, the widow of his predeceased son. Upon the death of the survivor of the two widows the daughter-in-law took possession of the property and remained in possession thereof for more than twelve years, adversely to the reversioners. *Held* on suit by the reversioners to recover possession that their claim was time-barred, their cause of action having commenced from the death of the survivor of the two widows of the last owner. *Shim Koer* v. *Dab Koer*, L. R. 29 I. A. 132, referred to. GAJADHAR PANDE *v.* PARBATI, 33 All. 312 ... 210

Sch. II, Art. 178 —*Act No. IX of* 1908 (*Indian Limitation Act*), *s.* 15 —*Execution of decree—Limitation—Execution stayed by injunction.*—In execution of a decree certain property was attached by the decree-holder by means of an application made on the 8th of July, 1904. Objection was taken to the attachment, which was disallowed on the 10th of March, 1908. This was followed up on the 5th of April, 1905, by a declaratory suit against the decree-holder. An injunction was also granted on the 6th of April, 1905, whereby the sale of the property in suit was stayed. The suit terminated on the 26th of June, 1907, but the injunction lasted until January, 1909. The next application for execution was made on the 14th of April, 1910. *Held* that this last application was within time whether the Limitation Act of 1877 or that of 1908 applied. It was not relevant that the decree-holder might possibly have obtained execution of the decree against other property of his judgment-debtor. *Behari Lal Misir* v. *Jagannath Prasad*, I. L. R. 28 All. 651, followed. GHULAM NASIR-UD-DIN *v.* HARDEO PRASAD, 34 All. 436 ... 846

Sch. II, Art. 180—*Execution of decree—Limitation—Terminus a quo—Order of His Majesty in Council dismissing an appeal for want of prosecution an affirmance of the decree appealed from.*—An order of His Majesty in the Privy Council dismissing an appeal for whatever cause is in effect an affirmance of the court below and is the only order in the litigation capable of enforcement. Where, therefore, an appeal to His Majesty in Council from a decree passed by the High Court for sale on a mortgage was dismissed for want of prosecution, it was *held* that limitation in respect of an application by the decree-holder for an order absolute for sale was governed by art. 180 of the second schedule to the Indian Limitation Act, 1877, time running from the date of the order of His Majesty in Council. *Pitts* v. *La Fontaine*, L.R. 6 A. C. 482, *Luchmun Pershad Singh* v. *Kishun Persad Singh*, I. L. R. 8 Cal. 218. *Beni Rai* v. *Ram Lakhan Rai*, I. L. R. 20 All. 367, *Tassaduq Rasul Khan*, v. *Kashi Ram*, I. L. R. 25 All. 109, and *Oudh Behari Lal* v. *Nageshar Lal*, I. L. R. 13 All. 278, referred to. *Bipro Doss Gossain* v.

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Chunder Seekur Bhuttacharjee, 7 W. R. C. R. 521, distinguished. ABDUL MAJID *v.* JAWAHIR LAL, 33 All. 154 ... 104

Sch. II, Art. 179. See LIMITATION, 33 All. 264 ... 178

Sch. II, Art. 179. See CIVIL PROCEDURE CODE (1882), ss. 341 and 349, 33 All. 279 ... 188

——1878—I (Opium Act).

Ss. 5, 9—*Master and servant—Liability of master for act of servant.*—Where the servant of a licensed vendor of opium, in the course of his employment as such servant, sold opium to a person under the age of fourteen years, it was *held* that the licensed vendor also was liable under s. 9 of the Opium Act even though he might not have been aware of the sale. *Queen-Empress* v. *Tyab Ali*, I. L. R. 24 Bom. 423, followed. EMPEROR *v.* BABU LAL, 34 All. 319 ... 764

——1878—XVII (Northern India Ferries Act).

S. 22—*Ferry—Illegal toll taken by servants of lessee—Lessee himself not responsible.*—*Held* that the lessees of a ferry could not be held responsible under s. 29 of the Northern India Ferries Act, 1878, for the taking of unauthorized tolls by their servants when they were not present and took no part in the extortion. *Queen-Empress* v. *Tyab Ali*, I. L. R. 24 Bom. 423, distinguished. EMPEROR *v.* BEHARI LAL, 34 All. 146 ... 648

——1881—XXVI (Negotiable Instruments Act).

S. 98—*Want of notice of dishonour—Whether damage caused by reason of such want of notice—Burden of proof.*—In a suit by intermediate endorsers of a *hundi* against earlier endorsers, the court found that the *hundi* had not been presented for payment within a reasonable time and that notice of dishonour was not given. *Held* that it lay upon the plaintiffs to prove that the defendants could not suffer damage by reason of want of notice of dishonour; not upon the defendants to prove that they had suffered damage. *Moti Lal* v. *Moti Lal*, I. L. R. 6 All. 78, followed. MADHO RAM *v.* DURGA PRASAD 33 All. 4 ... 3

——1882—II (Indian Trusts Act).

S. 88—*Trust—Trustee entering into dealings in which his own interest may come into conflict with his duty as trustee—Purchase of mortgage deed comprising property belonging at the time of purchase to the trust.*—A member of a body of trustees purchased for a very low price at an auction sale in execution of a simple money decree held by the trustees as such a mortgage bond comprising, amongst other property, a village of which two-thirds had been previously purchased by the author of the trust and formed part of the trust property. Neither the purchaser nor the trustees had obtained the leave of the court to bid. The auction purchaser claimed the purchase for himself and sought to enforce the mortgage by suit.—*Held* that the auction purchaser could not be allowed to do this, but must, on the contrary, be taken to have made the purchase for the benefit of the trust. All that he was entitled to was to be repaid the actual sum which he himself paid for the mortgage deed at the auction sale. GOPI NARAIN *v.* KUNJ BEHARI LAL, 34 All. 306 ... 755

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Acts (1882)—IV (Transfer of Property Act).

S. 6—*Transfer of expectancy—Compromise between Hindu brothers that property of a brother dying without male issue should be divided amongst survivors—Hindu Law—Dayabhaga—Administration—Suit to enforce administration bond—Limitation.*—*Held* that a provision in a family settlement whereby certain Hindu brothers divided the family property belonging to them amongst themselves and agreed that upon the death of any one of them without male issue his share should pass to the surviving brothers was neither in contravention of Hindu Law nor obnoxious to the provisions of the Transfer of Property Act, s. 6(*a*), as being a transfer of an expectant interest in property. *Ram Nirunjun Singh* v. *Prayag Singh*, I. L. R. 8 Cal. 138, followed. *Held*, also that where the assignee of a bond given by an executor for the due administration of the estate sues to enforce the bond, time does not begin to run against him necessarily until the death of the obligor. KANTI CHANDRA MUKHERJI *v.* AL-I-NABI, 33 All. 414 ... 278

S. 41—*Ostensible owner—Owners of property minors at date of transfer—Act (Local) No. II of* 1901, *s* 201.—The owner of certain zamindari property died leaving him surviving a widow and two minor sons. During the minority of the sons their mother not only got herself recorded in respect of one-third of the property left by the husband (her proper share being one-eighth and the balance being her sons), but she mortgaged it to one *N*. *N* sold his rights to *R* who brought a suit for sale on his mortgage and having brought the property to sale purchased it himself. He subsequently transferred it to *M*. *M* brought a suit for profits against the sons and got an *ex parte* decree. *Held* on suit by the sons for declaration of title to their share in the property excluding the one-eighth belonging to their mother, or in the alternative for possession, (1) that the suit was not barred by the provision of s. 41 of the Transfer of Property Act, 1882, and (2) that the proviso to s. 201 of the Agra Tenancy Act, 1901, protected the present suit. *Dalibai* v. *Gopibai*, I. L. R. 26 Bom. 43, and *Dambar Singh* v. *Jawitri Kunwar*, I. L. R. 29 All. 292, referred to. ABDULLAH KHAN *v.* MUSAMMAT BUNDI, 34 All. 22 ... 656

S. 6 A. See MUHAMMADAN LAW, All. 457 ... 307

S. 43. CIVIL PROCEDURE CODE (1882) 317, 33 All. 382 ... 257

Ss. 58, 100. See MORTGAGE, 34 All. 446 ... 852

Ss. 59, 100—*Mortgage—Charge—Attestation—Document attested by one witness only.*—*Held* that a document which purported to be a mortgage, but which was attested by only one witness could not operate either as a mortgage or as creating a charge on immoveable property within the meaning of s. 100 of the Transfer of property Act, 1882. *Shamu Patter* v. *Abdul Kadir Ravuthan*, 35 Mad. 607, referred to. COLLECTOR OF MIRZAPUR *v.* BHAGWAN PRASAD, 35 All. 164 ... 1134

S. 65 (a). See MORTGAGE, 35 All. 48 ... 1054

S. 82—*Mortgage—Contribution—Principle upon which contribution is to be assessed.*—Where of two properties belonging to the

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same owner one is mortgaged to secure one debt and then both are mortgaged to secure another debt, for the purpose of apportioning the liability of the respective properties in regard to the subsequent mortgage, the value of the two properties must be taken into account, and credit given for the amount due upon the earlier mortgage out of the value of the property comprised in the subsequent mortgage. Where the amount due upon the earlier mortgage exceeds the value of the property comprised in that mortgage the necessary result is that the whole of the amount of the second mortgage is recoverable from the other property comprised in the latter mortgage. GHULAM HAZRAT *v.* GOBARDHAN DAS, 33 All. 387 ... 261

Ss. 82 *and* 100—*Mortgage—Contribution—Equitable lien—Limitation—Act No. IX of* 1908 (*Indian Limitation, Act schedule I, arts.* 62, 120 *and* 132.—The owner of a property which is mortgaged with other properties to secure a single debt acquires by virtue of the provisions of s. 82 and 100 of the Transfer of Property Act, 1882, a charge against such other properties when his property has been sold in execution of a decree on the mortgage and has contributed more than its ratable share of the mortgage debt, and none the less if the owner of such property has neither redeemed the mortgaged property nor has the sale of his property alone discharged the mortgage decree. A claim to enforce such a charge is governed by art. 132 of the first schedule to the Indian Limitation Act, 1908. *Ibn Hasan* v. *Brijbhukhun Saran*, I.L.R. 26 All. 407, *Muhammad Yahiya* v. *Rashid-ud-din*, I. L. R. 31 All. 65, *Rajah of Vizianagram* v. *Rajah Satrucherla Somasekhararaz*, I. L. R. 26 Mad. 686, and *Bhagwan Das* v. *Har Dei*, I. L. R. 26 All. 227, referred to. *Per* BANERJI and CHAMIER, JJ. (*dubitante*) RICHARDS, C. J.:—If property against which a charge for contribution would otherwise have accrued has been sold and has realised more than the amount remaining due on the mortgage, an equitable lien on the surplus sale proceeds arises in favour of the person entitled to contribution. A suit to recover contribution in virtue of such a lien is governed by article 62 of the first schedule to the Indian Limitation Act, 1908, if not, perhaps, by article 120. *Berhamdeo Pershad* v. *Tara Chand*, I.L.R., 23 Cal. 92. *Gosto Behary Pyne* v. *Shib Nath Dut*, I. L. R., 20 Cal. 241, *Kamala Kant Sen* v. *Abul Barkat*, I. L. R. 27 Cal. 180, *Mahomed Wahib* v. *Mahomed Ameer*, I. L. R. 32 Cal. 527, *The Rajputana Malwa Railway Co-operative Stores, Limited*, v. *The Ajmere Municipal Board*, I.L.R. 32 All. 491, and *Guru Das Pyne* v. *Ram Narain Sahu*, I. L. R. 10 Cal. 860. referred to. BHAGWAN DAS *v.* KARAM HUSAIN, I. L. R. 33 All. 708 ... 474

S. 85. *See* HINDU LAW, 33 All. 7 ... 5

Ss. 88, 89—*Joint decree for sale—Application for order absolute made by some of the decree-holders after the coming into force of the Civil Procedure Code* (1908), *order XXXIV—Act No X of* 1897 (*General Clauses Act*), s. 6 A decree for sale under the provisions of s. 88 of the Transfer of Property Act, 1882, was passed jointly in favour of *B* and *K*. *B* died before any order absolute

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for sale was passed. On 30th April, 1909, the sons of *B* made an application for an order absolute for sale under s. 89 of the Transfer of Property Act. *K* was not made a party to it. *Held* that the application would lie, inasmuch as the sons of *B* being joint decree-holders with *K* were entitled to apply for an order for sale (whether or not such order be in fact a final decree), their right to do so being inherent in the decree under s. 88 of the Transfer of Property Act. The subsequent repeal of the section could not "affect any right acquired or liability incurred" thereunder. GANGA SINGH *v.* BANWARI LAL, 34 All. 72 ... 599

S. 90—*Mortgage—Sub-mortgage—Purchaser from mortgagor—Mortgage money forming part of consideration for sale—Personal liability of purchaser—Sale of mortgagee rights.* In this case it was held (affirming the decisions of the Courts in India in *Jamna Das* v. *Ram Autar Pande*, I. L. R. 31 All. 352) that the purchaser of the mortgaged property was not a person from whom the balance of the mortgage debt was "legally recoverable" within the meaning of s. 90 of the Transfer of Property Act, IV of 1882. JAMNA DAS v. RAM AUTAR PANDE, 34 All. 63 ... 592

S. 91—*Redemption—Mortgage of fixed rate tenancy—Death of tenant without heirs—Right of zamindars to redeem—Escheat to Crown—Act (Local) No. II of* 1901 (*Agra Tenancy Act*), ss. 5, 18, 20, 57.—*Held* that on the death of fixed-rate tenant without heirs his tenancy does not escheat to the Crown but reverts to the zamindar. *Ram Dihal Rai* v. *The Maharaja of Vizianagram*, I. L. R. 30 All. 488, overruled. *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor*, L. R. 3 I. A. 92; I. L. R. 1 Cal. 391, distinguished. TULSHI RAM SAHU v. GUR DAYAL SINGH, 33 All. 111 ... 75

S. 101—*Purchase—Satisfaction of mortgage on property Purchased—Intention of purchaser to keep mortgage alive for his benefit—Presumption.*—In considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property, the point of time to be regarded is the date of the acquisition of the property.—If an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, the charge cannot be treated as still subsisting simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive. *Liquidation Estates Purchase Co.* v. *Willoughby*, [1898.] A. C. 321, followed. *Bindeshri Singh* v. *Pandit Balraj Sahai*, 10 Oudh Cases, 49, and *Mohesh Lal* v. *Bawan Das*, I. L. R. 9 Cal. 961 referred to. JUGAL KISHORE v. RAM NARAIN, 34 All. 268 ... 729

S. 111, *clause* (*g*)—*Landlord and tenant—Denial of title—Suit for ejectment of tenant—Landlord's intention to take advantage of denial of title to be expressed before suit.*—The denial of his landlord's title by a tenant, in order to work a forfeiture under s. 111 (*g*) of the Transfer of Property Act, 1882, must be an unequivocal and unambiguous denial : mere non-payment of rent or

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even the mortgaging of the premises as belonging to the tenant does not necessarily constitute such a denial. A landlord wishing to take advantage of his tenant's denial of title to determine the lease must do some act showing his intention to do so before he can file a suit for ejectment. PRAG NARAIN v. KADIR BAKHSH, 35 All. 145 ... 1120

——V (Indian Easements Act).

S. 13—*Easement of necessity—Definition.*—An easement of necessity is an easement without which a property cannot be used at all, and not one merely necessary to the reasonable enjoyment of the property.—*Wheeldon* v. *Burrows*, L. R. 12 Ch. D. 31, followed. *Union Lighterage Company* v. *London Graving Dock Company*, 2 Ch. D. 557, and *Ray* v. *Hazelline*, 2 Ch. D. 17, referred to. SUKHDEI *v.* KEDAR NATH, 33 All. 467 ... 314

——VI (Indian Companies Act).

S. 169—*Company—Winding up—Appeal—Notice of appeal—Limitation.*—On the 3rd of December 1910, the District Judge of Aligarh made an order for the winding up under the supervision of the Court of a company, called the Shri Baldeo Mills Company, Limited. On the 7th of February 1911, an application by some of the share-holders to reconsider the winding up order was dismissed. On the 25th of February 1911, the applicants appealed to the High Court, ostensibly against the order of the 7th of February 1911, but in effect against the winding up order of the 3rd December, 1910. No notice of this appeal was served on the respondents until at the earliest the 25th of March 1911. *Held* that the appeal was time-barred in view of s. 169 of the Indian Companies Act, 1882. *Ramanapa* v. *The Official Liquidator Bellary Brucepetta Stock and Loan Transacting Company, Limited*, I. L. R. 22 Mad. 291, *Lakshminarasayya Setti* v. *Venkanna Setti*, I. L. R. 22 Mad. 576, *Wall* v. *Howard*, I. L. R. 18 All. 215, and *In re Sarawak and Hindustan Banking and Trading Company, Limited*, I.L.R. 4 Cal. 704, referred to. GHISU MAL *v.* THE OFFICIAL LIQUIDATOR, SHRI BALDEO MILLS COMPANY, LIMITED, 33 All. 641 - ... 430

S. 74—*Penalty—Criminal Procedure Code*, s. 260—*Summary jurisdiction—Power to try summarily offences under the Indian Companies Act.*—*Held* that there is nothing in law to prevent a Magistrate from trying summarily offences under the Indian Companies Act, 1882. *Held* also, that the penalty provided by s. 74 of the Indian Companies Act, 1882, is a fixed and not a maximum penalty. *Queen Empress* v. *Moore* 20 Cal. 696 referred to. EMPEROR *v.* DINA NATH, 35 All. 173 ... 1140

S. 169—*Company—Winding up—Appeal—Limitation—Notice.*—*Held* that the provisions of section 169 of the Indian Companies Act, 1882, as to service of notice of appeal are imperative, and if the requisite notice has not been served within three weeks from the date of the order complained of and the time for service has not been extended by the appellate Court, the appeal cannot be heard. C. J. BOWER *v.* IMPERIAL BANK, LIMITED, 35 All. 177. 1143

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Acts (1883)—XV (North-Western Provinces and Oudh Municipalities Act.)

S. 10—*Act* (*Local*) *No I of* 1900 (*United Provinces Municipalities Act*), *s* 187—*Municipal Board—Election—Suit to set aside election—Jurisdiction of Civil Court—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *sch.* 1, *art.* 120—*Held* that an order of the Government directing that a particular municipal election held in the year 1911 should be conducted according to certain rules passed in 1884, and not according to the rules passed *in pari materia* in 1910, which superseded those of 1884, was *ultra vires*, and that, inasmuch as the rules of 1884 did not apply and the election was not held under the rules of 1910, a suit would lie in a civil Court to contest the election, irrespective of anything contained in either set of rules, the period of limitation applicable to which was that prescribed by art. 120 of the first schedule to the Indian Limitation Act, 1908. *Gur Charan Das* v. *Har Sarup*, 34 All. 391, referred to. RAGHUNANDAN PRASAD *v.* SHEO PRASAD, 35 All 308 ... 1235

——**1887—IX (Provincial Small Cause Courts Act)**

Sch. II, Art. 35 (*j*), *See* execution of decree, 33 All. 306 ... 206

S. 25—*Jurisdiction of High Court—Revision—Refusal of leave to amend plaint.—Held* that the refusal on the part of a Court of Small Causes of permission to amend a technical defect in the plaint amounted to an irregularity such as would justify the interference of the High Court in revision under s. 25 of the Provincial Small Cause Courts Act, 1887. HEYDORN AND COMPANY *v.* MUHAMMAD SHAFI, 34 All. 348 ... 784

Sch. II Art. 13. *See* ACT No. X of 1897, s. 3 (25), 35 All. 156 ... 1128

——**1887—XII (Bengal North-Western Provinces and Assam Civil Courts Act)**, *Ss.* 8, 20—*Act No. III of* 1907 (*Provincial Insolvency Act*), *ss.* 43, 46, 3—*Appeal—Jurisdiction—Effect of order of District Judge assigning work to Additional Judge.*—Where an additional District Judge sentenced an applicant for insolvency under s. 43 of the Provincial Insolvency Act, 1907, acting in the matter under an order of the District Judge assigning the particular class of work to him under s. 8 of the Bengal North-Western Provinces and Assam Civil Courts Act, 1887, it was held that an appeal from the Additional Judge's order lay to the High Court and not to the District Judge. MAKHAN LAL *v.* SRI LAL, 34 All. 382 ... 807

Ss. 8 (2), 21 (3)—*Assignment to Additional Judge of cases coming from a particular district—Jurisdiction.*—A District Judge has power not merely to make over appeals to an Additional Judge for hearing, but to direct that all appeals and other cases coming from a particular area within the judicial division shall be filed in his Court. MUTSADDI LAL *v.* MULE MAL, 34 All. 206. 687

——**1889—VII (Succession Certificate Act).**—

Ss. 19, 26—*Munsif invested with functions of District Court—Appeal Jurisdiction.*—*Held* that an appeal from an order of a Munsif invested under s. 26 of the Succession Certificate Act, 1889, with the functions of a District Judge, and cannot be transferred for disposal to any other Court such as the Subordi-

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nate Judge or Judge of the Small Cause Court, not empowered under s. 56. HURAN BIBI *v.* HINGAN BIBI, 34 All 148 ... 649

Ss. 2, 4—*Certificate not to be given for collection of part only of a debt—Debt in part irrecoverable—Muhammadan law—Dower.*—*Held* that no certificate could be granted to one of the heirs of a Muhammadan lady, who had died leaving her dower debt unrealized, for collection merely of part of the dower debt of the deceased. *Muhammad Ali Khan* v. *Puttan Bibi*, I. L. R. 19 All. 129 and *Bismillah Begam* v. *Tawassul Husain*, I. L. R. 32 All. 335, followed. *Shitab Debi* v. *Debi Prasad*, I L. R. 16 All. 21, and *Akbar Khan* v. *Bilkisara Begam*, Weekly Notes, 1901, p. 125, referred to. GHAFUR KHAN *v.* KALANDARI BEGAM, 33 All. 327 ... 220

——*Certificate of succession—Joint Certficate not illegal if granted with the consent of the grantees.*—*Held* that the grant of a joint certificate under the provisions of the Succession Certificate Act, 1889, is not illegal, provided that the persons to whom such certificate is granted all consent to its being granted in this form. RAM RAJ *v.* BRIJ NATH, 35 All. 470 ... 1347

Ss. 4 *and* 16—*Succession certificate—Holder of certificate not entitled to assign his rights thereunder.*—*Held* that the rights conferred by the grant of a succession certificate under Succession Certificate Act, 1889, are personal to the grantee and cannot be assigned. ALLAHDAD KHAN *v.* SANT RAM, 35 ALL. 74 ... 1072

S. 9—*Certificate in favour of Hindu widow to realize interest only—Certificate* ultra vires.—*Held* that, where a certificate was granted to a Hindu widow for collection of debts due to her late husband, it was not competent to the Court, in lieu of requiring security from the grantee, to give a certificate for realization of interest only without disturbing capital. *Shib Dei* v. *Ajudhia Prasad* F. A. F. O. No. 108 of 1910, decided on the 13th of February, 1911 JAI DEI *v.* BANWARI LAL, 35 All. 249 ... 1193

——**1890—VIII (Guardians and Wards Act).**

S 17—*Guardian and ward—Considerations by which a court should be gurded in the selection of a guardian.*—In considering the appointment of a guardian for a minor the proper test is the welfare of the minor. Where the applicant was a distant relation of the husband of a childless widow of some 12 or 13 years of age who was living happily with her father, it was *held* that the father of the minor widow was her proper guardian.—*Khudiram Mookerjee* v. *Banwari Lal Roy*, I. L. R. 16 Cal. 534, referred to. TOTA RAM *v.* RAM CHARAN, 33 All. 222 ... 149

S. 20—*Guardian and minor—Certificated guardian—Sale—Powers of certificated guardian different from those of a guardian under the general rule of law.*—The powers of a certificated guardian are regulated and defined by the Guardians and Wards Act, and the rule of law, that, there being no mutuality in a contract to which a minor was party, it could not be enforced by him, does not apply to a contract for the sale of immoveable property entered into by the certificated guardian of a minor with the sanction of the Court; such a contract is valid and a suit for damages for breach of the contract will lie on behalf of the

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minor. *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*, I. L. R. 39 Cal. 232, distinguished. BABU RAM *v.* SAID-UN-NISSA, 35 All. 499 ... 1367

——IX (Indian Railways Act),

S. 77 *Suit against railway company—Notice—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, art.* 31—*Waiver of notice.*—Certain goods were despatched on the 26th of March 1908, from Bombay to Ghazipur. The goods were lost in transit while in possession of the Great Indian Peninsula Railway Company. The consignee made a claim against the East Indian Railway Company, as the result of which he was offered a certain sum as compensation by the assistant traffic manager of that company, who stated that he did so with the authority of the deputy traffic manager of the Great Indian Peninsula Railway Company. There was, however, no proof that any such authority had been given, and the offer was refused. On the 9th August 1909, the consignee brought a suit against the Great Indian Peninsula Railway Company for damages for the loss of his goods, but did not give the notice required by s. 77 of the Indian Railways Act, 1890. He claimed that certain conditions printed on the back of the railway receipt releived him of the necessity of giving notice under s. 77. *Held* that this was not so; nor did the action of the assistant traffic manager of the East Indian Railway Company amount to a waiver of notice. The suit was also barred by limitation under article 31 of the first schedule to the Indian Limitation Act, 1908. GREAT INDIAN PENINSULA RAILWAY COMPANY *v*, GANAPATHI RAI, 33 All 544 ... 953

Ss. 75, 80—*Suit for compensation for loss of through-booked goods—Short delivery—Uninsured goods.*—*Held* that where goods are booked for conveyance over more than one railway system the owner can only claim compensation for loss against a railway company other than the company with which they were booked, if it is shown that the loss occurred on the system of the company sued. *Held also* that if goods, the insurance of which is obligatory are packed un-insured with other goods he insurance of which is not obligatory, no compensation is obtainable for the loss of either class of goods. *Pandlik Udaji Jadhav* v. *S. M. Railway Company*, I.L.R., 11 Bom. 827, followed. GREAT INDIAN PENINSULA RAILWAY *v.* SHAM MANOHAR, 34 All. 422 836

S. 75—*Goods referred to in s.* 75 *consigned on a "risk note"—Railway Company not liable for loss.*—Where a person chooses to send goods referred to in s. 75 of the Indian Railways Act on a "risk note" form instead of declaring them and paying the extra percentage demandable under the terms of the section he cannot hold the Railway Company by which such goods are sent responsible for the loss therefore. NARAIN DAS *v.* THE EAST INDIAN RAILWAY COMPANY, 34 All. 665 ... 997

S. 125—*Cattle left in charge of keepers allowed to stray on a railway line—Liability of owner.*—The owner of cattle which have been allowed to stray upon a railway in consequence of the neg-

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ligence of the person actually in charge of them on the owner's behalf is not liable to punishment under s. 125 (1) of the Indian Railways Act, 1890. *Queen Empress* v. *Andi*, I,L.R., 18 Mad., 228, followed. EMPEROR *v.* GUR PRASAD GIR, 34 All. 91 611

——1893—IV (Partition Act).

Ss. 2 *and* 3—*Partition—Mortgagee rights in a revenue paying mahal —Application for sale by owners of less than a moiety—Act (Local) No. III of* 1901 (*United Provinces Land Revenne Act*), s. 107.—Mortgagee rights merely in a revenue-paying mahal do not fall within the purview of the United Provinces Land Reve nue Act, 1901, for the purposes of partition: consequently the provisions of the Partition Act,. 1892 apply to the partition amongst co-owners of such rights. But an order for sale of the mortgagee rights under s. 2 of the Partition Act will not be valid unless based upon the request of a parto or parties interested to the extent of one moiety or upwards. BANKU LAL *v.* SHANTI PRASAD, 35 All. 387 ... 1289

——1894 –I (Land Acquisition Act).

Ss. 9, 25—*Omission to attend in answer to notice—Owner not entitled to claim more than was awarded by the acquisition officer.*— It is intended by s. 9, clause (2) of the Land Acquisition Act that the owner of property about to be acquired should appear and state his claim in the manner provided by the clause so as to enable the acquisition officer to make a fair, reasonable and proper award based upon a proper inquiry after the proper means have been placed before him for holding such inquiry. S. 25, clause (2), makes the refusal or omission to comply with the provisions of s. 1 (2) without sufficient cause an absolute bar to the obtaining of a greater sum than that awarded by the Collector. SECRETARY OF SAATE FOR INDIA IN COUNCIL *v.* BISHAN DAT, 33 All. 376 ... 254

S. 23—*General principles of valuation.*—Although in ascertaining the market-value of land sought to be acquired under Act No. 1 of 1894 the general principle to be applied is that the value of the land should be calculated with reference to the most lucrative and advantageous way in which the land might be used, if it is apparent that the use of such land for some special purpose, e. g., as building sites, would be permitted, the land should not be valued as if it could be utilized for such purpose. *Stebbing* v. *Metropolitan Board of Works*, L. R. 6 Q. B. 37, referred to. UJAGAR LAL *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 33 All. 733 ... 490

S. 30—*Compensation—Mode of apportioning amount allotted as compensation between different interests.*—Where land which is taken up under the Land Acquisition Act belongs to two or more persons the nature of whose interest therein differs, the compensation allotted therefor must be apportioned according to the value of the interest of each person having rights therein so far as such value can be ascertained. HRIDE NARAIN *v.* POWELL, 35 All. 9 ... 1027

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—1897—X (General Clauses Act).

S. 3 (25)—*Act No. IX of* 1887 (*Provincial Small Cause Courts Act*), *sch. II, art.* 13—*Court of Small Causes—Jurisdiction—Ferry—"Immoveable property"—Suit to recover tolls alleged to be due to plaintiff as lessee of a ferry.*—*Held* that the right to a ferry is a benefit which arises out of land and comes within the definition of immoveable property under s. 3 (25) of the General Clauses Act, 1897, and a suit by a lessee of a ferry to levy a toll alleged to be recoverable by him as such lessee falls under art. 13 of the second schedule to the Provincial Small Cause Courts Act and is therefore not cognizable by that Court. *Gokal Chand* v. *Lal Chand*, Punj. Rec. 1897, Case No. 48, p. 215, and *Desa Singh* v. *Narain Das*, Punj. Rec. 1898, Case No. 80, p. 278 approved. ABDUL HAMID KHAN *v.* BABU LAL, 35 All. 156 ... 1128

S. 6. See ACT NO. IV OF 1882, ss. 88, 89, 34 All. 72 ... 5 9

S. 10. See ACT NO IX OF 1908, s. 31, 34 All. 375 ... 802

—1899—II (Indian Stamp Act).

Ss. 2 (21) *and* 60; *sch.* I, *art.* 48 (*g*)—*Stamp Power—of attorney—Document authorizing holder to appear and do all acts necessary for execution of decree.*—*Held* that a document purporting to authorize the person in whose favour it was executed, who was not a certificated mukhtar or pleader, to appear and do all acts necessary for the execution of a decree of a foreign court, which had been transferred to a court in the United Provinces for execution, required to be stamped as a power of attorney with a one rupee stamp, and not as a vakalatnamah or mukhtarnamah. PARMANAND *v.* SAT PRASAD, 33 All. 487 ... 327

Ss, 2 (23), 62 *and* 63 – Sarkhat—*Memorandum of account—Receipt—Several items of over Rs.* 20 *each* –*Each item to be stamped.*—*Held* that a memorandum of account between debtor and creditor, which was left in the possession of the debtor and consisted of items entered from time to time of money advanced and repaid, was a document which required a separate receipt stamp in respect of each item of over Rs. 20. EMPEROR *v.* TUESHI RAM, 35 All. 290 ... 1223

S. 65—*Receipt—Money remitted by postal money order and receipt signed on post office form—Further receipt not exigible from payee.*—Where money is remitted by postal money order and the payee has signed the receipt in duplicate on the post office form he cannot legally be compelled to give a further receipt to the payer, and his refusal to do so will not render him liable under s. 65 of the Indian Stamp Act, 1899. EMPEROR *v.* BALMAKUND, 34 All. 192 ... 679

—1907—III (Provincial Insolvency Act).

S. 46 (4)—*Act No. IX of* 1908 (*Indian Limitation Act*), *ss.* 12 *and* 29—*Appeal—Limitation—Time requisite for obtaining copies.*—The Provincial Insolvency Act was intended to be, and is, so far as matters governed by it are concerned, a complete code in itself and contains its own limitation law. In computing, therefore, the period of limitation prescribed for presenting an appeal under the said Act time requisite for obtaining a copy of the order complained of cannot be excluded. *Behari Lall*

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Mookerjee v. *Mungolanath Mookerjee*, I. L. R. 5 Cal. 110, and *Nagendro Nath Mullick* v. *Mathura Mohan Parhi*, I. L. R. 18 Cal. 368, referred to. *Beni Prasad Kuari* v. *Dukkhi Rai*, I. L. R. 23 All. 270, distinguished. JUGAL KISHORE *v.* GUR NARAIN, 33 All. 738 ... 494

S. 16—*Secured creditor—Landholder and tenant—Suit for arrears of rent—Declaration of insolvency in force at date of suit.*—A landholder is not as regards an agricultural tenant a secured creditor within the meaning of s. 16 (5) of the Provincial Insolvency Act, 1907. Although he possibly may be in a position to distrain even whilst a declaration of insolvency is in force, he cannot without the leave of the court sue for arrears of rent. RAGHUBIR SINGH *v.* RAM CHANDAR, 34 All 121 ... 631

Ss. 16 *and* 31—*Civil Procedure Code* (1908), *order XXXIV, rule* 6—*Application for decree over against two judgment-debtors one of whom had been declared insolvent.*—Where one of two mortgagors against whom a decree under order XXXIV, rule 6, of the Code of Civil Procedure was otherwise obtainable had been declared an insolvent under the provisions of the Provincial Insolvency Act, 1907, but the other had not, *held* that the decreeholder could not be granted a decree over as against the insolvent, but could only prove their debt in the insolvency proceedings. *Barter* v. *Dubeux and Company*, L. R. 7 Q. B. D. 413, referred to. MAMRAJ *v.* BRIJ LAL CHAKRAVARTI, 34 All 106 ... 612

S. 16 *and* 34—*Execution of decree against insolvent during pendency of insolvency proceedings—Right of decree-holder in respect of property attached and sold and money attached before adjudication.*—Whilst proceedings in insolvency under the Provincial Insolvency Act, 1907, were pending, certain immovable property of the insolvent was attached and sold in execution of a decree against him, and the proceeds deposited in court for the benefit of the decree-holder. The decree-holder also attached certain moneys which had been paid into court to the credit of the insolvent, but up to the date of the order of adjudication had taken no further steps to possess himself thereof. *Held*, that the decree-holder was entitled as against the receiver to the benefit of the proceeds of execution of his own decree, but not to the money of the insolvent which he had attached. *Peacock* v. *Madan Gopal*, I. L. R. 29 Cal. 428, followed. SRI CHAND *v.* MURARI LAL, 34 All. 628 ... 977

Ss. 24 *and* 26—*Insolvency—Application by a creditor to have his name entered in the schedule of creditors—Right of the scheduled creditors to make objections—Revision.*—Creditors whose names are already in the schedule prepared under s. 24 of the Provincial Insolvency Act, 1907, are entitled to be heard before the debt of a creditor who comes in at the last minute under s. 24 (3) of the Act is entered in the schedule. ALLAHABAD BANK, LIMITED *v.* MUKLIDHAR, 34 All. 442 ... 850

Ss. 43, 46, 3. *See* ACT NO. XII OF 1887, s. 8, 20, 34 All. 382 ... 807

S. 46 (4)—*Appeal—Limitation—Application of general provisions of the law of limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *ss.* 12 *and* 29.—The Provincial Insolvency Act is a

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special law within the meaning of s. 29 of the Indian Limitation Act, but, inasmuch as it is not in itself a complete code, there is nothing to prevent the application thereto of the general provisions of the Indian Limitation Act. Such general provisions do not "affect or alter" the period prescribed by a special law, but only the manner in which that period is to be computed. *Jugal Kishore* v. *Gur Narain*, I. L. R. 33 All. 738, overruled. *Beni Prasad Kuari* v. *Dharaka Rai*, I L R. 23 All. 277, *Joti Sarup* v. *Ram Chandar Singh*, Weekly Notes, 1902, p. 34 and *Veeramma* v. *Abbiah*, I. L. R. 18 Mad. 99 followed. *Poulson* v. *Modhoosoodun Paul Chowdhry*, 2 W. R. Act X Rulings, 21 *Unnoda Persnud Mookerjee* v. *Kristo Koomar Moitro*, 15 B. L. R. 60 note, *Nagendra Nath Mullick* v. *Mathura Mohun Farhi*, I. L. R. 18 Cal. 368, *Girija Nath Roy Bahadur* v. *Patani Bibee*, I. L, R. 17 Cal. 263, *Bihari Lall Mookerjee* v. *Mungolanath Mookerjee*, I. L, R. 5 Cal. 110, *Golap Chand Nowlukha* v. *Kristo Chnnder Das Biswas*, I. L. R. 5 Cal. 314, *Nijabutoola* v. *Wazir Ali*, I. L. R. 8 Cal. 910, *Khetter Mohan Chuckerbutty* v. *Dinabashy Shaha*, I.L.R. 10 Cal. 265, *Guracharya* v. *President of the Belgaum Town Municipalities*. I. L. R. 8 Bom. 529, *Kullayappa* v. *Lakshmipathi*, I. L. R. 12 Mad. 467, *Abdul Hakim* v. *Latif un-nissa Khatun*, I. L. R. 30 Cal. 532, and *Suraj Bali Prasad* v. *Thomas*, I. L R. 28 All. 48, referred to. DROPADI *v.* HIRA LAL, 34 All. 496 ... 887

Ss. 22, 46 *and* 52—*Act No. IX of* 1908 (*Indian Limitation Act*), *s.* 5—*Insolvency*—*Appl cation to Court to reverse act of receiver*—*Limitation.*—*Held* that s. 5 of the Indian Limitation Act, 1908, does not apply to application, contemplated by s. 22 of the Provincial Insolvency Act, 1907. *Dropadi* v. *Hira Lal* 34 All. 496, distinguished. THAKUR PRASAD PANNA LAL, 35 All. 410 ... 1305

——1908—IX (Indian Limitation Act).

S. *Limitation*—*Amendment of plaint after expiry of limitation*—*Zamindari property*—*Incorrect statement of extent of share claimed.*—In a suit for pre-emption under the Muhammadan law of a zamindari share it was found that the necessary conditions of the Muhammadan law had been fulfilled, but, there being some doubt as to the exact share sold, the plaintiff had specified it in his plaint as 15 biswansis, when in fact it amounted to 17 biswansis. *Held* that it was within the competence of the court to allow the plaintiff to amend his plaint so as to claim the larger share, even after the period of limitation for the suit had expired. MUHAMMAD SADIQ *v.* ABDUL MAJID, 33 All. 616. 418 494

Ss. 12 *and* 29, *See* ACT NO. III of 1907, s. 46 (4) 33 All. 738 ...

S. 12—*Time requisite for obtaining copy*—*Application for copy made on date the court close for annual vacation*—*Notice posted during the vacation*—*Copy received after vacation.*—Where an application for copies of a judgment and decree was made on the day when the court rose for its annual vacation, it was *held* that the applicant was entitled to the benefit of the whole period of the vacation, notwithstanding that the copying

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department was kept open for some days and a notice posted during the vacation that the applicant's copies were ready. KHUB CHAND *v.* HARMUKH RAI. 34 All. 41 ... 578

Ss. 12 AND 29, *See* Act No. III of 1907, s. 46 (4), 34 All. 496 ... 887

S. 15, *See* Act No. XV of 1877, schedule II, art. 178, 34 All. 436 ... 846

S. 19—*Limitation—Aknowledgment by agent—Law to be applied to test the validity of an acknowledgment.—Held* that the criterion to be applied to test the validity of an acknowledgment of liability put forward by a plaintiff as extending the period of limitation in his favour is the law in force at the time when the plaintiff's suit would otherwise have been time-barred and not that in force at the time when the acknowledgment relied upon was made. *Mahesh Lal* v. *Busunt Kumaree*, I. L. R. 6 Cal. 340, *Rahmani Bibi* v. *Hulasa Kuar*, I. L. R. 1 All. 642, and *Hanuman Prasad* v. *Raghunandan Singh*, 1 A. L. J. 355, referred to. ZAIB-UN-NISSA BIBI *v.* THE MAHARAJA OF BENARES, 34 All. 109 ... 623

S. 19—*Limitation—Acknowledgment—Requisites for valid acknowledgment.—Held* that an acknowledgment of a debt to be a valid acknowledgment within the meaning of s. 19 of the Indian Limitation Act, 1908, need not be addressed to the creditor, but may be made to some other person, as, e g., by means of a deposition in Court. *Held* also that a statement in the form "the whole of Janki Prasad's mortgage money is owing," there being in existence at the time two mortgages held by Janki Prasad, must be taken to apply to both, in the absence of evidence indicating a different signification. *Maniram Seth* v. *Seth Rupchand*, 33 Cal. 1047, and *Mylapore Iyasawmy Vyapoory Moodaliar* v. *Yeo Kay*, 14 Cal. 801, referred to. MEGH RAJ *v.* MATHURA DAS, 35 All. 437 ... 1324

S. 20—*Limitation - Interest—Payment of part of interest due—Suit for foreclosure.*—The word "interest" in s. 20 of the Limitation Act means interest or any part of the interest due. *Kallu* v. *Halki*, 18 All. 95, and *Anwar Husain* v. *Lalmir Khan*, 26 All. 167, distinguished. ABDUL AHAD *v.* MAHTAB BIBI, 35 All. 378 ... 1283

S. 29—*Act No XV of* 1877 (*Indian Limitation Act*), *s.* 2, *sch. II, art.* 35 - *Suit for restitution of conjugal rights—Limitation,*—The plaintiff in a suit for restitution of conjugal rights filed in 1910, alleged that his wife had been taken away by two of the defendants under a promise that she should return to him shortly, but subsequently they denied all knowledge of her whereabouts. In 1909, he alleged, he was informed that she was living at a certain place with one of the defendants *Held* that the plaintiff's suit was not barred by limitation. *Binda* v. *Kaunsilia*, I. L. R. 13 All. 227, referred to. AYESHA *v.* FAIYAZ HUSAIN, 34 All. 412 ... 829

S. 31—*Mortgage—Suit for sale—Limitation—Act No. X of* 1897 (*General Clauses Act*), *s.* 10.—The special period of limitation for suits for foreclosure or for sale by a mortgagee, prescribed by s. 31 of the Indian Limitation Act, 1908, namely, two years from the date of the passing of the Act, expired on a Sunday.

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Held that a suit for sale to which s. 31 applied instituted upon the following Monday was within time. *Shevdas Daulatram Marwadi* v. *Narayan valad Asaji*, 13 Bom. 1153, dissented from.—HIRA SINGH *v.* MUSAMMAT AMARTI, 34 All. 375 ... 802

S. 31—*Limitation—Mortgage—Suit on mortgage barred under Limitation Act of* 1871—*Mortgagee's rights not revived by present Act.*—*Held* that s. 31 of the Indian Limitation Act, 1908, cannot be construed as reviving rights already time-barred under the Limitation Act of 1871. JAI SINGH PRASAD *v.* SURJA SINGH, 35 All. 167 ... 1136

S. 31. 35 All. 270 ... 1208

Sch. I, Art. 31. 33 All. 544 ... 365

Sch. I, Arts. 62 & 120. 35 All. 419 ... 1311

Sch. I. Arts. 62 & 120. 33 All. 708 ... 474

Art. 75—*Bond—Option of suing for whole amount due on default of payment of instalments—Limitation.*—A bond payable by instalments gave to the creditor the option of suing for the whole amount due on default in payment of any instalment or of suing for the instalments separately. Two instalments were paid; the third was not, and more than six years after default in payment of this instalment, nothing further having been paid on the bond, the creditor sued to recover the whole amount due stating that the cause of action arose on the date when the third instalment became due. *Held* that the suit was time-barred. *Ajudhia* v. *Kunjal*, 30 All. 123, distinguished. AMOLAK CHAND *v.* BAIJNATH, 35 All. 455 ... 1337

Ss. I, Art. 91 & 120—*Limitation—Suit for declaration that nominal lessee is not the beneficial lessee but merely* benamidar *for the plaintiff.*—*Held* that a suit for a declaration that the defendant, whose name appeared in a certain lease as lessee, had no interest under the lease and that the person really interested in the lease was the plaintiff, was governed as to limitation by article 120 and not by article 91 of the first schedule to the Indian Limitation Act, 1908, the cause of the action accruing to the plaintiff when his position as a lessee was challenged. BASANT LAL *v.* CHHIDAMMI LAL, 35 All. 149 ... 1123

Sch. 1, *Art. s.* 113, 116, 120, *See* ACT NO. 1 OF 1877, s. 30, 34 All. 43 ... 579

S. I. *Art* 116, 120, 131 132—*Suit to recover arrears of annuity charged on immoveable property—Claim for personal decree only—Limitation.*—*Held* that article 132 of the first schedule to the Indian Limitation Act is applicable only to suits in which the plaintiff claims to recover money charged upon immoveable property to aise it out of that property and not to claim in which merely personal decree is asked for. *Ramlin* v. *Kalka Prasad*, I. L R 7 All. 503, followed. *Held* also that the words of article 131 "to establish a periodically recurring right" are altogether inapplicable to a suit to recover arrears of payments due under a registered contract. *Dost Muhammad Khan* v. *Sohan Singh*, Punj, Rec. 1906, p. 303, followed. A suit of such a nature is governed by either article 116 or article 120 of the first schelule to the Indian Limitation Act. LACHMI NARAIN *v.* TURAB-UN-NISSA, 34 All. 246 ... 714

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Sch. I, art. 128—*Execution of decree—Limitation—Step in aid of execution—Application for transfer of decree—Civil Procedure Code* (1882), *s.* 223. *Held*, that an application made to the Court passing a decree to transfer it for execution to another Court is an application to take a step in aid of execution within the meaning of art. 182 of the first schdule to the Indian Limitation Act, 1908 *Chandra Nath Gossami v. Gurroo Prosunno Ghose* 22 Cal 375, followed. TODAR MAL *v.* PHOLA KUNWAR, 35 All. 389 ... 1291

Sch. I, Art .132—*Limitation*—Malikana—*Suit for* malikana—*Decree asked for against property charged.* Where a plaintiff sued for the recovery of *malikana* was for 11 years and claimed a decree against the property on which the *malikana* was charged, it was *held* that the suit was within time having regard to art. 132 of of the first schdule to the Indian Limitation Act, 1908. *Kallar Roy* v. *Ganga Pershad Singh* 33 Cal. 998, distinguished. SHAIDA ALI *v.* PHULLO, 35 All. 185 ... 1149

Sch. I, Arts. 138 *and* 144—*Execution of decree—Successive purchasers of same property—Suit by subsequent purchaser to recover from earlier purchaser.* Art. 138 of the Limitation Act only applies to suits in which the auction purchaser is the plaintiff and the judgment-debtor, or some one claiming through him, is the defendant. *Ram Lakhan Rai v. Gajadhar Rai* 34 All 224 and *Khiroda Kanta Roy v. Krishna Das Laha* 12 C. L. J. 378 referred to. BHAGWANT SINGH *v.* BHOLI SINGH, 35 All. 432 ... 1321

Sch. I, Art. 152—*Limitation—Appeal—Jurisdiction—Appeal presented to Judge at his private house after court hours.*—A memorandum of appeal was presented to a District Judge at his private house, after court hours on the last day of limitation. *Held*, that the Judge had jurisdiction to accept the memorandum of appeal so presented, though he was not obliged to do so. *Jai Kuar* v. *Heera Lal.* 7 N. W. P. H. C. Rep. 5 overruled. THAKUR DIN *v.* HARI DAS 34 All. 482 ... 877

Art. 181, 35 All. 178 ...

——1908 XVI (Indian Registration Act).

Ss. 17 (*b*), 49—*Document compulsorily registrable—Assignment of decree for sale of immoveable property.*—*Held* that a deed of assignment of a final decree for the sale of mortgaged property under Or. XXXIV, r. 5 of the Code of Civil Procedure, 1908, is not a document which is compulsorily registrable under the provisions of s. 17 (*b*) of the Indian Registration Act, 1908. *Gopal Narayan* v. *Trimbak Sadashiv*, I. L. R. 1 Bom. 267, and *Mutasaddi Lal* v. *Muhammad Hanif*, 10 A. L. J. 167, distinguished. *Abdul Majid* v. *Muhammad Faizullah*, I. L. R. 13 All. 89, and *Baij Nath Lohea* v. *Binoyendra Nath Palit*, 6 C. W. N. 5 followed. MUMTAZ AHMAD *v.* SRI RAM, 35 All. 524 ... 1385

S. 17 (2) (*xi*)—*Mortgage—Receipt for mortgage money—Registration.*—A receipt for money due upon a mortgage was given in the following terms:—"The bond is returned. No money remains due." *Held*, on suit for recovery of the mortgage debt

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that the receipt did not require to be registered and that the words " no money remains due " did not purport to extinguish the mortgage. PIARI LAL *v.* MAKHAN, 34 All. 528 ... 909

Ss. 31, 32, 52 *and* 87—*Presentation by a person not an authorized agent of the executant—Procedure—Invalid presentation not merely a question of procedure.*—Where a document is presented for registration by a person not duly authorized to present it according to the law applicable to registration of documents, such presentation is altogether invalid, and its subsequent registration, made upon the admission of the executant before an officer who had no jurisdiction to accept the document for registration, is likewise invalid. *Mujib-un-nissa* v. *Abdur Rahim*, 23 All. 233, followed. KHALIL-UD-DIN AHMAD *v.* BENNI BIBI, 35 All. 34 ... 1044

S. 32—" *Presentation* "—*Presentation by a servant of the mortgagor in the presence of mortgagor.*—Where a mortgage-deed was handed over to the sub-registrar for the purpose of registration by a person other than the mortgagor, but the mortgagor was present assenting to the registration of the document with full knowledge of what was being done in the office of the sub-registrar; *held* that the presentation was a valid presentation within the meaning of s. 32 of the Registration Act. *Nath Mal* v. *Abdul Wahid Khan* 34 All. 355, followed. *Mujib-un-nissa* v. *Abdur Rahim* 23 All 233, distinguished. *Jambu Prasad* v. *Aftab Ali Khan* 34 All. 331, not followed. KANTA KISHAN *v.* HARNAM CHAND, 35 All. 72 ... 1070

S. 32 — *Registration* — " *Presentation* " — *Physical delivery of document by person not authorized to " present " but executant present and assenting while registration was going on.*—Where it is shown that, prior to the registration of the document by the duly authorized official, a person who is competent to present the document for registration was present before that official assenting to the registration, the requirements of the Registration Act are sufficiently complied with. *Mujib-un-nissa* v. *Abdur Rahim* 23 All. 233, and *Karta Kishan* v. *Har Narain* 35 All. 72, referred to. ATMA RAM *v.* UGRA SEN, 35 All. 134 ... 1113

S. 49—*Registration — Evidence of title—Petition of compromise in a mutation case and order thereon.*—*Held* that a petition of compromise filed in a mutation case before a court of Revenue and the order of the court thereon can neither effect nor prove a conveyance of the immovable property to which the mutation proceedings may relate. *Pranal Anni* v. *Lakshmi Anni*, I. L. R. 22 Mad. 508, *Raghubans Mani Sing* v. *Mahabir Singh*, I. L R. 28 All. 78, *Kashi Kunbi* v. *Sumer Kunbi*, I. L. R. 32 All. 206, *Biraj Mohini Dassee* v. *Kedar Nath Karmakar*. I. L R. 35 Cal. 1010, *Muthayya* v. *Venkataratnam*, I. L. R. 25 Mad 553, and *Sadar-ud-din Ahmad* v. *Chajju*, I. L. R. 31 All 13, referred to. RUSTAM ALI KHAN *v.* GAURA, 33 All. 728 ... 487

S. 50—*Registered and unregistered documents—Priority—Effect on rights of prior unregistered mortgage of sale in execution of a decree on a subsequent registered mortgage.*—When property is

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sold in execution of a decree on a subsequent registered mortgage taking priority over a prior unregistered mortgage such sale does not hade the effect of invalidating the prior mortgage or of extinguishing altogether the rights of the mortgagee thereunder, but his debt would still be recoverable from the surplus, if any, left after the satisfaction of the registered mortgage. DHANPAL SINGH *v.* BUDH SINGH, 35 All. 271 ... 120

Ss. 36, 73, 77—*Registration—Refusal of Sub-Registrar to register—Appeal to Registrar—Refusal to register based on inability to procure attendance of executants—Suit to compel registration.*—A sale deed was presented for registration, but the executants did not appear before the Sub-Registrar, who after four months from the date of execution, reported the fact to the Registrar and was directed by the latter not to register it. Registration was accordingly refused. An appeal against that order to the Registrar was dismissed. It appeared that the summonses by the Sub-Registrar to the executants had been returned unserved. The vendees brought a suit for registration of the document. *Held*, that the suit was maintainable, the refusal by the Sub-Registrar to register not being based upon denial of execution. *Luckhi Narain Khettry* v. *Sat Cowrie Pyne*, I. L. R. 16 Cal. 189, distinguished. KHADIM HUSAIN *v.* BHARAT SINGH, 34 All. 315 ... 761

Ss. 73, 74, 77—*Registration—Refusal to register—Inquiry ordered, but application dismissed on account of parties failing to attend—Suit to compel registration.*—A Sub-Registrar refused to register a document presented to him, and on the application of one of the parties the Registrar directed an inquiry under s. 74 of the Indian Registration Act, 1908. On the date fixed for the inquiry, however, the parties failed to appear, and the Registrar accordingly dismissed the application. *Held* that this amounted to a refusal to register within the meaning of s. 77 of the Act and a suit to compel registration would lie. *Sajibullah Sirkar* v. *Haji Khosh Mohamed Sirkar*, I.L.R. 13 Cal. 264, followed. *Udit Upadhia* v. *Imam Bandi Bibi*, I. L. R. 24 All. 402, distinguished. ABDUL HAKIM KHAN *v.* CHANDAN, 34 All. 165 ... 660

——1899—III (Court of Wards Act).

S. 16, 19 *and* 49—*Decree on contract made while debtor was a ward of Court—Collector not made a party—Execution of decree.*—*C* obtained a decree for money against *M* based upon a contract entered into by the latter after he had become a ward of the Court of Wards. In execution of the decree certain moveable property belonging to *M* was attached. Upon objection taken that a certificate that the claim was notified under s. 16 of the Court of Wards Act, 1899, should be obtained from the Collector, *held*, that the decree was bad, inasmuch as the suit and proceedings in execution were a fraud upon the court, and that as soon as it was brought to the notice of the court that the judgment-debtor was a ward of court, the court should have of its own motion then and there made the Collector a party and

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waited for such defence as the Collector might put forward. MUAZZAM ALI SHAH *v.* CHUNI LAL, 33 All. 791 ... 529

——(Local)—1900—I (United Provinces Municipalities Act).

S. 49——*Suit against a member of a Municipal Board for damages —Notice—Act purporting to be done in official capacity.*—A member of a Municipal Board, as such member, made a report to the Board which resulted in the prosecution of certain persons for a municipal offence. The persons prosecuted were acquitted, and thereafter filed a suit for damages for malicious prosecution against the maker of the report. *Held* that the defendant was entitled to the notice provided for by s. 49 of the Municipalities Act, 1900. *Muhammad Saddiq Ahmad* v. *Panna Lal*, I. L. R. 26 All. 220, distinguished. JUGAL KISHORE *v.* JUGAL KISHORE, 33 All. 540 ... 362

Ss. 87—(5), 147, 152—*Municipal Board—Order for demolition of building—Order* ultra vires—*Revision—Jurisdiction.*—*Held* (1) that s. 152 of the Municipalities Act, 1900, does not apply where the prohibition, notice or order issued by the Board is *ultra vires*, and (2) that s. 87 (5) of the Act applies only to buildings of the kind referred to in the preceding sub-sections, that is, new buildings in respect of which notice should have been given under sub-section (1). *Alopi Din* v. *The Municipal Board of Allahabad*, Weekly Notes, 1907, p. 2, and *Hyam* v. *The Calcutta Corporation*, 10 C. W. N. 1904, referred to. EMPEROR *v.* RAM DAYAL; 33 All. 147 ... 99

S. 88—*Municipal Board—Power of Board to order demolition of structure overhanging a public road—Compensation—offer to pay compensation—not a condition precedent to order for demolition.*—The owner of a house to which was attached a balcony overhanging a public road repaired the balcony, which had become dilapidated, and made it serviceable, but without obtaining the permission of the Municipal Board thereto. The board thereupon issued notice to the house-owner under s. 88 of the Municipalities Act, 1900 to remove the balcony, and, in default of compliance prosecuted him. *Held* that the board had power, under s. 88, clause (2) of the said Act, to order the removal of the balcony without assigning any reason, and that it was not necessary for the Board, in the case of a notice issued under s. 88, to tender or express its willingness to pay compensation in respect of the structure the demolition of which was ordered. EMPEROR v. NANNA MAL, 35 All. 375 ... 1281

S. 128 (*h*) (i) *Municipal Board—Power of Board to make rules—Rules regulating use by hawkers of patrs of public roads.*—*Held* that the United Provinces Municipalities Act, 1900, does not empower a Municipal Board to make rules regulating the sale or exposure for sale of goods in streets or public places under the control of the Board. EMPEROR v. IMAMI, 35 All. 24 ... 1037

S. 187, *See* ACT NO. 1 of 1904, s. 23, 34 All. 391 ... 814

S. 187—*Municipal Election—Rules framed by Local Government for regulation of elections—Petition by defeated candidate—Appeal—Procedure—"Decree"—"Order."—Held*, on a construc-

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tion of r. 42 of the rules, framed by the Local Government under s. 187 of the Municipalities Act, 1900, for the regulation of Municipal Elections, that the term 'competent court' as used in r. 42 means a civil court of competent jurisdiction with reference to the valuation given by the petitioner in his petition. *Gur Charan Das* v. *Har Sarup* 34 All. 391, followed. *Held* also that no appeal lies from the order of a competent court passed on an election petition under r. 42 above referred to. *Sundar Lal* v. *Muhammad Faiq* 16 Oudh Cases, 36, approved. *Raghunandan Prasad* v. *Sheo Prasad* 35 All. 308, and *Sabhapat Singh* v. *Abdul Ghaffur* 24 Cal. 107, referred to. KHUNNI LAL *v.* RAGHUNANDAN PRASAD, 35 All. 450 ... **1333**

S. 187 (1) (*h*)—*Municipal election—Rules framed by the Local Government for regulation of elections—Validity of rules—Petition against successful candidate—Appeal.—Held* (1) that the provisions of s. 187 of the United Provinces Municipalities Act which gave power to the Local Government to make rules "generally for regulating all elections under the Act," were wide enough to include rules for the filing and decision of election petitions, and (2) that no appeal lies from the order of a "competent court" passed on an election petition under r. 42 of the rules framed by the Local Government under s. 187 (1), clause (*h*) of the Act. *Khunne Lal* v. *Raghunandan Prasad* 35 All. 450, followed. *Sundar Lal Muhammad Faiq* 16 Oudh Cases, 36, approved. NAND RAM *v.* CHHOTE LAL, 35 All. 578. **1423**

S. 187, 35 All. 308 ... **1235**

——**1901—II (Agra Tenancy Act).**

Ss. 4, 95, 167, 197, *See* JURISDICTION, 34, All. 358 ... **791**

S. 4—*Chapter X—"Land."—Resumption of rent-free grants—Grove-land—Suit for resumption of grove-land not maintainable in Revenue Court.—Held* that grove-land not being "land held for agricultural purposes" within the meaning of s. 4 (2) of the Agra Tenancy Act, 1901, nor "land" within the meaning of Chapter X of the Act, no suit will lie in a Revenue Court for resumption of a rent-free grant of grove-land. *Sheo Mangal* v. *Sardor Singh* 6 A. L. J. 749, (1) and *Megh Singh* v. *Nazar Fatma*, Select Decisions of 1911, No 4, referred to. HADI HASSAN KHAN *v.* PATI RAM, 35 All. 200 ... **1159**

Ss. 5, 18, 20, 57, *See* Act No. IV of 1882, s. 91, 33 All. 111 ... **75**

S. 9—*Fixed rate tenancy—Entry of name of tenant in revenue records—"Conclusive proof."*—The entry mentioned in s. 9 of the Agra Tenancy Act, 1901, is "conclusive proof" only as to the nature of the tenancy as between the zamindar and the tenant and does not apply to questions as to the title to the tenancy as between rival claimants thereto, *Mulai Singh* v. *Rajwant Singh*, Weekly Notes, 1906, p. 58, overruled. JAI NATH PATHAK *v.* KALKA UPADHYA, 34 All. 285 ... **740**

Ss. 10, 20, 83—*Sale of zamindari—Agreement to surrender exproprietary rights—Possession not delivered—Suit for damages for breach of contract—Void contract.—Held* that a transaction, one of the objects of which is that one party shall be divested of his exproprietary rights and that those rights shall vest in the

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other party, or a sale of zamindari property coupled with an agreement to relinquish the ex-proprietary rights of the vendor, is voidso far as the relinquishment of ex-proprietary rights is concerned. *Bhikham Singh* v. *Harprasad*, I. L. R. 19 All. 35; *Muralidhar* v. *Pem Raj*, I. L. R. 22 All. 205, *Kashi Prasad* v. *Kedar Nath Sahu*, I. L. R. 20 All. 219, *Raghubans Sahai* v. *Brijnandan Lal*, 6 A. L. J. 477, *Bharat Singh* v. *Debi Dayal Singh*, 6 A. L. J. 555, and *Khurshed Ali* v. *Wazir-un-nissa*, 7 A. L. J. 778, referred to. IKRA-ULLAH KHAN v. MOTI CHAND, 33 All. 695 ... 466

Ss. 10, 202—*Exchange of lands on partition—Exproprietary tenant—Suit for possession in Civil Court*—Res judicata—*Procedure*—By s. 10 of the Agra Tenancy Act, 1901, where there is a transfer by private alienation, no rights of ex-proprietary tenants accrue if the alienation is by gift or by exchange between co-sharers. Where circumstances exist to which s. 202 of the same Act applies, the court has no option, but is bound to adopt the procedure laid down in that section. KURA SINGH *v.* CHHALU, 33 All. 507 ... 340

S. 11—*Et seqq—Occupancy holding—Mahant—Mahant capable of acquiring occupancy rights for the benefit of the* math *which he represents.*—*Held* that the mahant of a *math*, just as much as any other tenant who holds for his own personal benefit, can acquire occupancy rights under the provisions of the Agra Tenancy Act, 1901, for the benefit of the *math* which he represents. PARMANAND SINGH *v.* MAHANT RAMANAND GIR, 35 All. 474 ... 1350

S. 20—*Occupancy holding—Mortgage—Sub-mortgage by mortgagee of occupancy holding—Rights of sub-mortgagees.*—Where the usufructuary mortgagee of an occupancy holding purported to sub-mortgage his mortgagee rights, it was *held* that the sub-mortgagees were entitled to a money decree against their sub-mortgagor for the money advanced by them. BALGOBID BHAGAT v. NAYINA MISIR, 35 All. 405 1302

S. 20 (2)—*Civil Procedure Code* (1882), *s.* 266—*Occupancy holding—Mortgage of occupancy holding and appurtenant house—Mortgaged property not saleable.*—Where an occupancy tenant purported to mortgage (1) a grove, which was his occupancy holding, and (2) a house appurtenant to such holding, *held* that having regard to s. 20 (2) of the Agra Tenancy Act, 1901, and s. 266 of the Code of Civil Procedure (1882) neither the grove nor the house could be sold in execution of a decree on the mortgage. RAM DIAL *v.* NARPAT SINGH, 33 All. 136 ... 91

S. 21—*Occupancy holding—Mortgage—Suit by mortgagor to recover possession—Illegal contract—Restitution of benefit.*—*Held* that the mortgagor of an occupancy holding who has put the mortgagee in possession cannot recover possession upon the ground merely that the mortgage is void under the provisions of the Agra Tenancy Act, 1901, without repaying to the mortgagee the money which he has received from him. *Fasihud-din* v. *Karamat-ullah*, Weekly Notes, 1888, p. 128, followed. BAHORAN UPADHYA *v.* UTTAMGIR, 33 All. 779 ... 521

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S. 22—*Succession—Special rule of succession exclusive of personal law of parties. Held*, that the rule of succession which is laid down by s. 22 of the Agra Tenancy Act, 1901, is independent and exclusive of the personal law of the parties to whom the section applies. Consequently the grandsons of a deceased occupancy tenant, as his male lineal descendants, would be entitled to share in the tenancy jointly with the sons of the late tenant. *Bhura* v. *Shahab-ud-din*, I. L. R 30 All. 128, followed. ALI BAKHSH v. BARKAT-ULLAH, 34 All. 419 ... 834

S. 22—"*Lineal descendant*"—*Adopted son.—Held* that an adopted son is a lineal descendant within the meaning of s. 22 of the Agra Tenancy Act, 1901. LALA *v.* NAHAR SINGH, 34 All. 658. 998

Ss. 28, 29, 30 *and* 34—*Expropeietary tenant—Mortgagee from ex-proprietary tenant holding over after ejectment of mortgagor—Rent not fixed by agreement or by a decree of court—Right of zamindar to recover rent.*—*G.* and *H.* were zamindars who owned some *sir* land and occupancy holding. They executed a usufructuary mortgage of their *sir* land and occupancy holding in favour of *K.* and the predecessor of *J.* In execution of a money decree against *G.* and *H.* their zamindari rights were sold and *P.* purchased the same. Subsequently, in execution of a decree for arrears of rent, *P.* got *G.* and H. ejected by the Revenue Court. Later on *P.* got *K.* and *J.* the mortgagees also ejected by the Revenue Court. *P.* then brought a suit against *K.* and *J.* for arrears of rent for the period between the ejectment of *G.* and *E.* and their own ejectment. *Held* that *P.* was not entitled to recover the rent in regard to the period of time between the two ejectments as the rent had not been fixed either by agreement between the parties or by a decree of court. KAMTA PRASAD *v.* PANNA LAL, 35 All. 123 ... 1105

S. 34—*Defendant in possession of land without consent of owner—Ejectment of defendant through Revenue Court—Subsequent suit for rent—Cause of action—Misjoinder of causes of action—Civil Procedure Code* (1908), *order II, r.* 2.—On a partition of certain revenue-paying property some land which fell to the plaintiff's share remained in possession of the defendant, who refused to vacate it. The plaintiff sued the defendant for ejectment in the Revenue Court. The defendant pleaded that he was an ex-proprietary tenant, but the Court held him to be a non-occupancy tenant and ejected him. The plaintiff then brought the present suit under s. 34 of the Agra Tenancy Act, 1901, for rent of the land held by the defendant during the period prior to his ejectment as land occupied by the defendant without the plaintiff's consent. *Held*, that the defendant, being in occupation of the land without the consent of the plaintiff, was liable to pay rent therefor, under s. 34 of the Agra Tenancy Act, and further that the claim could be maintained notwithstanding that the defendant was not in possession at the date of the suit. *Sheo Gopal Pande* v. *Thakur Baldeo Singh*, 8 A. L. J. 1087, distinguished. *Held* further, that the suit was not barred by reason of the plaintiff having in his previous suit for ejectment treated the defendant as a tenant. *Held* also, that the plaintiff's

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cause of action under s. 34 of the Agra Tenancy Act was no part of his cause of action to recover possession of the property, and could not be joined in the previous suit, and the present suit was, therefore, not barred by the provisions of the Code of Civil Procedure, order II, r. 2. NANDAN SINGH *v.* GANGA PRASAD, 35 All. 512 ... 1377

S. 56—*Jurisdiction—Civil and Revenue Courts—Suit for ejectment of a tenant in Revenue Court—Subsequent suit in Civil Court against the same defendant as trespasser.*—Where the plaintiff had previously sought to eject the defendant by suit in the Revenue Court on the plea that he was the plaintiff's sub-tenant, but had failed, on the finding that the defendant was an occupancy tenant, it was *held* that the plaintiff could not thereafter sue the defendant in the Civil Court to evict him as a trespasser. NARAIN SINGH *v.* GOVIND RAM, 33 All. 523 ... 351

Ss. 58 *and* 200—*Appeal—Question of proprietary title—Defendants setting up a title as mortgagee of the proprietary rights.*—In a suit for ejectment under s 58 of the Agra Tenancy Act, 1901, the defendants pleaded that they were not tenants but mortgagees of the proprietary rights of which the plaintiff was alleged to be the purchaser of the equity of redemption. *Held* that this amounted to a distinct claiming of a proprietary title or at least of a portion of the bundle of rights which go to make up a proprietary title and the appeal would lie to the District Judge. KALYAN MAL *v.* SAMAND, 35 All. 157 ... 1129

S. 63—*Civil Procedure Code, section explanation Suit for ejectment in Revenue Court—Question of title decided by Assistant Collector—Decision allowed to become final*—Res judicata.—In a suit for ejectment in the Revenue Court, the defendants to that suit pleaded title in themselves, and the Assistant Collector determined that question and held that the plaintiff had failed to prove title as against them. This decision became final. In a subsequent suit in the Civil Court for declaration of title against the former defendants and also certain others; *Held* that the decision of the Revenue Court operated as *res judicata* so far as concerned those persons who had been defendants to the previous suit but not as against those who were no parties to the suit. *Behari v. Skeobalak*, I. L. R. 29 All. 601, referred to. BED SARAN KUNWARI *v.* BHAGAT DEO, 33 All. 453 ... 305

Ss. 79 *and* 95—*Jurisdiction—Land-holder and tenant—Occupancy holding—Suit for declaration that plaintiff is heir of deceased occupancy tenant and for possession of holding—Practice—Useless declaration refused.*—The son of a deceased occupancy tenant filed a suit against the zamindar in the civil court asking (1) to have it declared that he was the son and lawful heir of the late tenant and (2) for possession of the occupancy holding held by him. The plaintiff had been ejected more than two years before suit. *Held*, that although so far as the first relief claimed was concerned, the suit might be cognizable by a civil court, so far as the second relief was concerned the plaintiff's remedy was by suit under s. 79 of the Agra Tenancy Act, and, inasmuch as the time for filing such a suit had long since

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expired there was no object to be gained by granting the first relief. The entire suit was accordingly dismissed. *Dori Lal v. Sardar Singh* 5 A. L. J. 514 referred to. BIRHAM KHUSHAL *v.* SUMERA, 35 All. 299 ... 1228

S. 95—*Civil and Revenue Courts—Jurisdiction—Dispute between rival claimants to a tenancy.*—*Held* that the question of title to a tenancy arising between rival claimants to that tenancy is a question which is cognizable by a civil court and is not a matter coming within the purview of s. 95 of the Agra Tenancy Act, 1901. *Bhup* v. *Ram Lal* (1) followed. *Zubeda Bibi* v. *Sheo Charan* 22 All 83 and *Hamid Ali Shah* v. *Wilayat Ali* 22 All. 93 referred to. JAGAN NATH *v.* AJUDHIA SINGH, 35 All 14. 1030

Ss. 95 *and* 167 - *Civil and Revenue Courts—Jurisdiction—Dispute between rival claimants to a tenancy.*—S. 95 of the Tenancy Act was not intended to apply to the case of disputes between rival claimants to a tenancy. It was intended to apply to questions arising between the landlord on the one side and the tenant on the other. *Prima facie* the Civil Court is the proper court to try all questions, and it is only when suits are expressly excluded from its cognizance that its jurisdiction is ousted. *Kali Charan* v. *Musammat Utmi*, 7 A.L.J., 658, referred to. BHUP *v.* RAM LAL, 33 All. 795 ... 532

Ss. 102 *and* 198—*Landlord and Tenant—Suit for rent—Jus tertii—Intervenor to whom tenant has not actually paid rent.*—*Held* that s. 198 of the Agra Tenancy Act, 1901, does not apply to the case of an intervenor, whose *jus tertii* the tenant defendant in a suit for rent has set up, and who has been made a party to the suit, but to whom the tenant has not actually and in good faith paid rent. SHEO DIHAL SINGH *v.* BADRI NARAIN SINGH, 33 All. 61 ... 41

S. 158—*Definition*—"*Successor*"—*Transferee from a rent-free grantee.* *Held* that a transferee from a rent-free grantee is a successor of the grantee within the meaning of s. 158 of the Agra Tenancy Act, 1901. SUNDAR SINGH *v.* THE COLLECTOE OF SHAHJAHANPUR 33 All. 553 ... 371

Ss. 166, 201—*Lessee continuing to be recorded as such after expiry of lease—Suit for profits—Presumption.*—The lessee of a mortgagee of zamindari property was recorded as entitled to the profits of the share, and remained so recorded even after the mortgage had been redeemed. *Held*, in a suit for profits that the lessee was entitled to recover so long as he was recorded. *Durga Prasad* v. *Hazari Singh*, I.L.R. 33 All. 199, followed. MUHAMMAD AHMAD SAID KHAN *v.* MUHAMMAD MASIHULLAH KHAN, 34 All 250 ... 717

S. 177—*Appeal—Question of proprietary title—Jus tertii pleaded by defendant—Third person added as a defendant—Question decided against the latter.*—In a suit for assessment of revenue on land in the possession of the defendant the defendant pleaded that the land belonged not to the plaintiff, but to a third person. The third person was brought upon the record as a defendant and claimed the land as his, and, on the question of ownership being decided against him, appealed. *Held* that the

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question raised in the suit was a question of proprietary title which arose directly and substantially in the suit and that an appeal lay to the District Judge. MAHARAJA OF BENARES *v.* BALDEO PRASAD. 33 All. 260 ... 175

S. 194—*Lambardar—Suit by lambardar against co sharers for excess of profits due to other co-sharers and himself—Lambardar not agent of co-sharers.*—*Held* that a lambardar is not the agent of the co-sharers generally so as to be entitled to sue on their behalf to recover profits due to some of them from other co-sharers holding *sir* and *khudkasht* lands fn excess of their proper shares. BISHAMBAR NATH *v.* BHULLO, 34 All. 98 ... 616

S. 199—*Civil and Revenue Courts—Jurisdiction—Appeal—Question of proprietary right.*—The plaintiff sued in the Revenue Court to eject the defendant alleging that the land in suit was his occupancy holding and that the defendant was his sub-tenant. The defendant pleaded that he was a co-sharer in the village and that the land in suit was his *khud-kasht*. *Held* that no question of proprietary title was raised by the pleadings and that no appeal therefore lay to the District Judge from the order of the Assistant Collector who had decided the case in the first instance. *Dal Chand* v. *Shamla*, 2 A L. J. 176, dissentend from. UDIT TEWARI *v.* BIHARI PANDE, 35 All. 521 ... 1383

S. 201—*Evidence—Presumption—Record of plaintiff's name as co-sharer—Act No. I* of 1872 (*Indian Evidence Act*), *section* 4.—*Held* by RICHARDS, C. J., KARAMAT HUSSAIN, TUDBALL, CHAMIER AND PIGGOT, J.J., (KNOX, J., *dissenting*), that in a suit instituted under the provisions of chapter XI of the Agra Tenancy Act, 1901, where the plaintiff is recorded as having proprietary title entitling him to institute the suit, the Revenue Court is not competent to go behind the record, receive evidence and itself try the question of proprietary title. *Bechan Singh* v. *Karan Singh*, I. L. R. 30 All. 447, followed. *Waris Ali Khan* v. *Parsotam Narain*, I. L R. 32 All. 427, overruled. DURGA PRASAD *v.* HAZARI SINGH, 33 All. 799 ... 535

S. 201, *See* ACT NO. IV OF 1882, S. 41, 34 All. 22 ... 656

——(1901)—III (United Provinces Land Revenue Act)

S. 107, *See* ACT NO. IV OF 1893, SS. 1, 2 & 3, 35 All. 387 ... 1289

Ss. 51, 52 *and* 99—*Assignment of Government Revenue-Right of Government to enhance or remit revenue.*—Assignee of Government revenue takes the assignment subject to all the rights of Government to assess, enhance, reduce, remit or suspende the revenue. BENI MADHO *v.* BHAGWAN PRASAD, 33 All. 556 ... 373

Ss. 107 *and* 111—*Partition—Joint Hindu family—Hindu widow—Claim for partition by widow in possession in lieu of maintenance merely, though recorded* solatti causa *as a co-sharer.*—*Held* that the widow of a member of a joint Hindu family who is in possession of a portion of the family property under a family arrangement, in lieu of maintenance merely, is not a co-sharer and cannot in virtue of such possession enforce a claim for partition of the share of which she is so in possession, even though her name may be recorded *solatti causa* as a co-sharer *Kailashi Kuar* v. *Badri Prasad*, S. A. no. 344 of 1913, decided 17th July

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1913, *Bhoop Singh* v. *Phool Kower* N. W. P. H. C. Rep. 368 and *Jhunna Kuar* v. *Chain Sukh*, 3 All. 400 followed. *Bhupal Singh* v. *Mohan Singh*, 19 All. 324, referred to. *Hajib-ullah* v. *Musammat Kushimba* 3 A. L. J. 481, distinguished. PEMA *v.* JAS KUNWAR, 35 All. 52 ... 1387

Ss. 107, 111 *and* 112 —*Partition—Joint Hindu family—Hindu widow —Claim for partition by widow in possession in lieu of maintenance merely, though recorded*, solatti cause, *as a co-sharer*.—*Held* that the widow of a member of a joint Hindu family who is in possession of a portion of the family property under a family arrangement in lieu of maintenance merely, is not a co-sharer and cannot in virtue of such possession, enforce a claim for partition of the share of which she is so in possession, even though her name may be recorded, *solatti causa* as a co-sharer. *Bhoop Singh* v. *Phool Kower*, N. W. P. H. C. Rep., p. 368, and *Jhunna Kuar* v. *Chain Sukh*, 3 All. 400, referred to. KAILASHI KUNWAR *v.* BADRI PRASAD, 35 All. 548 ... 1402

Ss. 111, 112, 233, (*k*)—*Partition—Hindu law—Joint Hindu family —Minor—No necessity for minor to be specially represented in partition proceedings*.—Where a partition of the property of a joint Hindu family in which one of the members was a minor was found to have been properly carried out with due regard to the interests of the minor, it was *held* to be no ground for upsetting the partition, were such a course possible having regard to s. 233 (*k*) of the United Provinces Land Revenue Act, 1903, that the minor was not represented in the partition proceedings by a formally appointed guardian. In such circumstances a minor member of the family is suitably represented by the managing member or members. BHAGWATI PRASAD *v.* BHAGWATI PRASAD, 35 All. 126 ... 1108

S. 111 *Plaintiff referred to Civil Court—Suit filed within time but subquently withdrawn—Second suit filed after prescribed period*. Where a Revenue Court, acting under s. 111 of the United Provinces Land Revenue Act, 1901, required a party to the case before it to institute a suit in the Civil Court within three months, and the plaintiff did so, but for some technical reason had to withdraw it with permission to bring a fresh suit, which was in fact filed without delay, but after the three months had expired : *held* that the second suit must be considered to be a continuation of the first suit, and it could not, therefore, be held that the plaintiff had not complied with the order of the Revenue Court. RANDHIR SINGH *v.* BHAGWAN DAS, 35 All. 541 ... 1397

S. 233 (*k*)—*Partition—Revenue Court irregularly entertaining an application for allotment of a share to applicant—Suit in Civil Court for declaration of title as to share so allotted—Jurisdiction*.—Some of the co-sharers in a mauza applied for partition. *H*, one of the non applicants, came in within the time limited in the proclamation issued under s. 110 of the Land Revenue Act, 1901, and asked for his share also to be partitioned off. After the time for objection to the partition had expired, *L* filed an application claiming a share in the portion alleged by *H* to

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be his share, and without notice to *H* this application was granted, and part of the share allotted to him was given to *L*. *H* then sued in the Civil Court asking for a declaration of his title to the plots so allotted to *L*. *Held* that, however erroneous the procedure of the revenue authorities might have been, H's suit was barred by s. 233 (*k*) of the Land Revenue Act, 1901. *Muhammad Saddiq* v. *Laute Ram*, I. L. R. 23 All. 201, followed *Khasay* v. *Jugla*, I. L. R. 28 All. 432, and *Muhammad Jan* v. *Sadanand Pande*, I. L. R. 28 All. 394, distinguished. LACHMAN DAS *v.* HANUMAN PRASAD, 33 All. 169 ... 114

S. 233 (*k*)—*Partition—Land belonging to plaintiff's mahal allotted to defendants and a different plot to plaintiffs—Civil and Revenue Courts—Jurisdiction.*—By a mistake of a partition amin a plot belonging to the defendants was allotted to the plaintiffs and two plots belonging to the plaintiffs were allotted to the defendants. *Held* that no suit would lie in a Civil Court to rectify this error. *Kishan Prasad* v. *Kadher Mal*, Weekly Notes, 1900, p. 11 distinguished. TIRBENI SAHAI *v.* GOKUL PRASAD, 33 All. 440 ... 296

Ss. 56, 233 (*i*). See JURISDICTION, 34 All. 358 ... 917

——1903—I (Bundelkhand Encumdered Fstates Act).

S. 13—*Sub-mortgage by usufructuary mortgagee—Covenant to indemnify sub-mortgagee if dispossessed—Effect on such covenant of mortgagors taking advantage of the provisions of the Bundelkhand Encumbered Estates Act*, 1903.—The mortgagee in possession under a usufructuary mortgage executed a sub-mortgage of his mortgagee rights and covenanted with the sub-mortgagee that if during the period of the mortgage the property mortgaged, in any year, by any reason, should pass out of the possession of the sub-mortgagee, or the mortgage deed for any reason should be declared to be invalid, he, the executant, would be liable to pay the loss sustained by the mortgagee. The mortgagors took advantage of the provisions of the Bundelkhand Encumbered Estates Act. The mortgagee took no steps under the Act to realize the amount due to him on his mortgage. The sub-mortgagee did prefer a claim, but it was rejected, and he did not appeal against the special Judge's order rejecting it. The sub-mortgagee was ejected from the mortgaged property, and thereafter his sons sued the mortgagee on his ocnvnant, claiming damages on account of his ejectment. *Held* that the suit was not barred by reason of anything contained in the Bundelkhan Encumbered Estates Act, 1903. GAYA PRASAD *v.* GANGA BISHAN, 33 All. 138 ... 93

——1904—I (General Clauses Act).

S. 23—*Act* (*Local No. I of* 1900, *United Provinces Municipalities Act*), s. 187—*Municipality—Powers of Government to frame rules—Rules as to Municipal election—"Previous publication" "Competent court."*—Certain draft rules relating to municipal elections were published in the local Gazette. These draft rules were then considered by the Government in connection with such criticisms and objections as had been presented, and finally a set of rules was published in the Gazette as having

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been made under s. 187 of the United Provinces Municipalities Act, 1900. *Held* that such rules were none the less validly passed because in some details they differed from the draft rules previously published. The rules so made provided that a municipal election might be questioned by means of a petition presented to 'a competent court.' *Held* that the expression 'competent court' so used meant a Civil Court of competent jurisdiction with reference to the valuation given by the petitioner in his petition. GUR CHARAN DAS *v.* HAR SARUP, 34 All. 391 ... 814

——1910—IV (United Provinces Act).

S. 60—*Unlawful possession of excisable article—Search warrant—Act No. X of* 1873 (*Indian Oaths Act*), *s.* 13—*Presumption that oath was duly administered.*—An excise inspector searched the house of a person suspected to be in illicit possession of an excisable article, namely cocaine, and cocaine was found in the house. *Held*, that the subsequent conviction of the person in possession of the said house was rendered illegal by the fact that the excise inspector had not previously obtained a search warrant *Emperor* v. *Allahdad Khan*, 11 A. L. J. 442; 35 All. 358, and *Emperor* v. *Hargobind*, 35 All. 1, referred to. *Held*, also, that it is a reasonable presumption that an oath has been duly administered to a witness appearing before a court although the record of the court may contain no reference to that fact. EMPEROR *v.* SAYE D AHMAD, 35 All. 575 ... 1420

S. 63—*Criminal Procedure Code, s.* 537—*Unlawful possession of excisable article—Search warrant—Conviction not invalidated owing to absence of warrant.* Where the superintendent of police and a sub-inspector searched the house of a person suspected of being in illicit possession of excisable article and such articles were found in the house searched, it was *held* that the conviction of the owner of the house under s. 63 of the United Provinces Excise Act 1910, was not rendered invalid by the fact that no warrant had been issued for the search, although it was presumably the intention of the Legislature that in a case under s. 63, where it was necessary to search a house, a search warrant should be obtained beforehand. EMPEROR *v.* ALLAHDAD KHAN, 35 All. 358 ... 1269

Administration.

See ACT NO. IV OF 1882, S. 6, 33 All. 414 ... 278

Adoption.

See ACT (LOCAL) NO. II OF 1901, S. 22, 34 All. 658 ... 998
See ESTOPPEL, 34 All. 398 ... 819
See SUIT FOR DECLARATION OF INVALIDITY OF ADOPTION, 34 All 8 556
See HINDU LAW, 35 All. 263 ... 1203

Adverse Possession.

Limitation—Land situate in a cantonment—Presumption as to title.—Certain land situate in the cantonment of Dehra Dun was appropriated in the beginning of the nineteenth century by the predecessor in title of the defendant for the purpose of building a house. The land was held, subject to the rules from time to time applicable to cantonments, by various occupiers until the year 1874, when the cantonments were handed to the civil

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authorities. In 1890 the Secretary of State sued the then occupant for a declation of title and assessment of ground rent, or, in the event of the defendant refusing to pay rent, for possession. *Held* that the circumstances of the case warranted the presumption that the title to the land in suit was vested in the Crown, and that the possession thereof could not be regarded as adverse until at the earliest the year 1874, when the land in suit ceased to be a part of the cantonment. *Secretary of State for India* v. *Jagan Prasad*, I. L. R. 6 All. 648, referred to. BANK OF UPPER INDIA *v.* THE SECRETAEY OF STATE, 33 All. 229 ... 153

Limitation—Purchaser of a decree on a mortgage allowing a puisne mortgagee to pay him off—Such position inconsistent with a claim to be in adverse possession of the mortgaged property.—Held that when the purchaser of a decree for sale on a mortgage accepted from a puisne mortgagee the amount due under the decree which he had purchased, he by so doing admitted the validity of the puisne mortgage, and his position was not consistent with a claim to be in adverse possession of the mortgaged property. *Ramacharan* v. *Sadashiv*, I. L. R. 11 Bom. 422, referred to. JAGDIP NARAIN SINGH *v.* BILAR SINGH, 33 All. 463 ... 311

See ACT NO. XV OF 1877, SCHEDULE II, ART. 137, 142, 144, 33 All. 224. ... 150

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In restraint of trade, See ACT NO. IX OF 1872, Ss. 23, 27, 34 All. 587 ... 949

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Aggregate Sentences.

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See CIVIL PROCEDURE CODE, S. 60 (1) (c), 34 All. 25 ... 567

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Alienation.

See CIVIL PROCEDURE CODE, (1882) S. 325A, 33 All. 233 ... 156

Annuity.

See ACT NO. IX OF 1908, SCH. I, ARTS. 116, 120, 131 & 132, 34 All. 246 ... 714

Appeal.

Jurisdiction—Valuation—Suit for specific performance of contract to sell—Additional relief claimed by way of cancellation of sale-deed subsequently executed.—Where a suit was primarily a suit for specific performance of a contract to sell certain property to the plaintiffs, but also asked for the cancellation of a subsequent sale-deed of the property in favour of certain defendants, it was held that the latter relief was merely incidental to the former and its valuation would not affect the jurisdiction of the

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appellate court. *Pirthi Singh* v. *Maru Singh*, 8 A. L. J. 266, distinguished. NITYA NAND *v.* BISHAN LAL, 33 All. 634 ... 425
See ACT No. VII OF 1870, s. 7, cl. V (*b*) 33 All. 705 ... 472
See ACT No. VI OF 1882, s. 169. 33 All. 641 ... 430
See ACT No. III OF 1907, s. 46 (4), 33 All.738 ... 494
See ACT (LOCAL) No. II OF 1901, s. 177, 33 All. 260 ... 175
See CIVIL PROCEDURE CODE (1882), s. 170, 33 All. 68 ... 46
See CIVIL PROCEDURE CODE (1908), s. 11, 33 All. 151 ... 102
See CIVIL PROCEDURE CODE (1908), s. 100 ; Order XLV, Rule 27 33 All. 379 ... 255
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Arbitration.

Arbitrator refusing to act—Compromise of suit and decree in terms of compromise—Compromise stating matters in dispute and nominating arbitrators to decide them—Power of Court on arbitrator refusing to act—Civil Procedure Code (1882), *ss.* 375, 506, 508, 510.—*Court determining matters referred to arbitration.*—S. 510 of the Code of Civil Procedure (Act XIV of 1882) which

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provides that " if an arbitrator refuses to act the Court may in its discretion appoint a new arbitrator . . . . or make an order superseding the arbitration, and in such case shall proceed with the suit," is applicable even if the person appointed arbitrator has not accepted office before refusing to act. When he has been nominated by the parties his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue; and any other construction would defeat the provisions of the Act. *Pugardin Ravutan* v. *Moidinsa Ravutan*, I. L. R. 6 Mad. 414, and *Bepin Behari Chowdhury* v. *Annoda Prosad Mallick*, I. L. R. 18 Cal. 324 disapproved of. In the present case the parties had compromised the suit, and had stated in the instrument of compromise the matters in dispute, and had each nominated therein a person as arbitrator to decide them. A decree in terms of the compromise was made by the Court and the matters were referred to the arbitrators named for their decision. One of them refused to act, and the party whose nominee he was declined to make another nomination. The District Judge in the exercise of his discretion under s. 510 of the Code thereupon himself determined the matters submitted to the arbitrators, thus practically superseding the arbitration. His decision was confirmed by the Court of the Judicial Commissioner. *Held* (reversing the decision of the Courts in India) that the District Judge should, under s. 510, have appointed a new arbitrator, which he had power to do notwithstanding that the arbitrator refusing to act had not first consented to do so, and he was not precluded from making such appointment by the fact that the party whose arbitrator had refused to act declined to assist the Court by suggesting another name. The Court could not " proceed with the suit," which had been put an end to by the compromise, the decree on which was final: and it had no power except by consent of parties to itself decide the matters referred to arbtiration. That rights, having been remitted to one tribunal, had been decided by another, was a fatal objection to the procedure adopted. SADIQ HUSSAIN *v.* NAZIR BEGAM, 33 All. 743 ... 497

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Award—Party to the suit not made party to the submission to arbitration—Party so omitted not a necessary party to the suit. —*Held* that an arbitration and an award made in the course of a suit would not be rendered invalid by the mere fact that a party whose name was on the record, but who was not a necessary party to the suit, was not made a party to the arbitration proceedings. SABTA PRASAD v. DHARAM KIRTI SARAN, 35 All. 107 ... 1095

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Award.
Refusal of court to file a private award—Subsequent suit to enforce terms of award—Res judicata.—*Held*, that the refusal of a court to file a private award will not operate as *res judicata* in respect of a subsequent suit brought to enforce the award. *Kunji Lal* v. *Durga Prasad*, I. L. R. 32 All. 404, followed. *Basant Lal* v. *Kunji Lal*, I. L. R. 28 All. 21, referred to. SHIB CHARAN DAS *v.* RAM CHANDRA SARUP, 33 All. 490 ... 329
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S. 2—*Joint Magistrate—Jurisdiction—Criminal Procedure Code, s.* 435—*Power of Sessions Judge to make reference.*—It is only the Collector who can take action and impose a fine under Bengal Regulation VI of 1886. A Joint Magistrate has no jurisdiction under S. 2 of the Regulation, even though the case may have been made over to him by the District Magistrate. EMPEROR *v.* MUHAMMAD ALAM, 33 All. 84 ... 56
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Mortgage—Redemption—Limitation—Act No. XIV of 1859 (*Limitation Act*), *S. I* (12)—*Accounts.*—A usufructuary mortgage was executed in the year 1852, in a place to which the provisions of Bengal Regulation XV of 1793 applied. It provided that the mortgagees should enter into possession and collect the rent and pay the Government revenue and defray collection charges &c., therefrom and retain the balance in lieu of interest. There was to be no accounting on either side and the mortgagor was to be entitled to redeem on payment of the principal sum of

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Rs. 252. *Held*, on suit by the representative of the mortgagor to redeem, brought within 60 years from the date of the mortgage, that the suit was within time; that the mortgage could not be considered as redeemed in the strict sense of the term from the moment when the profits received by the mortgagees became equal to the amount due to them for principal and interest, and that the mortgagor was, notwithstanding anything contained in the deed, entitled to an account of the profits received by the mortgagees. *Sudarshan Das Shastri* v. *Ram Prasad*, I. L. R. 33 All. 97, followed. *Shafi-un-nissa* v. *Fazl Rab*. 7 A. L. J. 787, and *Badri Prasad* v. *Murlidhar*, I. L. R. 2 All. 593, distinguished. HABIB-ULLAH *v.* ABDUL HAMID, 34 All. 261 ... 724

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Certificate.

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Champerty and Maintenance.

Agreements contrary to public policy—Assignment—Right of party to impeach.—Held that there may be a valid transfer of property for the purpose of financing a suit upon the terms that the property or the proceeds realized from the litigation shall be divid-

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ed between the transferor and transferee irrespective of the fact whether or not there was any agreement for the payment of consideration "win or lose." The duty of the court in such a case is to determine whether or not the agreement is a fair agreement to supply funds and does not purport to have been made so as to be inequitable or for improper objects, as for the purpose of gambling in litigation or of injuring others by encouraging unrighteous suits, *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* L. R. 4 I. A. 23; I. L. R. 2 Cal. 233 followed. *Held* also that, although as a general rule where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration, the rule is not invariable and would not apply where the transferor being a party to the litigation had never admitted the assignment, but on the countrary had pleaded that it was fictitious and without consideration. *Mani Shankar Pranjivan* v. *Bai Muli*, I. L. R. 12 Bom. 686, followed. BALDEO SAHAI *v.* HARBANS, 33 All. 626 420

Charge.

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Civil and Revenue Courts.

Jurisdiction—Suit to set aside decree of Revenue Court—Matters within exclusive jurisdiction of Revenue Court—Held that no suit can be entertained by a Civil Court for the purpose of setting aside a decree of a Court of Revenue in a matter as to which the latter Court has exclusive jurisdiction. *Keshab Deo* v. *Bahori* S.A No. 883 of 1905, decided on the 30th November. 1906, and *Kishan Sahai* v. *Bakhtawar Singh*, I. L. R. 20 All. 237, referred to. CHIRANJI LAL *v.* KEHRI SINGH, 33 All. 1 ... 1

Jurisdiction of—See ACT (LOCAL) NO. II of 1901, s. 56, 33 All 523. 351
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Jurisdiction—Occupancy holding—Usufructuary mortgage—Surrender of holding—Ejectment of mortgagee—Suit by mortgagee for declaration that surrender was not binding on him.—An occupancy tenant who had made a usufructuary mortgage of his holding then proceeded to surrender the holding to the zamindar' who had the mortgagee ejected by the Revenue Court. *Held*, on suit by the mortgagee for a declaration that the surrender of his holding by the mortgagor was not binding on him, that no such suit would lie in the face of the ejectment proceedings in the Revenue court which were binding on the parties. *Kam Devi Kuari* v. *Bindesri Upadhya*, 8 A. L. J. 940, followed. SHIVA PRAKASH v. KARNA, 35 All. 464 ... 1343
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Civil Procedure Code (1882).

S. 10, 102 *and* 103—*Suit dismissed for default of appearance—Date fixed not for hearing of case but for appointment of a guardian to a minor defendant only—Order of dismissal* ultra vires.—Consequent on the death of one of the defendants to a suit, the plaintiff applied to bring the heirs of the deceased defendant on to the record, and as one of them was a minor, nominated as his guardian, his elder brother. The brother declined to act as a guardian and the court fixed a date upon which the plaintiff was to appear and nominate another person as guardian. Upon the date so fixed the plaintiff failed to appear, and the court dismissed the entire suit, subsequently also rejecting an application for its restoration. *Held* that the court had no jurisdiction to dismiss the whole suit, as the only matter then before it was the appointment of guardian to the minor defendant. DEBI SAHAI *v.* SARASWATI 33 All. 560 ... 367

Ss. 13, 43—Res judicata—*Dismissal of suit for redemption of a mortgage—Second suit for redemption of another mortgage of the same properties—Civil Procedure Code* (1908), *s.* 11; *order II, rule* 2.—*Held* that the dismissal of a previous suit for redemption of an alleged oral mortgage was no bar to the institution of another suit for redemption of a written mortgage in respect of the same properties of a different date. *Thrikat Madathil Raman* v. *Thiruthiyil Krishnen Nair*, I.L.R., 29 Mad., 153 followed. RAM SAHAI *v.* AHMADI BEGAM, 33 All. 302 ... 204

Ss. 13, 539—Res-judicata—*Suit for declaration of trust and of property comprised in it—Party to such suit not competent subsequently to deny existence of trust.*—*Held* that a person who had been a party to a suit under section 539 of the Code of Civil Procedure, 1882, in which suit the existence of a waqf and the property comprised therein had been declared, was not competent in a subsequent suit for ejectment of the defendant from a part of the waqf property to plead that the property was not waqf. *Ghazaffar Husain Khan* v. *Yawar Husain.* I. L. R., 28 All., 112, referred to. MANOHARI *v.* MUHAMMAD ISMAIL, 33 All. 752 ... 504

Ss. 30 *and* 539—*Civil Procedure Code* (1908), *S.* 92—*Waqf alienation of waqf property—Suit to set aside such alienation and for declaration that property is waqf—Right to sue.*] *Held* that a suit by two Muhammadans for a declaration that a certain property is waqf and to set aside the alienation of such property by the persons in charge thereof is not a suit contemplated by S. 539 of the Code of Civil Procedure, 1882, or S. 92 of the Code of Civil Procedure, 1908, and is maintainable without permission obtained under S. 30 of that Code. *Muhammad Abdullah Khan* v. *Kallu*, I. L R., 21 All., 187. *Jamaluddin* v. *Mojtaba Husain*, I. L. R., 25 All., 631 and *Kazi Hussain* v. *Sagun Balkrishna*, I.L.R., 24 Bom., 171 followed. DASONDHAY *v.* MUHAMMAD ABU NASAR 33 All. 660 ... 443

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S. 43—*Civil Procedure Code* (1908), *sch. I, Or. II, r.* 2—*Competence to give leave to omit remedies or split claims not limited by pecuniary jurisdiction of Court—Suit for surplus collections made by mortgagee—Limitation—Act No. IX of* 1871, *sch. II, art.* 105—*Act No. XV of* 1877, *sch. II, arts.* 105, 109—*Act No. IX of* 1908, *sch. I, arts.* 105, 109.—The competence of a court to give leave to a plaintiff to omit to sue for a relief to which he may be entitled is not affected by the pecuniary value of the relief in respect of which such leave is sought. A suit by a mortgagor after the mortgage has been satisfied to recover surplus collections received by the mortgagee may be brought within three years from the time when the mortgagor re-enters on the mortgaged property under art. 105 of the second schedule to the Limitation Act of of 1877 (sch. I to the Limitation Act of 1908) and there is no restriction as to the way in which the mortgagor may obtain possession. *Ram Din* v. *Bhup Singh*, I. L. R. 30 All. 225 discussed. MUHAMMAD FAIYAZ ALI KHAN *v.* KALLU SINGH, 33 All. 244 ... 164

S. 43—*Suit for injunction—Suit dismissed upon the ground that plaintiff had failed to prove his possession—Subsequent suit for possession.*—*Held* that the dismissal of a suit for an injunction in respect of certain property upon the ground that the plaintiff has not proved his possession of the property in respect of which the injunction is sought is no bar to a subsequent suit for possession of the same property. The principle of the decision in *Darbo* v. *Kesho Rai*, I. L. R. 2 All. 356, *Sarsuti* v. *Kunj Behari Lal*, I. L. R. 5 All. 345, and *Mohan Lal* v. *Bilaso*, I. L. R 14 All 512, followed. BANDE ALI v. GOKUL MISIR, 34 All. 172 ... 665

S. 108. *See* LIMITATION, 33 All. 264 ... 178

S. 170—*Appeal—Contempt of Court—Property of person in contempt sold to realize a fine, but sale afterwards set aside on the submission of the person in contempt.*—No appeal lies from an order refusing to confirm a sale held by the Court to realize a fine imposed by it for contempt under s. 170 of the Civil Procedure Code, 1882. The court has power to refuse to confirm such a sale if the fine and costs are paid in by the person guilty of contempt, and the Court considers that the contempt is purged. BADRI PRASAD *v.* TEJ SINGH, 33 All 68 ... 46

Chapter XX—Insolveney—Insolvent discharged without a schedule of debts being framed—Attempt on the part of creditor to proceed against after-acquired property.—Where an insolvent had taken advantage of the provisions of chapter XX of the Code of Civil Procedure, 1882, and had been discharged under s. 351, but no schedule of debts had been framed, it was *held* that a judgment-creditor of the insolvent could not thereafter have recourse against property which had come into the hands of the insolvent subsequently to his discharge. AMIN-UD-DIN HAIDAR *v.* SHEORAJ SINGH, 35 All. 402 ... 1300

S. 223. *See* ACT NO. IX OF 1908, SCHEDULE I, ARTICLE 128, 35 All. 389 ... 1291

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Ss. 230, 235—*Execution of decree—Limitation—Application for execution whether a fresh application or merely a continuance of a subsisting application.*—The subsequent application to execute the same decree mentioned in s. 230 of the Code of Civil Procedure, 1882, means a substantive application for execution in the form prescribed by s. 235 of the Code. Hence, where an application for execution in accordance with s. 235 of the Code has been made within the period of limitation prescribed by s. 230 and has been granted, that is, execution has been ordered in accordance with the prayer of the decree-holder's application, the right of the decree-holder to obtain execution will not necessarily be defeated, if, by reason of objections on the part of the judgment-debtor or action taken by the court or other cause for which the decree-holder is not responsible, final completion of the proceedings in execution initiated by the application under s. 235 cannot be obtained within the period limited by s. 230. Further applications of the decree-holder to the court executing the decree to go on from the point where the execution proceedings had been arrested and complete execution of his decree would be applications merely ancillary to the substantive application under s. 235 and would not be obnoxious to the bar of s. 230. *Rahim Ali Khan* v. *Phul Chand*. I. L. R. 18 All. 482 followed. RAM SARUP *v.* DASRATH TIWARI, 33 All. 517 ... 347

S. 230—*Execution of decree—Limitation—Application for transfer of decree—Subsequent application for execution not in continuation of application for transfer.*— *Held* that an application for execution can in no sense of the words be regarded as an application in continuation of an applicatiou for transfer of a decree from one court to another. In order that an application may be a continuation of another application, it is necessary that the two applications must be of the same nature, and the application for transfer being an application of an entirely different nature from that for execution of a decree does not suspend the operation of s. 230 of the Code of Civil Procedure, 1882, *Sundar Singh* v. *Doru Shankar*, I. L. R. 20 All. 78, applied. *Ram Sahai* v. *Nanni* Weekly Notes, 1886, p. 137, dissented from. KHRTPAL *v.* TIKAM SINGH 34 All. 396 ... 818

S. 230—*Execution of decree—Decree upon compromise against lessees, and on their failure to pay against the property of their surety —Execution against lessess after the lapse of twelve years.*—A decree for rent was passed upon a compromise against certain lessees and their surety. The decree provided that the amount of it should be realized in the first instance from the lessees by annual instalments, and in the event of failure, it would be recoverable by the sale of certain immoveable property which the surety had hypothecated. The decree was put into execution against the lessees as a simply money decree more than 12 years after the date of its passing. *Held*, that s. 230 of the Code of Civil Procedure of 1882 applied, and the decree could not be executed after the expiration of 12 years from the date thereof. *Pahalwan Singh* v. *Narain Das*, I.L.R. 22 All.

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401, distinguished. MAHARAJA OF BENARES *v.* LALJI SINGH, 34 All. 646 ... 988

S. 258. See EXECUTION, 35 All. 178 ... 1144

S. 266. See ACT (LOCAL) No. II of 1901, s. 28 (2), 33 All. 136 ... 91

Ss. 278, 279, 280, 281—*Execution of decree—Attachment—Objection to attachment—Objection dismissed—Suit to recover possession—Jurisdiction.*—*Held* on a construction of ss. 278, 279, 280 and 281 of the Code of Civil Procedure, 1882, that an objector may raise an objection to an attachment not only on the ground that he is in possession of the property attached but also on the ground that he has an interest in it, and that, when an executing court disallows the claim of an objector under s. 281, the court has jurisdiction to do so, notwithstanding the fact that it erroneously does not go into the question of possession but disallows the objection on some other ground. BHAGWAN DAS *v.* RAJ NATH, 34 All. 365 ... 796

S. 287 (*c*)—*Execution of decree—Mortgage on property sold notified at time of sale—Subsequent suit on mortgage—Auction-purchaser not estopped from questioning validity of mortgage.*—In proceedings in execution of a decree a person alleging himself to be the mortgagee of property about to be sold asked the executing court to notify the existence of his prior incumbrance on the property to be sold, and the Court, without apparently making any inquiry as to the genuineness of the mortgage, did so, but did not sell the property subject to the prior incumbrance. The property was sold and purchased by the decree-holder. *Held* on suit by the mortgagee that the decree-holder auction purchaser was not estopped from contesting the validity of the mortgage so notified. *Shib Kunwar Singh* v. *Sheo Prasad Singh*, 28 All. 418, followed. JAIRAJ MAL *v.* RADHA KISHAN, 35 All 257 ... 1199

S. 310A. See ACT NO. XV of 1877. s. 3, SCH. II, ART. 13 & 14, 33 All. 93 ... 63

S. 315—*Execution of decree—Sale in execution—Auction purchaser deprived of property purchased owing to failure of judgment-debtor's title—Suit to recover purchase money—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *sch. I, arts.* 62 *and* 120.—*Held* (1) that an auction purchaser seeking to recover the purchase money paid by him upon the ground that he has been deprived of the property purchased owing to failure of the judgment-debtor's title thereto has no right outside the Code of Civil Procedure, and (2) that the remedy given by the Code of Civil Procedure is not a suit for money had and received, to which article 62 of the first schedule of the Indian Limitation Act, 1908, would apply but is a suit falling within the purview of article 120. *Munna Singh* v. *Gajadhar Singh* 5, All. 577 and *Mohiudeen Ibrahim* v. *Mahommed Mura Lewai* 23, M. L. J. 487, followed. *Ram Kumar Shaha* v. *Ram Gour Shaha* 13 C. W. N. 1080, not followed. *Hanuman Kamat* v. *Hanuman Mandur*, 19 Cal. 123, distinguished. SIDHESWAR PRASAD NARAIN SINGH *v.* GOSAIN MAYANAND, 35 All. 419 ... 1311

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S. 316—*Execution of decree—Purchase at auction sale—Date of accrual of auction purchaser's title.*—*Held* that under the Code of Civil Procedure, 1882, the title of a purchaser of immoveable property at a sale in execution of a decree to mesne profits arising therefrom does not accrue until the date of the confirmation of such sale. *Amir Kazim* v. *Darbari Mal*, I. L. R. 24 All. 475, and *Prem Chana Paul* v. *Purnima Dasi*, I. L. R. 15 Cal. 546, followed. SHIAM LAL *v.* NATHE MAL, 33 All. 63 ... 43

S. 316. See PRE-EMPTION, 33 All. 45 ... 30

S. 317—*Prior and subsequent mortgagees—Purchase of part of mortgaged property in execution of decree on prior mortgage—Suit on second mortgage—Auction purchaser alleged to be* benamidar *of mortgagor—Act No. IV of* 1882 (*Transfer of property Act*), s. 43.—A portion of certain mortgaged property was purchased by a third party at auction sale in execution of a decree on a prior mortgage. *Held* on suit for sale by the subsequent mortgagee that it was not open to the subsequent mortgagee to bring this portion again to sale upon the ground that the auction purchaser was merely a *benamidar* for the mortgagor. *Ram Narain* v. *Mohanian*, I L. R. 26 All. 82, followed. SARJU PRASAD *v.* BINDESHRI BAKHSH PAL SINGH, 33 All. 382 ... 257

S. 325A—"*Alienation*"—*Muhammadan law—Gift during* marz-ul-mant—*Will—Held* that a gift made by a Muhammadan during death-illness is (1) under the Muhammadan law a will and therefore valid as to one-third of the property comprised in it, and (2) is not an alienation which might fall under the prohibition contained in s. 325A of the Code of Civil Procedure (1882). MUHAMMAD SAYEED *v.* MUHAMMAD ISMAIL, 33 All. 233 ... 156

S. 341 *and* 349—*Execution of decree—Arrest of debtor—Discharge pending an insolvency petition—Re-arrest in execution of the same decree—Act No. XV of* 1887 (*Indian Limitation Act*), *Sch. II, Art.* 179.—Where a judgment-debtor who has been arrested and sent to the jail in execution of a decree obtains an *interim* release under s. 349 of the Code of Civil Procedure, 1882, such a release is not a discharge under s. 341 of the Code and does not exempt the judgment-debtor from liability to be re-arrested in execution of the same decree. An application, therefore, for execution in such circumstances of the decree by re-arrest of the judgment-debtor is one in accordance with law and saves limitation. *Shamji Deokaran* v. *Poonja Jairam*, I. L. R. 26 Bom. 652, followed. *Secretary of State for India* v. *Judah*, I. L. R. 12 Cal. 652, dissented from. SURAJ DIN *v.* MAHABIR PRASAD, 33 All. 279 ... 188

Ss. 376, 506, 508, 510, See ARBITRATION, 33 All. 743 ... 497

S. 411—*Suit for dower* in forma pauperis *by wife against her husband and his mortgagee—Suit pending execution of decree for sale upon mortgage—Decree dismissing suit against mortgagees and making husband solely liable—Execution of decree to recover court fees due to Government—Effect of sale of mortgaged property.*—The respondents obtained a decree for sale on their mortgage on the 17th of December, 1895. Pending execution

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the wife of the mortgagor brought a suit *in forma pauperis* against her husband and his mortgagees for dower, alleging that it was a charge on the mortgaged property in priority to the mortgage lien. It was found that the dower debt was not charged on the property, and on the 11th of May, 1897, her suit was dismissed as against the mortgagees, and a money decree passed against her husband alone: and under s. 411 of the Civil Procedure Code, XIV of 1882, the amount of the court fees due to Government was made a first charge on the amount decreed. Notwithstanding that the decree expressly dismissed the suit as against the mortgaged property, the Collector, in order to recover the court fees in the pauper suit brought it to sale, on the 22nd of July, 1899, in execution of the decree of the 11th of May, 1897, and recovered just enough to satisfy them. On the application of the respondents the Civil Court directed that the property should be again put up for sale in execution of the respondents' decree of the 17th of December, 1895, and on the the 20th of September, 1902, it was purchased at that sale by the respondents who got formal possession. The purchaser under the decree of the 11th of May, 1897, now represented by the appellants, had, however, then obtained possession, and there was a contest for mutation of names which resulted in the revenue courts upholding the right of priority of the Government for the court fees and the possession of the appellants. *Held* in a suit in the civil court by the respondents to enforce their priority and for possession, that they were entitled to succeed. The decree of the 11th of May, 1897, did not create, nor purport to create any charge on the mortgaged property; and the sale under it of the 22nd of July, 1899, being a sale of the property of the defendant in the suit for dower to satisfy a debt of the plaintiff in that suit, was without jurisdiction, and passed no title to the purchaser. RAGHO PRASAD *v.* MEWA LAL, 34 All. 223 ... 700

Ss. 443, 456 and 462. See MINOR, 35 All. 487 ... 1359

S. 492. See CIVIL PROCEDURE CODE, (1908) Or. XXXIX, r. 1, 33 All. 79 ... 53

S. 539—*Trust*—"*Public charitable or religious purposes*"—*Trust for benefit chiefly of a particular sect not necessarily not a public trust.*—Where it was clearly established by evidence that certain property had been held for very many generations for the purpose of supporting and maintaining fakirs, entertaining visitors and for the giving of alms, and there was no evidence that the property was ever held for any other purpose, it was *held* that the court ought to presume the existence of a charitable or religious trust within the meaning of s. 539 of the Code of Civil Procedure, 1882, and the trust was none the less a trust for a public purpose if its main object was in fact the support of fakirs of a particular sect and the propagation of the tenets of that sect. MAHANT PURAN ATAL *v.* DARSHAN DAS, 34 All. 468 ... 868

Ss. 584, 585—*Second appeal—Questions of law and fact—Construction of document—Wajib-ul-arz—Land-holder and tenant*—

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Rights of zamindars in respect of house sites and groves.—In a suit for a declaration of the proprietary title of the appellants to certain lands in a village, the first court dismissed the suit on the ground that the respondent was the zamindar, and the appellants only tenants of the lands. The Subordinate Judge found on the construction of the wajib-ul-arz of the village and other documentary evidence that the appellants were the owners of the lands in suit. On second appeal to the High Court it was contended that the Court was bound under s. 584 of the Civil Procedure Code, 1882, to accept the finding of the Subordinate Judge as conclusive, the question being one of fact; but the High Court rejected that contention. *Held* (affirming that decision) that the Subordinate Judge's finding was arrived at by inferences drawn from a misconstruction of the wajib-ul-arz. The right construction of documents was a question of law which the Court on second appeal was not precluded from considering under ss. 584 and 585 of the Civil Procedure Code. On the true construction it was clear from the documentary evidence that the appellants were only tenants of the land, and not proprietors FATEH CHAND *v.* KISHAN KUNWAR, 34 All. 579. 943

——(1908) *S.* 2 (11), *See* HINDU LAW, 33 All. 15 ... 10

S. 2, *See* ACT NO. X OF 1865, s. 244, 35 All. 448 ... 1332

Ss. 2, 104, 148—*Pre-emption—Decree in pre-emption suit fixing time for payment—Order extending time—Appeal—"Decree"—"Order."—Held* that s. 148 of the Code of Civil Procedure (1908) does not entitle the court to extend the time fixed by the decree for payment of the purchase-money in pre-emption cases. *Held*, also, that an order made under s. 148 of the Code of Civil Procedure (1908) is not a decree within the meaning of s. 2 of the Code, nor is it appealable as an order under s. 104. *Rahima* v. *Nepal Rai*, 14 All. 420, distinguished. SURANJAN SINGH *v.* RAM BAHAL LAL, 35 All. 582. 1425

S. 11—Res judicata—*Two suits—One judgment, but two decrees—Appeal against one decree before the decision of which the other decree becomes final.*—M and Z each filed a suit for pre-emption in respect of the same sale, each claiming a right of pre-emption preferential to that of the other. Each plaintiff was made a party defendant to the suit brought by the other. A judgment was delivered in the suit of M and a copy thereof was placed on the record as the judgment in the suit of Z, but a separate decree was framed in each suit. The suit of M was decreed: that of Z dismissed. Z appealed from the decree in his own suit, but not from the decree in the suit brought by M, which became final before Z's appeal was decided. *Held* that the doctrine of *res judicata* applied, and Z's appeal was barred. *Chajju* v. *Sheo Sahai*, I. L. R. 10 All. 123, *Bal Kishan* v. *Kishan Lal*, I. L. R. 11 All. 148; *Ram Lal* v. *Chhab Nath*, I. L. R 12 All. 578; *Mangli* v. *Narain*, Weekly Notes, 1893, p. 190; *Kesho Tiwari* v. *Sarju Kunwar*, Weekly Notes, 1893, p. 221; *Abdul Basit* v. *Ashfaq Husain*, Weekly Notes, 1908, p. 211 and other (unreported) cases of the Allahabad High Court approved and followed. *Damodar Das* v. *Sheo Ram Das*, I. L. R. 29

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All. 730, overruled. *Abdul Majid* v. *Jew Narain Mahto*, I.L.R. 16 Calc. 233; *Mariamnissa Bibi* v. *Joynab Bibi* I. L. R. 33Calc. 1101 and *Panchanada Velan* v. *Vaithinatha Sastrial*, I. L. R. 29 Mad. 333, dissented from *Gururajammah* v. *Venkatakrishnama Chetti*, I. L. R. 24 Mad. 350, referred to. ZAHARIA *v.* DEBIA 33 All. 51 ... 35

S. 11—Res judicata—*Same issue decided in two connected suits—Appeal in one only.*—The same issue was decided between the same parties in each of two connected suits. The party against whom the decision was appealed in the one case, but not in the other, the decree in which became final before his appeal was heard. *Held* that the hearing of the appeal was barred. *Zaharia* v. *Debia*, I. L. R. 33 All. 51, followed. DAKHNI DIN *v.* SYED ALI ASGHAR, 33 All. 151 ... 102

S. 11, Explanation VI—Res judicata—"*Right claimed in common*" Jus tertii.—In a suit for ejectment in a Revenue Court the defendants denied the title of the plaintiff, and set up their own title as to part of the property and a *jus tertii* as to the rest. The Revenue Court elected to try the question of title itself,and found that the plaintiff had not established her proprietorship, and that decision became final. *Held*, in a subsequent suit in the Civil Court for a declaration of title, that the decision of the Revenue Court, although it constituted a *res judicata* as between the plaintiff and the then defendants, could not amount to a *res judicata* as between the plaintiff and the third parties whose rights those defendants had set up. JAIMANGAL DEO *v.* BED SARAN KUNWARI 33 All. 493 ... 331

S. 11, order II, r. 2. *See* CIVIL PROCEDURE CODE (1882) Ss. 13 and 43 33 All. 302 ... 204

S. 11. EXPLANATION VI, *See* ACT (Local) No. II OF 1901, s. 63, 33 All 453 ... 305

S. 11—*Mortgage—Prior and subsequent mortgages—Suit for sale on second mortgage, first mortgagees being made parties—Rights of first mortgagees not set up—Subsequent suit by first mortgagees barred—Res judicata.*—Certain puisne mortgagees brought a suit for sale on their mortgage in which, although they impleaded the prior mortgagees, they simply asked for the sale of the property mortgaged, neither claiming to have their mortgage redeemed nor asking for sale subject to the prior mortgage. The prior mortgagees on their part did not set up their rights under the prior mortgage. *Held* that s. 11 of the Code of Civil Procedure was a bar to the prior mortgagees afterwards suing for sale on their mortgage. *Mohamed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*, I. L. R. 39 Cal. 527, followed. *Surji Ram Marwari* v. *Barhamdeo Prasad*, 1 C. L. J. 337, distinguished. GAJADHAR TELI *v.* BHAGWANTA, 34 All. 599 ... 957

S. 11— Res Judicata—*Prior and subsequent mortgagees—Suit by first mortgagee impleading second, but no decree as to rights of first mortgagee—Suit for sale by prior mortgagee not barred.* A second mortgagee brought a suit for sale on his mortgage, in which he impleaded the first mortgagee and asked to redeem. The first mortgagee did not appear. The plaintiff got a decree

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for sale, but the decree did not either give him redemption of the first mortgage or direct the property to be sold subject to the first mortgage. *Held* that the first mortgagee was not precluded from subsequently bringing a suit for sale on his mortgage. *Srinivasa Rao Saheb* v. *Yamunabhai Ammall*, 29 Mad. 84, *Katchalai Mudali* v. *Kuppanna Mudali*, 1912 M. W. N. followed *Sri Gopal* v. *Pirthi Singh*, 24 All 429, *Nattu Krishnama Chariar* v. *Annangara Chariar* 30 Mad. 353, and *Gopal Lal* v. *Benarasi Pershad Chowdhry*, 31 Cal. 428. distinguished. AJUDHIA PANDE *v.* INAYAT-UL-LAH, 35 All. 111 ... 1097

S. 11—Res judicata—*Two suits, one judgment and two decrees—Two appeals of which one abates before the other is heard.*—A plaintiff instituted, on the same day and in the same court, two suits, in each of which the claim was for a declaration that he was the *mahant* of a certain *math*. The one was against defendant *A* only, the other against defendants *A* and *S*. Both suits were decided by a single judgment, but a separate decree was framed in each. In the former suit *A* appealed. In the latter *S* appealed, but *A* did not. Pending *A's* appeal *S* died and his appeal abated and the judgment in the case became final. *Held* that the hearing of *A's* appeal was barred. *Zaharia* v. *Debia*, 33 All. 51, followed. ANANT DAS *v.* UDAI BHAN PARGAS, 35 All. 187 ... 1150

S. 20 (*c*)—*Act No. IX of* 1872 (*Indan Contract Act*), *s.* 212—*Principal and agent—Suit for compensation for loss caused by negligence of agent—Jurisdiction.*—The plaintiffs who were grain-dealers, ordered the defendant, who was a commission agent at Karachi, to purchase some grain for them. The latter did so, and the plaintiffs sent him some money on account. In accordance with the direction of the plaintiffs the railway receipt for the goods purchased was sent by value payable post. By some mischance it did not arrive. The defendant instructed the railway authorities not to deliver the goods till the balance due to him was paid. The balance was paid by the plaintiffs to the defendant's agent at Delhi. The Railway officials at Hathras refused to deliver the goods without the defendant's consent and delay occurred. In the meantime the price of the particular kind of grain fell and the speculation resulted in a loss to the plaintiffs. *Held*, on suit by the plaintiffs for compensation instituted at Hathras, that the case for compesation under s. 212 of the Contract Act in respect of the direct consequences of the defendant's neglect and misconduct, and that the cause of action arose at Karachi and the suit therefore did not lie in the court at Hathras. SALIG RAM *v.* CHAHA MAL, 34 All. 49 ... 583

S. 47—*Execution of decree—Interlocutory order—Appeal.*—The court executing a decree struck off the proceedings upon the ground of wilful default on the part of the decree-holder in prosecuting his claim. Subsequently, however, finding that the decree-holder had not really been in default, the court cancelled its former order, held that an attachment which was in existence at that time still subsisted, and that execution

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should proceed. *Held*, that this was not an order to which s. 47 of the Code of Civil Procedure, 1908, applied. Observations of BANERJEE, J. in *Jogodishury Debea* v. *Kailash Chundra Lahiry*, I. L. R. 24 Cal. 725, followed. MUKHTAR AHMAD *v.* MUQARRAB HUSSAIN, 34 All. 530 ... 910

S. 47—*Execution of the decree—Partition—Objection that decree-holders had realized certain debts assigned by the decree to the judgment-debtor—Procedure.*—The decree in a partition suit, *inter alia*, allotted a sum of money to be paid by the judgment-debtor to the decree-holders and assigned certain debts on account books to the judgment-debtor. On application by the decree-holders for execution as to the sum allotted to them, the judgment-debtor took objection that the decree-holders had as a matter of fact realized a large amount of the debts which had been assigned by the decree to him. *Held*, that the question thus raised was not a matter falling within the purview of s. 47 of the Code of Civil Procedure, and that the jugment-debtor's remedy was by a separate suit to recover from the decree-holders the amount alleged to have been illegally realized. MOHAN LAL *v.* JAGAN NATH, 35 All. 243 ... 1189

S. 48—*Execution of decree - Limitation--Execution prevented by fraud of judgment-debtor.*—Upon a correct interpretation of clause 2 of s. 48 of the Code of Civil Procedure (1908) the effect of the proviso embodied in that clause is that the bar to execution created by the first clause of the same section is removed for a period of twelve years from any date on which the judgment-debtor has by fraud prevented the execution of the decree. *Sreenath Goho* v. *Yusoof Khan*, I. L. R. 7 Cal. 556, dissented from. MOHSIN ALL *v.* MASUM ALI, 34 All. 20 ... 593

Civil Procedure (1908) the effect of the proviso embodied in

S. 60—"*Public Officer*" *Execution of decree—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *sch. I, art.* 182, *cl.* (5) *—Attachment—Pay of officer of regular forces not attachable—Statutes* 44 *and* 45 *Vict. Chap. LVIII, s.* 136—*Statutes* 58 *and* 59 *Vict. Chap. V, s.* 4.—An officer of His Majesty's regular forces serving in India is not a "public officer" within the meaning of s. 60 of the Code of Civil Procedure, 1908. The pay of such an officer, therefore, is not liable to be attached in execution of a decree of a court in British India. *Calcutta Trades Association* v. *Ryland*, I. L. R. 24 Cal. 102, and *Watson* v. *Lloyd*, I. L. R. 25 Mad. 402, referred to. LECKY v. BANK OF UPPER INDIA LIMITED, 33 All. 529 ... 355

S. 60 (1) (c)—*Execution of decree—Mortgage—Agriculturist's house not appurtenant to his holding.*—*Held by* RICHARDS, C. J. and TUDBALL J. (BANERJEE, J. *dissentiente*) that s. 60 of the Code of Civil Procedure will not operate to bar the sale of a house belonging to an agriculturist in execution of a decree on mortgage of the same if such house is not an appurtenance of the mortgagor's holding which he is prohibited by law from mortgaging or transferring. *Per* BANERJI.—The Legislature clearly intended that no court should sell a house belonging to and occupied by an agriculturist, provided that the house is of the

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description mentioned in clause (c) of the proviso to s. 60, Code of Civil Procedure, and it makes no difference in the powers of the court, whether that house was mortgaged by the agriculturist for his debt or was not so mortgaged. The proviso forbids both attachment and sale, that is, where an attachment must precede a sale it forbids attachment, as well as sale, and where attachment is not a preliminary step, it forbids sale. *Ram Dial* v. *Narpat Singh* I. L. R. 33 All. 136, referred to. BHOLA NATH v. MUSAMMAT KISHORI, 34 All. 25 ... 567

S. 60 (*c*)—*Execution of decree—Attachment—Objection that attached property is the house of an agriculturist—Judgment-debtor both zamindar and agriculturist—Burden of proof.*—Where a judgment-debtor whose house was attached in execution of a decree took objection that the house was the house of an agriculturist to which s. 60 (*c*) of the Code of Civil Procedure applied and was not susceptible of attachment, and it was found that the judgment-debtor was both an agriculturist and a zamindar: *Held* that it lay on the judgment-debtor to prove that the house was strictly of the nature contemplated by the provisions of section 60 (*c*). JAMNA PRASAD RAUT v. RAGHUNATH PRASAD, 35 All. 307 ... 1234

S. 66—*Execution of decree*—Benami *purchase—Claim against certified purchaser, but not by representative of the real purchaser.*—The widow of one Bhola Nath purchased a house at a civil court auction sale in the name of her son-in-law Baldeo and incorporated it into another house left by her husband who had died sonless. On her death one of her daughters claimed the house as an heir of her deceased father. The son-in-law in whose name the house was purchased raised the plea that he was the certified auction purchaser and the suit was barred by s. 66 of the Code of Civil Procedure. *Held* that as the plaintiff did not claim through the widow, but through the widow's husband, her father, the suit did not come within the purview of s. 66 of the Code. *Ram Narain*, v. *Mohanian* 28 All. 82, distinguished. NARAIN DEI v. DURGA DEI, 35 All. 138 ... 1116

S. 92, 33 All. 660 ... 443

S. 92—*Waqf—Suit for declaration of plaintiff's right as* mutawalli *and for possession—Jurisdiction.*—Where the plaintiff came into court alleging that he was the rightful *mutawalli* of a certain *waqf*, and that the defendant, on the death of the last incumbent, had wrongfully taken possession of the *waqf* property, and asking to be put into possession thereof as *mutawalli*, it was *held* that this was not a suit which fell within the purview of section 92 of the Code of Civil Procedure and was properly filed in the court of a Subordinate Judge. *Budree Das Mukim* v. *Chooni Lal* v. *Johurry* 33 Cal. 789, and *Ghelabhai Gavrishankar* v. *Uderam Icharam*, 36 Bom. 29, referred to. *Muhammad Ibrahim Khan* v. *Ahmad Said Khan* 32 All. 503, and *Saiyid Ali* v. *Ali Jan*, 35 All. 98, distinguished. MUHAMMAD ABDUL MAJID KHAN v. AHMAD SAID KHAN, 35 All. 459 ... 1340

S. 92 (1)—*Procedure—Muhammadan law—Waqf—Trust for a public purpose of a religious or charitable nature.*—Where a trust is

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a trust created for a public purpose of a religious or charitable nature (in this case a waqf under the Muhammadan law) no suit can be maintained for the removal of a duly appointed trustee, save in conformity with the provisions of s. 92, sub-s. (1), of the Code of Civil Procedure. SAIYID ALI *v.* ALI JAN, 35 All. 98 ... 1089

S. 98, *See* MINOR, 35 All. 487 ... 1359

Ss. 99, 107; *sch.* II—*Arbitration—Appellate Court, powers of—Reference once made unaffected by death of party.*—An application for a reference to arbitration under sch. II to the Code of Civil Procedure, 1908, may be made to an Appellate Court as well as to a court of original jurisdiction, and the court is bound to accept and act upon such application if made by all the parties interested in the appeal. When an application for arbitration has been made, it will not lapse by reason of the death of one of the parties : but if the right to sue survives, the arbitration must be proceeded with after substitution of the representatives of the deceased party. *Perumalla Satyanarayana* v. *Perumalla Venkata Rangayya*, I. L. R., 27 Mad. 112, referred to. DUTTA *v.* KHEDU, 33 All. 645 ... 433

S. 100 : *O XLV, r.* 27—*Refusal to admit additional evidence in appeal—Discretion of Court—Appeal.*—A refusal in the exercise of discretion to admit additional evidence under Or. XLI, r. 27, of the Code of Civil Procedure, will not afford a ground for second appeal. *Ram Piari* v. *Kallu*, I. L. R., 23 All. 121, followed. DURGA PRASAD *v.* JAI NARAIN, 33 All. 379 ... 255

S. 104, *cl.* (2); *O. XLIII, r* 1 (*a*)—*Order returning a plaint for presentation to proper court—Appeal—Case remanded to court of first instance—Appeal from order of remand inadmissible*—A Munsif returned for presentation to the proper Court a plaint filed before him. Then plaintiff appealed against this order to the District Judge, who transferred the appeal to a Subordinate Judge, who in turn remanded the case to the Munsif for trial on the merits. *Held* that no appeal would lie from the appellate order of remand. NAUBAT SINGH *v.* BALDEO SINGH, 33 All. 479 ... 321

Ss. 105, 108, 109 ; *Or. XLI, r.* 23—*Remand—Appeal—Privy Council.*—*Held* that an order remanding a case to the lower appellate court passed by the High Court under Or. XLI, r. 23 of the Code of Civil Procedure, 1908, is not appealable to His Majesty in Council. *Forbes* v. *Ameeron-nissa Begam*, 10 Moo. I A. 315, *Mahant Ishvargar Budhgar* v. *Candasama Amarsang*, I. L. R. 8 Bom. 548, *Saiyid Muzhar Hoosein* v. *Musammat Bodha Bibi*, I. L. R. 17 All. 112, and *Radhi Kishan* v. *The Collector of Jaunpur*, I. L. R. 23 All. 210, referred to. AHMAD HUSSAIN *v.* GOBIND KRISHNA NARAIN, 33 All. 391 ... 264

S. 110—*Appeal to His Majesty in Council—Requirements to be fulfilled before grant of certificate—Decree involving some question respecting property of the value of ten thousand rupees or upwards.*—The value of the subject matter of the suit in the court of first instance was over Rs. 10,000, but the value of the subject matter in dispute on appeal to His Majesty in Council

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was less than Rs. 10,000. On the other hand, the proposed appeal to His Majesty in Council necessarily involved a decision as to the validity of an award which dealt with property of far greater value and which had been declared by the High Court to be invalid. *Held* that the provisions of s. 110 of the Code of Civil Procedure applied and a certificate should be granted. It was not necessary that at the time of presenting the application for leave to appeal there should be pending in a court a dispute respecting other property of the value of Rs. 10,000. *Macfarlane* v. *Leclaire*, 15 Moo. P. C. 181, *Musammat Aliman* v. *Musammat Hasiha*, 1 C. W. N. 93—(notes) xciii, *Ananda Chandra Bose* v. *Broughton*, 9 B. L. R. 423, referred to. SRI KISHAN LAL *v.* KASHMIRO, 35 All. 445 ... 1329

S. 115—*Criminal Procedure Code*, s. 195 (6)—*Sanction to prosecute—Sanction granted by Munsif—Revisional powers of District Judge.*—One of the parties to a civil suit applied for sanction to prosecute the plaintiff on the ground that he had instituted a false claim. The Munsif dismissed the application on technical grounds. The applicant applied to the District Judge under s. 195 (6) of the Code of Criminal Procedure. The Judge remanded the case to the Munsif for trial of the application. *Held*, that the powers of revision exercisable by the District Judge were confined to those conferred by s. 195, Criminal Procedure Code, and he had no jurisdiction to make the order of remand. BENI PRASAD *v.* SARJU PRASAD THAKURIA, 33 All. 512 ... 344

S. 115—*Revision—Interlocutary order—Scope of section.*—*Held* by KARAMAT HUSSAIN, J.—that an application under s. 115 of the Code of Civil Procedure cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by s. 105, which provides that they may be made a ground of objection in appeal against the final decree. *Moti Lal Kashibhai* v. *Nana*, I. L. R. 18 Bom. 35, followed. Inasmuch as an order under Or. IX, R. 13, setting aside an *ex parte* decree can be attacked in appeal from the final decree, no application will lie for revision of such an order. *Gopala Chetti* v. *Subbier* I. L. R. 26 Mad. 604, followed. NAND RAM *v.* BHOPAL SINGH, I. L. R. 34 All. 592 ... 952, 816

S. 115, *See* CRIMINAL PROCEDURE CODE, s. 470, 34 All. 393 ...

S. 148: *Or.* XXXIV, *R.* 8—*Mortgage—Redemption—Mortgage money not paid within time limited by decree—Power of court to extend.*—S. 148 of the Code of Civil Procedure applies to cases in which the time fixed by the Code of Civil Procedure for the doing of some act is extended and not to the extending of the time fixed by a mortgage decree for the payment of a prior mortgage. The plaintiff, in a suit for redemption of a mortgage, obtained a decree which provided in the event of non-payment, not that he should be debarred from all right to redeem the mortgaged property but that his suit should be dismissed. Owing to a *bona fide* mistake, the plaintiff paid into court within the time limited less than the sum actually due. *Held*, that the court had power under Or. XXXIV, r. 8, of the

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Code of Civil Procedure to extend the time limited for payment of the full decretal amount. HET SINGH *v.* TIKA RAM, 34 All. 388 ... 812

Or. I, R. 8. *See* MAHOMEDAN LAW, 35 All 197 ... 1157

Or. II, R. 2. *See* CIVIL PROCEDURE CODE (1882), S. 43, 33 All. 244 ... 164

Or. II. R. 2. *See* MUHAMMADAN LAW, 33 All. 291 ... 196

Or. II, R. 2. *See* ACT (LOCAL) NO. II OF 1901, S. 34, 35 All. 512. 1377

Or. V, Rr. 1 *and* 2; *Or. IX, r.* 13—Ex parte *decree—Appearance of defendant in answer to a preliminary application not equivalent to appearance in answer to the plaint.*—*Held* that the fact that before the admission of a suit one of the proposed defendants had appeared by pleader on a miscellaneous application for his appointment as guardian *ad litem* to a minor defendant, did not absolve the court from the necessity of serving such defendant when the suit was admitted, with a copy of the plaint and notice of the date fixed for hearing. GULAB CHAND *v.* SHANKAR LAL, 35 All. 163 ... 1133

Or. V. Rr. 15-23—*Practice—Issue of summons transmitted for service to Court having jurisdiction in the place where defendant resides—Question of sufficiency or insufficiency of service to be determined by court serving summons.*—Where a summons is sent by a court in which a suit is field to a court within the jurisdiction of which the defendant resides for service on the defendant, it is the serving court and not the issuing court with which, ordinarily speaking, rest the decision whether such summons has been properly served or not, though possibly there may be causes in which the issuing court may find it necessary to re-open the question of service and to decide thereon. *Ram Nath Bural* v. *Guggodonandan Sen*, I. L. R., 22 Calc., 889, dissented from. The provisions of order V, rules 15 to 23 discussed. DWARKA PRASAD *v.* BRIJ MOHAN LAL. 33 All. 649 ... 436

Or. V, r. 15—*Summons—Question of sufficiency of service of summons.* The summons in a suit was served on the paternal uncle of the defendant who was a member of the same joint family and lived in the same house with the defendent. *Held* that such service was insufficient in the absence of evidence that the defendant himself could not be found. MAKHAN DAS *v.* MANNU LAL, 35 All. 556 ... 1407

Or. VIII, r. 6—*Set-off—Claim barred according to* lex fori, *but not according to* lex loci contractus. In a suit filed against him in the United Provinces the defendant claimed to set off a debt, which, though it would have been barred by limitation in the United Provinces, was not barred according to the local law (that of the Punjab) applicable thereto. *Held*, that the set-off claimed was admissible. BACHCHAN LAL *v.* BANARSI DAS, 35 All. 238 ... 1185

Or. IX, rr. 8 *and* 9; *s.* 151—*Dismissal of suit for default—Restoration—Sufficient cause—Court's inherent power to restore.*—Or. IX, r. 9 of the Code of Civil Procedure, 1908, makes it compulsory on a court to set aside a dismissal under rule 8 where the plaintiff satisfies the court that there was sufficient cause for

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non-appearance. It, however, cannot take away the court's power to restore the case for any other valid reasons. LALTA PRASAD *v.* RAM KARAN, 34 All. 426 ... 838

Or. IX, r. 8—*Appeal—Dismissal for non-appearance of appellant—Appellant present but unrepresented and unable to argue the appeal himself—Procedure.*—On the date fixed for the hearing of an appeal one of the two appellants (the other being a woman) appeared before the court and applied for an adjournment to enable him to procure the attendance of his pleaders. He was called on to argue his appeal, but he said he had nothing to say, and thereupon the appeal was dismissed on the ground that it had not been supported. *Held* that in these circumstances the court was not justified in dismissing the appeal for want of prosecution, but was bound to consider the grounds of appeal and to decide the case on the merits. BALDEO PRASAD *v.* KUNWAR BAHADUR, 35 All. 105 ... 1093

Plaintiff, non-appearance of—Dismissal of suit—Order setting aside dismissal when plaintiff was found to have been dead at the time suit was dismissed—Civil Procedure Code (1908), *order IX, rules* 8 *and* 9—*Order XXII, rules* 3 *and* 9—*S.* 115 *and* 151—*Rules and orders applicable only to defaulters wrongly applied in case of dead party.* On the non-appearance of the plaintiff in a suit against the respondent an order was made on the 4th of July, 1911, dismissing the suit for default. The plaintiff was in fact dead at the time the order was made, and his son the appellant was engaged in performing his father's funeral ceremonies and was unable to attend court. These facts were brought to the notice of the Deputy Commissioner in an application made under order XXII, rr. 3 and 9, of the Civil Procedure Code (Act V of 1908) by the appellant as the heir and legal representative of the plaintiff, which was filed and accepted by the Deputy Commissioner within the time allowed by law and an order was made on the 11th of September setting aside the dismissal of the suit, and substituting the name of the appellant on the record in place of the deceased plaintiff. On an application for revision of the Deputy Commissioner's order of the 11th of September made by the respondent under s. 115 of the Code to the Court of the Judicial Commissioner, that Court reversed the order, and confirmed that decision on review, mainly on the grounds that the order of the 4th of July dismissing the suit wasa proper order under Or. IX, r. 8 of the Code; that the appellant's application to set aside that order was not within time, and was therefore barred, and that order XXII, r. 3, of the Code applied only to a still pending suit, and not to one that had been dismissed. *Held* (reversing the decisions of the Court of the Judicial Commissioner) that those decisions were vitiated by applying to a dead man orders and rules applicable only to a mere defaulter. An " abuse of the process of the Court " within the meaning of s. 151 of the Code had occurred by the course adopted in the Judicial Commissioner's Court. Quite apart from that section, any Court might rightly have considered itself to possess inherent power to rectify the mistake inadvertently

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made in dismissing the suit. The order of the Deputy Commissioner setting aside the dismissal was manifestly 'sensible and correct, and their Lordships restored it, and remitted the case to India to be disposed of on the merits. DEBI BAKSH SINGH v. HABIB SHAH, 35 All. 331 ... 1250

Or. XVII, r. 3; Or, XLI r. 27—Procedure—Order for parties to appear with witnesses at adjourned hearing—Default of plaintiff's witnesses—Dismissal of suit.—On the date for the hearing of a suit the parties and their witnesses were present, but, as there was some prospect of a compromise, the hearing was adjourned. On the adjourned date the plaintiffs were present, but their witnesses, though summoned, did not appear. The plaintiffs did not apply for an adjournment, nor did they ask the court to enforce the attendance of their witnesses under Or. XVI, r. 10, of the Code of Civil Procedure, 1908, and the court, acting apparently under Or. XVII, r. 3, of the Code, dismissed the suit. The plaintiffs appealed, and the District Judge, dealing with the case as if the plaintiffs had made default in appearing remitted the case to the first court to be disposed of according to law. *Held* that the procedure of the District Judge was erroneous: he should have proceeded under Or. XLI, r. 27, to direct the admission of fresh evidence, and under Or. XLI, r. 25, to refer the issues for trial to the Court of first instance. RAM NARAIN DUBE *v.* JAGDEO, 33 All. 690. 463

Or. XVII, r. 3; Or. IX, r. 4—Adjourned hearing—Suit dismissed on merits—Remedy of plaintiff—Procedure.—At an adjourned hearing of a suit in the court of a Munsif the plaintiffs were not present and their pleader intimated to the court that he had no instructions to go on with the case. The suit was thereupon dismissed under Or. XVII, r. 3, of the Code of Civil Procedure, 1908, on the ground that the claim was not proved. The plaintiffs then made an application for restoration under Order IX, r. 4. The munsif dismissed the application and his order was affirmed by the District Judge. *Held*, on application in revision by the plaintiffs, that no revision lay. The suit having been dismissed under Or. XVII, r. 3, of the Code on the merits, the plaintiffs' remedy was by way of appeal against the Munsif's decree. *Lalta Prasad* v. *Nand Kishore*, I. L. R. 22 All. 66, followed. GAURA BIBI *v.* GHASITA, 34 All. 123 ... 633

Or. XX, r. 2—Judgment written but not delivered before transfer of Judge—Successor in office competent to pronounce his own judgment.—Where a judge fixed a date for delivering judgment, wrote it out and placed it upon the record, but was transferred before the date fixed, and his successor took a different view and delivered his own judgment *held* that his successor in office was not obliged to deliver the judgment but was competent to pronounce a judgment of his own in the case. *In the goods of Prem Chand Moonshi*, I. L. R. 21 Cal. 832, followed. *Re Baker; Nicholas* v. *Baker*, 44 Ch. D. 262, referred to. LACHMAN PRASAD *v.* RAM KISHAN, 33 All. 236 ... 158

Or. XX, r. 2—Judgment—Judgment written by the Judge who heard the case after his transfer from the division and pro-

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nounced by his successor in office.—A Judge may pronounce a judgment written but not pronounced by his predecessor in office, and this notwithstanding that at the time the judgment was written the Judge who wrote it had ceased to be the Judge of the court in which the case was tried. *Satyendra Nath Ray Chaudhuri* v. *Kastura Kumari Ghatwalin*, 35 Cal. 756, followed. BASANT BEHARI GHOSHAL *v.* THE SECRETAEY OF STATE FOR INDIA, 35 All. 368 ... 1276

Or. XX, r. 18—*Partition—Appeal—Preliminary decree—Subsequent interlocutory order giving directions for preparation of final decree.*—In a suit for partition a preliminary decree was passed and confirmed on appeal. When the case went back to the court of first instance for the passing of a final decree that court passed an order directing that actual partition should be made in accordance with certain directions then given by it. *Held* that no appeal would lie against such an order, but its propriety could be questioned in appeal from the final decree. The Code of Civil Procedure contemplated the preparation of only one preliminary decree, and the order in question could not be regarded as more than an interlocutory order containing directions as to the preparation of the final decree. BHARAT INDU *v.* YAKUB HASAN, 35 All. 159 ... 1131

Or. XXI, r. 2; Or. XXXIV, r. 5. See EXECUTION OF DECREE, 35 All. 178 ... 1144

Or. XXI, r. 16—*Execution of decree—Decree for money and costs of suit—Transfer af the decree as to costs merely. Held* that a decree for payment of a sum of money and for costs of the suit is one and indivisible and the decree-holder cannot transfer the decree so far merely as it my be a decree for costs, retaining the right to execute the decree for the main sum awarded. RAM CHANDRA NAIK KALIA *v.* ABDUL HAKIM, 35 All. 204 ... 1162

Or, XXI, rr. 18. 19, 20—*Execution of decree—Cross decree—Set off-Money decree—Decree for enforcement of charge.—Held* that under the Code of Civil Procedure (1908) a court is competent to set off a simple decree for recovery of money against a decree for recovery of money by enforcement of a charge. NAGAR MAL *v.* RAM CHAND, 33 All. 240 ... 161

Or. XXI, r. 23—*Remand—Finding that burden of proof has been wrongly laid without finding that the decision of the first court is wrong.*—It is not a good ground for passing an order of remand under Or. XLI, r. 23 of the Code of Civil procedure to say that the preliminary issue has been decided by the court of first instance on a wrong view of the burden of proof unless the appellate court also finds that that decision is wrong. HABIB-ULLAH KHAN *v* LALTA PRASAD 34 All. 612 ... 962

Or. XXI, r. 35—*Suit for recovery of joint possession—Form of decree — Practice.—Held*, that a plaintiff who is entitled to possession jointly with other persons can be granted a decree for joint possession whether the plaintiff was originally in joint possession and was subsequently dispossessed or whether he had never been in possession. *Phani Singh* v. *Nawab* v. *Singh*, I.L. R., 28 All., 161 dissented from. *Bhairon Rai* v. *Saran Rai*, I.L.

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R., 26 All., 588, *Rahman Chaudri* v. *Salamat Chaudhri* Weekly Notes 1901, p. 48. *Watson & Co.* v. *Ram Chand Dutt*, I.L.R., 18 Cal., 10, and *Bhola Nath* v. *Buskin* Weekly Notes 1894 p. 127 referred to. JAGARNATH OJHA *v.* RAM PHAL 34 All 150 ... 650

Or. XXI, r. 57—Execution of decree—Attachment—Application for execution dismissed, but subsequently restored on review.— By a mistake of the Court an application for execution against property which was under attachment was dismissed, but the decree-holder obtained a review of that order and the executing court has directed to proceed. There was no order removing the attachment. *Held* on application by the decree-holder to sell the attached property that the attachment still subsisted and was valid as against a sale made by the judgment-debtor previous to the review. AZIZ BAKHSH *v.* KANIZ FATIMA BI BI 34 All. 490 ... 883

Or. XXI, r. 89—Execution of decree—Sale in execution of simple money decree, the decree-holder also holding a decree upon a mortgage of the property sold—Application by decree-holder to have sale set aside.—A decree-holder held two decrees against the same judgment-debtor, the one being a decree for sale on two mortgages, and the other a simple money decree. In execution of the latter decree the decree-holder caused part of the mortgaged property to be sold by auction, and it was purchased by a stranger. *Held* that the decree-holder was not competent to apply under Or. XXI, rule 89, of the Code of Civil Procedure, 1908, to get this sale set aside. MUHAMMAD AHMADULLAH KHAN *v.* AHMAD SAID KHAN, 33 All. 481 ... 323

Or. XXI, r. 89—Execution of decree—Property sold by judgment-debtor to a third person after execution sale—Judgment-debtor not competent to apply to have auction sale set aside.— Where a judgment-debtor, after the sale in execution of his immoveable property, sold such property to a third party, it was *held* that the judgement-debtor was not competent thereafter to apply under Or. XXI, r. 89, of the Code of Civil Procedure, 1908, to have the execution sale set aside. *Debi Prasad Pandit* v. *Muhammad Unis Arabi*, 14 Oudh Cases, 33. approved, ISHAR DAS *v.* ASAF ALI KHAN; 34 All. 186 ... 674

Or. XXI, rr. 84, 89, 92—Execution of decree—Sale of immoveable property—Acceptance of final bid deferred—Application to set aside sale—Limitation. *Held* that a sale of immoveable property in execution of a decree is not complete until the sale officer has accepted the final bid and the purchaser has paid in the deposit of 25 per cent. of the purchase money required by r. 84 of Or. XXI of the Code of Civil Procedure, 1908. The period of thirty days prescribed by r. 92 will not, therefore, begin to run against a person applying under r. 89 if for any reason the final bid remains for a time unaccepted by the sale officer. MUNSHI LAL v. RAM NARAIN, 35 All. 65 ... 1065

Or. XXI, r. 88—Execution of decree—Sale in execution—Pre-emption—Title of pre-emptor defeasible.—*Held* that a title to a share in undivided immovable property sold in execution of a decree which is still defeasible at the date of the sale in execution is not sufficient to support a claim for pre-emption under

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Or. XXI, r. 88, of the Code of Civil Procedure, 1908. *Kamta Prasad* v. *Mohan Bhagat* 32 All. 45, and *Nabia Bibi* v. *Kauleshur Rai*, 4 A. L. J. 351, followed. ABDUL GHAFUR v. GHULAM HUSAIN, 35 All. 296 ... 1226

Or. XXXIII, r. 1—*Inquiry into pauperism—Claim for redemption of mortgage—Applicant able to raise money upon security of equity of redemption.—Held* that a plaintiff seeking to sue for redemption *in forma pauperis* cannot claim to sue as a pauper so long as he can raise money on his equity of redemption and that in so doing he will not in effect be mortgaging his claim. *Vedanta Desikacharyulu* v. *Perindevamma*, I L.R. 3 Mad. 249, distinguished. KAPIL DEO SINGH *v.* RAM RIKHA SINGH, 33 All. 237 ... 159

Or. XXXIV, See ACT NO. IV OF 1882, Ss. 88, 89, 34 All. 72 ... 599

Or. XXXIV, r. 1, See HINDU LAW, 34 All. 549, 572 924, 939

Or. XXXIV, r. 6 See ACT NO. III OF 1907 S. 16 AND 31, 34 All. 106 621

Or. XXXIV; r. 1 *Or. I, r.* 9—*Parties to suit—Mortgage—Joint mortgage of separate properties—Suit barred as against one mortgagee—Remaining property liable for whole debt.*—The separate properties of two mortgagors were jointly mortgaged to secure one debt. The mortgagee sued for sale just within limitation, making one of the heirs of one mortgagor a party defendant, and stating that nothing had been heard of the other for twenty-five years. In the written statement it was pleaded that this heir was alive but by that time the suit as against him was time-barred.—*Held* that the unimpleaded heir of the mortgagor was not a necessary party to the suit, and that the suit might be proceeded with against the other representative of the mortgagor and his sepaaate property for the whole amount due on the mortgage.—*Jai Gobind* v. *Jas Ram* 1891 Weekly Notes, 120, followed. *Gendan Lal* v. *Babu Ram* 9 A. L, J. 86, distinguished. *Imam Ali* v. *Baij Nath Ram Sahu* 33 Cal, 613, *Hakim Lal* v. *Ram Lal*: 6 C. L. J. 46, *Krishna Ayyar* v. *Muthukumarasawmiya Pillai*, 29 Mad. 217, *Haro Kumari* v. *Eastern Mortgage Co.*, 7 C. L. J. 274, and *Debendra Nath Sen* v. *Mirza Abdul Samad* 10 C. L. J. 150, referred to.—SANWAL SINGH *v.* GANESHI LAL, 35 All. 441 ... 1326

Or. XXXIV, r. 1—*Mortgage—Suit for sale—Intentional non-joinder of subsequent mortgage—Effect of such non-joinder.*—Subsequently to the execution of a mortgage of a 4 biswa zamindari share in favour of A. S. the mortgagor executed a further (usufructuary) mortgage of a portion of the same share in favour of A, S. and his brother N. S. A. S. brought a suit for sale on the earlier mortgage, but without making N.S. a party thereto. *Held*, that the effect of the non-joinder of N. S. would not be the total dismissal of the suit, but only of so much of it as related to that portion of the property which was covered by the subsequent mortgage. ALAM SINGH *v.* GOPAL SINGH, 35 All. 484 ... 1357

Or. XXXIV, r. 5. See ACT NO. VII OF 1870, SCH I, ART. 1; SCH. II, ART. 11, 35 All. 476 ... 1351

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Or. XXXIV, r. 8—*Execution of decree—Decree for sale on a mortgage conditioned on redemption of prior mortgages—Power of court to extend time for payment of redemption money.*—When a suit for sale by a subsequent mortgagee became by reason of the intervention of a prior mortgagee also a suit for redemption of the prior mortgage and a decree was passed accordingly, it was *held* that the court had power to under Or. XXXIV, r. 8, to extend the time for payment of the sum found necessary to redeeem the prior mortgage, the plaintiffs having through a *bona fide* mistake paid into court an insufficient amount. KALIAN *v.* SADHO LAL, 35 All. 116 ... 1101

Or. XXXIV, r. 14—*Execution of decree—Usufructuary mortgage—Suit for possession of mortgaged property—Decree for possession and costs—Execution for costs by attachment of part of the mortgaged property.*—Certain usufructuary mortgagees suing for possession of the mortgaged property, which had not been delivered to them, obtained a decree for possession and for costs. In execution of their decree for costs the mortgagees applied for attachment of part of the mortgaged property. *Held* that this application was not barred by the provisions of Or. XXXIV, r. 14, of the Code of Civil Procedure, 1908. *Khiarajmal* v. *Daim*, I. L. R. 32 Cal. 296, distinguished. *Muhammad Abdul Rashid Khan* v. *Dilsukh Rai*, I. L. R. 27 All. 517, referred to. HARIBANS RAI *v.* SRI NIWAS NAIK, 35 All. 518 ... 1381

Or. XXXIX, r. 1—"*Wrongfully sold in execution of a decree*"—*Temporary injunction—Civil Procedure Code* (1882), *S.* 492—*Act No. X of* 1877, *S.* 492—*Act No. VIII of* 1859 *S.* 92.—*Held* that when the words "wrongfully sold in execution of a decree" were added by the Legislature to the Civil Procedure Code of 1877, it was clearly intended that an injunction might be granted when property which the claimant claimed to be his was in danger of being sold in execution of a decree against another person or even against himself. *In the matter of the petition of Chando Bibi*, I. L. R. 26 All. 311, and *Meghraj Singh* v. *Lala Mal*, 4 A. L. J. 342 (Reporter's Diary), overruled. *Brojendra Kumar Rai Chowdhuri* v. *Rup Lal Doss*, I. L. R, 12 Cal. 515, *Ganga Nand* v. *Balgobind Das*, Weekly Notes, 1884, p. 349, and *Kirpa Dayal* v. *Rani Kishori*, I. L. R. 10 All. 80, followed. ABDULLA KHAN *v.* BANKE LAL, 33 All. 79 ... 53

Or. XXXIX, r. 1; *Or. XLIII, r.* 1—*Injunction—Order refusing injunction—Appeal.*—*Held* that an appeal lies from an order refusing, as well as from one granting, a temporary injunction. LACHMI NARAIN *v.* RAM CHARAN DAS, 35 All. 425 ... 1316

Or. XLI, r. 22—*Procedure—Cross objections entertainable though appeal was not so—Act No. I of* 1877 (*Specific Relief Act*), *ss.* 39 *and* 42—*Separate suit for cancellation of a document and for possession—Practice.*—A respondent may file cross-objections and the appellate court may act upon them notwithstanding that the appeal in which such objections are filed is not maintainable. Ordinarily where a plaintiff is out of possession, and he is in a position to claim a decree for possession, he should not be permitted to obtain merely a decree for the cancellation

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of an instrument according to which, if genuine, he has no title. SHANKAR LAL *v.* SARUP LAL, 34 All. 140 ... 644

Or. XLI, r. 23, *Or. XLIII, r.* 1 (*u*)—*Suit dismissed for default of appearance,but restored by appellate court—Remand—Appeal.*—*Held* that no appeal would lie from an appellate order directing that a suit, which had been dismissed because neither party had appeared, should be restored to the file of pending cases and heard. WAHID-UN-NISSA *v.* KUNDAN LAL, 35 All. 427 ... 1317

Or. XLI, r. 33—*Appeal—Procedure—Power of appellate court to interfere with portion of decree not challenged by either party.*—Plaintiff sued defendant for rent and obtained a decree for a portion of his claim. Plaintiff then appealed against the disallowance of the balance of the amount claimed, but defendant submitted to the decree and neither filed a cross appeal nor took objections under order XLI, r. 22, of the Code of Civil Procedure, 1908. *Held*, that it was not competent to the appellate court acting under order XLI, r. 33, to interfere with the decree obtained by the plaintiff in so far as it had not been challenged by defendant. *Attorney General* v. *Simpson*, 2 Ch. D. 671, referred to. RANGAM LAL *v.* JHANDU, 34 All. 32 ... 571

Or. XLVIII, r. 1—*Review of judment—Decisions after judgment sought to be reviewed—"New and important matter".*—The plaintiff instituted a suit for ejectment. The defendants pleaded that they were tenants of the plaintiff. The Munsif ordered the defendants to get a declaration of their tenancy. The Assistant Collector declared them to be tenants and the Munsif thereupon dismissed the suit. On appeal, however, the Commissioner set aside the order of the Assistant Collector and this decision was upheld by the Board of Revenue. The plaintiff then applied within 90 days of the decision of the Board of Revenue for review of the Munsif's judgment. *Held* that the judgments of the Commissioner and the Board were "new and important matters" within the meaning of Or. XLVII, r. 1 of the Code of Civil Procedure. *Waghela Raisangji Shivsangji* v. *Shaik Masludin*, I.L.R. 13 Bom. 330, and *Waman Hari* v. *Hari Vithal*, I.L.R. 31 Bom. 128, referred to. RAM LAL *v.* KALKA PRASAD, 33 All. 566 ... 380

Clerk.

See MASTER AND SERVANT, 35 All. 132 ... 1112

Company.

See ACT NO. VI OF 1882, S. 169, 33 All. 641 ... 430

Winding up—Shares applied for subject to a condition, and partly paid for—Condition not fulfilled—Resolution of company to refund part-payment—Position of applicant as regards winding up proceedings.—A company started in Meerut in 1904, with objects of a very general nature, proposed in 1906 to erect a mill at Fyzabad, and accordingly issued a prospectus and invited the public to subscribe the necessary capital. On the faith of this prospectus one M. applied for shares, but added to his application a condition to the following effect:—"These shares are only subscribed on the condition that any mill is started in the suburbs of Fyzabad." The

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company, however, found that they could not raise the necessary funds to start a mill at Fyzabad, and therefore passed a resolution that the money already subscribed for that purpose should be refunded. But before this was done the company went into liquidation. *Held* that M. was in the circumstances not a member of the company, but a creditor and entitled to get back what he had already paid. MAHENDRA GOPAL MUKERJI *v.* LACHMAN PRASAD, 35 All. 538 ... 1395

Compensation.
For frivolous or vexatious accusations. See CRIMINAL PROCEDURE CODE, s. 250, 34 All. 354 ... 788
For land compulsorily acquired, 35 All. 9 ... 1027

Complaint.
See ACT NO. XLV OF 1860, Ss. 182, 193, 35 All. 102 ... 1091
See CRIMINAL PROCEDURE CODE, Ss. 4 and 195 (1), 25 All. 8 ... 1026
Ss. 203, 437, 35 All. 78 ... 1074

Compromise.
See ACT NO. IV of 1882, S. 6, 33 All. 414 ... 278
See ACT NO. XVI of 1908, S. 49, 33 All. 728 ... 487
See ARBITRATION, 33 All. 743 ... 497
See HINDU LAW, 33 All. 356 ... 240
See MUHAMMADAN LAW, 33 All. 457 ... 307
See ACT NO. I of 1872, S. 44, 34 All. 143 ... 646
See HINDU LAW, 34 All. 65 ... 594
See HINDU LAW, 35 All. 240 ... 1187
See SALE, 35 All. 168 ... 1137

"Conclusive Proof".
See ACT (LOCAL) NO. II of 1901, S. 201, 33 All. 799 ... 535
S. 9, 34 All. 285 ... 740

Confession.
See ACT NO. I OF 1872, S. 91, 35 All. 263 ... 1201

Consideration.
See EVIDENCE, 33 All. 483 ... 325
Effect of Non-payment of, 34 All. 273 ... 732
See ACT NO. I OF 1872, S. 92, 35 All. 558 ... 1409

Construction of Document

Sale subject to agreement executed on the same day reserving right to vendor to repurchase—Documents to be read together—Mortgage. Two documents were executed by the same parties on the same day. The first purported to be an out and out sale of certain property, but was expressed to be "subject to the terms of the deed of agreement executed by the vendee." The agreement referred to was an agreement under certain conditions to reconvey the property purchased. *Held* that in the circumstances the two documents must be read together as constituting a mortgage by conditional sale. *Bhagwan Sahai* v. *Bhagwan Din*, I. L. R. 12 All. 387, distinguished. WAJID ALI KHAN *v.* SHAFAKAT HUSAIN, 33 All. 122 ...

Sale—Agreement to repurchase executed on same day—Mortgage by conditional sale—When what purported to be an out and out sale was accompanied by a contemporaneous agreement given to the vendor a right of repurchase within five years at the

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same price, it was *held* that the transaction was what it purported to be, and could not be construed as a mortgage by conditional sale. *Bhagwan Sahai* v. *Bhagwan Din*, I. L. R. 12 All. 387, followed. *Vasudeo* v. *Bhau*, I. L. R. 31 Bom. 528, referred to. GHULAM NABI KHAN *v.* NAIZ-UN-NISSA, 33 All. 337 ... 227

Deed of sale followed after an interval by an agreement for repurchase—Sale—Mortgage by conditional sale.—A document purporting to be an out and out sale-deed was executed on a certain date and seven days later a second document was executed by the vendee whereby he covenanted to reconvey the property sold if the vendors paid back the purchase-money after the lapse of nine or ten years from the date of that sale-deed. The two deeds were separately stamped and were registered on different dates. *Held*, in view of the delay intervening between the two deeds and other circumstances attending their execution, that the two deeds were not intended to be parts of one and the same transaction so as together to constitute a mortgage by conditional sale, but must be construed separately, and were merely what they purported to be. *Bhagwan Sahai* v. *Bhagwan Din*, I. L. R. 12 All. 387, followed. *Balkishen Das* v. *Legge*, I. L. R. 22 All. 149, distinguished. JHANDA SINGH *v.* WAHID-UD-DIN, 33 All. 585 ... 393

Will—Devise of one kind of property accurately described exclusive of other somewhat similar property not mentioned in the will.—By his will a testator devised to his wife shares in certain patbis, in the village of Hariah, of which the numbers were given, describing the property as in his separate possession. *Held* that this description would not pass shares in shamilat patbis in the village which were not mentioned or referred to in the will. TULSHA v. MATHURA PURI, 33 All. 66 ... 44

Will—Gift—Property given to two brothers who were joint—Nature of estate taken by brother—Hindu law.—Where property is given or devised, without specification of the individual interests of the recipients, to persons who are members of a joint Hindu family, it does not follow that they take such property as joint property the principle of joint tenancy being unknown to Hindu law save in connection with the joint Hindu family. *Jageswar Narain Deo* v. *Ram Chandra Datt*, I. L. R. 23 Cal. 670. *Bai Diwali* v. *Patel Bechardas*, I. L. R. 26 Bom. 445 and *Gopi* v. *Jaldhara*, I. L. R. 33 All. 41 referred to. *Mankamma Kunwar* v. *Balkishan Das*, I. L. R. 23 All. 38, doubted. KISHORI DUBAIN *v.* MUNDRA DUBAIN, 33 All. 665 ... 446

See ACT No. XXI of 1871, ss. 3, 4, 6 and 8, 33 All. 580 ... 389
See ACT (LOCAL) No. I of 1903, s. 13, 33 All. 138 ... 93
See HINDU LAW, 33 All. 41 ... 28
See MORTGAGE, 33 All. 107 ... 72
See MUHAMMADAN LAW, 33 All. 421 ... 283
See PRE-EMPTION, 33 All. 85, 104, 196, 296, 299. ... 57, 70, 132, 199, 202, 374
See WILL, 33 All. 558 ... 824
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See LAND-HOLDER and TENANT, 34 All. 545 ... 921
See CIVIL PROCEDURE CODE (1882), ss. 584, 585, 34 All. 579 ... 943
1908, See LETTERS-PATENT, s. 10, 34 All. 13 ... 559
See MORTGAGE, 34 All. 446 ... 852
See MUHAMMADAN LAW, 34 All. 478 ... 875
See HINDU LAW, 35 All. 337 ... 1255
See MAHA-BRAHMAN, 35 All. 412 ... 1307
See WILL, 35 All. 211 ... 1167

Contempt of Court.

See CIVIL PROCEDURE CODE, S. 170, 33 All. 68 ... 46

Contract.

Sale—Deposit—Failure of purchaser to complete contract—Vendor entitled to retain deposit.—Plaintiff agreed to purchase 500 bales of cotton yarn from defendants and to deposit 5 rupees per bale as earnest money. He deposited somewhat more than half the earnest money and thereafter repudiated the contract. *Held* that plaintiff was not entitled to recover that portion of the earnest money which he had paid. *Collins* v. *Stimson*, 11 Q. B. D. 142 *Howe* v. *Smith*, L. R. 27 Ch. D. 89, *Ex parte Barrell; in re Parnell*, L. R. 10 Ch. App. 512 and *Bishan Chand* v. *Radha Kishan Dass*, I. L. R. 19 All. 489, referred to. ROSHAN LAL *v.* THE DELHI CLOTH AND GENERAL MILLS COMPANY, 33 All. 166 ... 112

Void—See ACT (LOCAL) No. II of 1901, s. 10, 20, 83, 33 All. 695 ... 466

Covenant in sale-deed to discharge a debt due to a third party—Suit for compensation for breach—Actual damage not necessary to support suit—Cause of action—Limitation Act No. XV of 1877, schedule II, *art*, 116.—On a sale of immoveable property the vendees covenanted with the vendors to pay a certain sum of money on account of a mortgage debt due by the vendors. They did not pay in accordance with the covenant, and the mortgagee thereupon brought a suit upon his mortgage and obtained a decree. *Held*, on suit by the vendors for compensation for breach of the covenant, that it was not necessary that the vendors, should have suffered any loss before they could bring their suit; and that, as no time was specified in the sale-deed for the payment of the mortgage money, limitation began to run from the date of the execution of the deed. *Lethbridge* v. *Mytton*, 2 B & Ad. 772, *Carr* v. *Roberts*, 5 B. & Ad. 78, *Loosemore* v. *Radford*, 9 M. & W. 657, *Ashdown* v. *Ingamells*, L. R. 5 Exch. D. 280, *Dorasinga Tevar* v. *Arunachalan Chetti*, I. L. R. 23 Mad. 441, *Raghunath Rai* v. *Brijmohan Singh*, Weekly Notes, 1901, p. 14; *Kumar Nath Bhuttacharjee* v. *Nobo Bhuttacharjee*, I. L. R. 26 Cal. 241 and *Battely* v. *Faulkner*, 3 Barn & Ald. 228; 22 R. R. 390, referred to. RAGHUBAR RAI *v.* JAIJ RAI, 34 All. 429 ... 841

See ACT NO. IX of 1872, s. 39, 34 All. 273 ... 732

See MINOR, 34 All. 296 ... 748

Sale—Goods sent to purchaser not in accordance with terms of contract—Purchaser not bound to return goods to vendor.—When goods sent to a purchaser, professedly in execution of a contract of sale are not of the kind which the vendor had agreed to

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supply, it is not the duty of the purchaser to see that such goods are returned to the vendor; it is enough if he gives notice to the vendor that the goods are lying at the place to which they were sent at the vendor's risk. *Grimoldby* v. *Wells*, L. R. 10 C. P. 391, followed. PHAGGU *v.* BABU LAL, 35 All. 325 ... 1246
See ACT No. XIII of 1859, 35 All. 143 ... 1119
See MASTER AND SERVANT, 35 All. 132 ... 1112

Contribution.
See ACT No. IV of 1882, ss. 82 and 100, 33 All. 708 ... 474

Co-owners.
Right of—*inter se.* See LANDLORD AND TENANT, 33 All. 308 ... 208

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Time requisite for obtaining. See ACT No. IX OF 1908, s. 12, 34 All. 41 ... 578

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See ACT No. XX of 1847, ss. 7 and 12, 33 All. 24 ... 17

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See EXPROPRIETARY TENANT, 35 All. 27 ... 1039

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See ACT (LOCAL) No. III of 1892, ss. 16, 19 and 49, 33 All. 791 ... 529

Criminal Breach of Trust.
See Act No. XLV of 1860, s. 409, 33 All. 36 ... 25
See CRIMINAL PROCEDURE CODE, s. 179, 35 All. 29 ... 1041
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Criminal misappropriation.
See CRIMINAL PROCEDURE CODE, S. 197, 34 All. 487 ... 881
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Criminal Procedure Code.
S. 106 (3)—*Security to keep the peace—Powers of appellate court not limited by jurisdiction of original court—Act No. XLV of* 1860 (*Indian Penal Code*), Ss. 71, 147, 149, 326—*Separate sentences.*—The power conferred upon an appellate court by clause (3) of s. 106 of the Code of Criminal Procedure is not limited in any way by the powers exercisable by the original court which tried the case. *Emperor* v. *Bhausing Dhumalsingh*, I.L.R. 33 Bom. 33 followed, *Muthiah Chetti* v. *Emperor*,

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I. L. R. 29 Mad. 190; *Paramasiva Pillai* v. *Emperor*, I. L. R. 30 Mad. 48; *Dorasami Naidu* v. *Emperor*, I.L.R. 30 Mad. 182, and *Emperor* v. *Momin Malita*, I. L. R. 35 Cal. 434, dissented from.—*Held* also that where in the course of a riot grievous hurt was committed the accused might be lawfully convicted of separate offences under ss. 147 and 325 read with 149 of the Indian Penal Code and sentenced separately for each offence. *Queen Empress* v. *Bisheshar*, I. L. R. 9 all 645 followed. EMPEROR *v.* DHARAM DAS, 33 All. 48 ... 32

S. 106—*Security to keep the peace*—"*Offence involving a breach of the peace*"—*Mischief by removing land-mark*—*Act No. XLV of* 1860 (*Indian Penal Code*) *s.* 434.—*Held* that an offence "involving a breach of the peace" mentioned in s. 106 of the Code of Criminal Procedure, does not mean only an offence which necessarily involves a breach of the peace or of which a breach of the peace forms an ingredient, but includes such an offence as in common knowledge is ordinarily or very probably the occasion of a breach of the peace as, for example, the removal of a land mark. *Baidya Nath Majumdar* v. *Nibaran Chunder Gope*, I. L. R. 30 Cal. 93, *Arun Samanta* v. *Emperor*, I. L. R. 30 Cal. 366, *Raj Narain Roy* v. *Bhagabat Chunder Nandi*, I. L. R. 35 Cal. 315, and *Muthiah Chetti* v. *Emperor*, I. L. R. 29 Mad. 190, dissented from. EMPEROR *v.* MANIK RAI, 33 All. 771 ... 516

S. 107—*Security to keep the peace*—*Circumstances in which the performance of religious ceremonies may amount to a wrongful act likely to occasion a breach of the peace.*—*Held* that persons who performed religious ceremonies in a place not set apart for the purpose and where no such ceremonies had been performed before, and who did so with the deliberate intention of triumphing over, insulting, and wounding the religious feeling of their neighbours, committed a wrongful act and one which might probably occasion a breach of the peace or disturb the public tranquility within the meaning of section 107 of the Code of Criminal Procedure. EMPEROR *v.* MURLI SINGH 33 All 775 ... 518

S. 125—*Security to keep the peace*—*Cancellation of bond*—*Power of Magistrate to send accused to jail.*—Under section 125 of the Code of Criminal Procedure a District Magistrate may cancel a bond for good behaviour, but he is not competent to send the person whose bond is so cancelled to jail. EMPEROR *v.* FAKHR-UD-DIN KHAN, 33 All. 624 ... 418

Ss. 107, 145—*Security to keep the peace*—*Dispute concerning land likely to lead to a breach of the peace*—*Procedure.*—Where there exists a dispute relating to immoveable property which is likely to lead to a breach of the peace, the magistrate concerned is not necessarily bound to proceed under section 145, but can take action—and this may sometimes be the better course—equally under section 145 of the Code of Criminal Procedure. *Sheoraj Roy v. Chatter Roy*, I. L. R. 32 Cal. 966 and *Emperor v. Ram Baran Singh*, I. L. R. 28 All. 406; followed. *Mahadeo Kunwar v. Bisu*, I. L. R. All. 537 distinguished. *Balajit Singh v. Bhoju*, I. L.R. 35 Cal. 170 not followed. EMPEROR v. THAKUR PANDE, 34 All. 449 ... 855

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S. 145, 526—*Transfer*—"*Criminal*"—"*case Accused person*".—*Held*, that the expression "criminal case, as used in s. 526 of the Code of Criminal Procedure includes a proceeding initiated under s. 145 of the Code aud that the High Court under s. 526 has power to transfer such a proceeding from one court to another court subject to all the conditions under which a transfer can be made. *Arumuga Tegundan*, I. L. R. 26 Mad. 188, *Lolit Mohan Moitra* v. *Suraj Kanta Acharjee*, I. L. R. 28 Cal. 709, and *Gurudas Nag* v. *Gaganendra Nath Tagore*, 2 C. L. J. 614, referred to. *In re Pandurang Govind Pujari*, I. L. R. 25 Bom. 179, dissented from. An 'accused person' is one over whom a criminal court exercises jurisdiction. *Queen-Empress* v. *Mutasaddi Lal*. I.L.R. 21 All. 107, followed. JAGGU AHIR *v.* MURLI SHUKUL, 34 All. 533 ... 912

Ss. 188, 227—*Offence committed in Nepal territory—Certificate granted by political officer specifying a particular section of the Indian Penal Code—Trying Magistrate not debarred from convicting under another section if within the facts stated.*—A certificate granted by a political officer under ss. 188 of the Code of Criminal Procedure in respect of a certain set of facts will cover every charge which the facts disclosed in the proceedings will suffice to sustain. The certificate is granted on the allegation of certain facts which constitute the charge against the accused, and the trying Magistrate is not restricted to the section which is mentioned in the certificate, but at the utmost to the facts. EMPEROR *v.* KRISHNA NATH TIWARI, 33 All. 514 ... 345

S. 133—*Public nuisance—Construction of dam causing injury to village lands.*—A, B and C being contiguous villages, of which C lay at a lower level than A and B, the surplues water falling on A and B used to run off through certain natural channels over the lands of village C. The inhabitants of C erected a dam to keep the water from their lands, and by so doing caused flooding of and damage to the lands of A and B. *Held*, that the area and number of persons affected by the action of the inhabitants of C were sufficient to justify a magistrate in treating their action as a public nuisance and taking steps to abate it under s. 133 of the Code of Criminal Procedure. EMPEROR *v.* BHAROSA PATHAK, 34 All. 345 ... 782

S. 177—*Jurisdiction—Effect of place where offence was committed ceasing to be British territory.*—An offence was committed in March 1910, at a place which was then part of the Mirzapur district. Subsequently one of the persons alleged to have taken part in the commission of such offence was arrested in Bengal and sent to Mirzapur, when he was committed by the Joint Magistrate to take his trial before the Court of Session. In the meanwhile the place where the offence was committed had ceased to be British territory. *Held* that this fact did not oust the jurisdiction of either the Magistrate or the District Judge of Mirzapur. EMPEROR *v.* GANGA, 34 All. 451 ... 856

S. 179—*Criminal misappropriation—Jurisdiction*—"*Place where consequences of act ensued.*"—The word 'consequence' in s. 179

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of the Criminal Procedure Code means a consequence which forms a part and parcel of the offence. It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of that offence. Hence where an agent in charge of a branch shop in Sultanpur misappropriated money belonging to his principal, which should have been sent to the head office at Cawnpore, it was held that the courts at Cawnpore had no jurisdiction to try the agent for criminal misappropriation. *Queen-Empress* v. *O'Brien* I.L.R. 19 All. 111, and *Colville* v. *Kristo Kishore Bose*, I. L. R. 26 Cal. 746, distinguished, *Babu Lal* v. *Gunsham Das*, 5 A. L. J. 333, referred to. GANESHI LAL *v.* NAND KISHORE, 34 All. 487 ... 881

S. 195 (6), 33 All. 512 ... 344

S. 195 (7), *Clauses* (*a*), (*b*) *and* (*c*)—*Sanction to prosecute*—*Sanction refused*—*Further application*—"*Case*"—"*Principal court of original jurisdiction.*"—In a suit for arrears of rent exceeding Rs. 100, a decree was passed in favour of the appellant. In course of execution proceedings the respondents made certain statements which, according to the appellant, were false. The appellant applied for sanction to prosecute them under s. 195, clause (7) of the Code of Criminal Procedure. The sanction was refused by the Assistant Collector. *Held*, on application made to the District Judge to grant sanction, that no such application lay. The "case" in connection with which an offence was alleged to have been committed was the proceedings in execution, from which no appeal lay, and the District Judge was not in relation to such proceedings the "principal court of original jurisdiction." AJUDHIA PRASAD *v.* RAM LAL, 34 All. 197 ... 682

Ss. 195, 476—*Sanction to prosecute*—*Sanction set aside by superior court and order for prosecution under s.* 476 *substituted*—*Jurisdiction.*—*Held* that a court hearing an application under s. 195 of the Code of Criminal Procedure to revoke sanction for a prosecution granted by a subordinate court has jurisdiction to set aside the order of the subordinate court and direct a prosecution under s. 476 of the Code. *In the matter of the petition of Mathura Das*, I. L. R. 26 All. 80, overruled. CHADAMMI *v.* LALTA PRASAD, 34 All. 602 ... 959

S. 195 (*c*)—*Sanction to prosecute*—*Forgery*—*Offence alleged not in connection with any proceeding before any Court*—*Sanction unnecessary.*—By s. 195, clause (*c*), of the Code of Criminal Procedure courts are prohibted from taking cognizance of an offence described in s. 463 of the Indian Penal Code, when such offence has been committed by a party to any proceeding in any court in respect to a document produced or given in evidence in any such proceeding. The section does not remove from the cognizance of criminal courts an offence described in s. 463 when such an offence has been committed by an ordinary individual. So long as the prosecution is confined to offences connected with a document committed prior to its production in court, such prosecution is within the law and requires no sanction. EMPEROR *v.* LALTA PRASAD, 34 All. 654 ... 995

S. 195, See ACT NO. XLV OF 1860, ss. 182, 211, 34 All. 522 ... 905

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Ss. 4 *and* 195 (1)—"*Complaint*"—*Information of the supposed commission of an offence communicated by the District Judge to the District Magistrate with a view to the latter taking action as a magistrate.* A Munsif, being of opinion that a document filed in a case before him had been tampered with, communicated his suspicions to the District Judge, who thereupon wrote to the District Magistrate, requesting him to take action in the matter. *Held* that the letter of the District Judge to the District Magistrate amounted to a complaint within the meaning of s. 195 (*c*) of the Code of Criminal Procedure. *Emperor* v. *Sundar Sarup*, 26 All. 514, followed. EMPEROR *v.* DEBI PRASAD, 35 All. 8... 1026

Ss. 35 *and* 408—*Appeal*—"*Aggregate sentences*"—*Concurrent sentences not aggregate.* *Held* that the term "aggregate sentences" as used in sub-s. (3) of s. 35 of the Code of Criminal Procedure applies only to consecutive and not to concurrent sentences. Where therefore an Assistant Sessions Judge passes concurrent sentences and the whole term to be served by the convict does not exceed four years, the appeal under s. 408 of the Code does not lie to the High Court but to the Sessions Judge. *Sher Muhammad* v. *Emperor of India* Punj. Rec. 1901, case 85. *Emperor* v. *Tulshidas Lakshman*, 11 Bom. L. R. 544, and *Ragina* v. *Gulam Abas*, 12 Bom. H.C.R. 147, approved and followed. *Abdul Khalek* v. *King-Emperor* 17 C.W.N. 72, dissented from. EMPEROR *v.* TULSHI RAM, 35 All. 154 ... 1127

Ss. 55, 56 *and* 110—*arrest of suspected person—Warrant—Procedure*—S. 55 of the Code of Criminal Procedure is independent of Chapter VIII of the Code, although proceedings under that chapter may follow an arrest under s. 55 as a natural sequence. An officer in charge of a police station can, therefore, arrest or cause to be arrested, without a warrant or an order of a Magistrate, any person who is by repute an habitual robber, housebreaker or thief or otherwise comes within the scope of s. 110. EMPEROR *v.* NEPAL, 35 All. 407 ... 1303

S. 125—*Security to keep the peace—Procedure—Appeal—Jurisdiction.*—A District Magistrate taking action under s. 125 of the Code of Criminal Procedure cannot treat an application made under that section as an appeal and reverse the order of a first class Magistrate on the facts. If he considers the order to be wrong on the merits he can exercise his revisional powers and submit the record to the High Court: but the cancellation of bonds contemplated by s. 125 can only be on the ground that the bonds are no longer necessary. BENARSI DAS *v.* PARTAB SINGH, 35 All. 103 ... 1092

S. 179—*Jurisdiction—Place where consequence of act ensued—Act No. XLV of* 1860 (*Indian Penal Code*) *s.* 406—*Criminal breach of trust.*—*Held* that the loss caused to the person beneficially entitled to property through a criminal breach of trust is a consequence which completes the offence, and a prosecution will therefore lie at the place where such loss occurred. *Queen-Empress* v. *O'Brien* 19 All. 111 and *Emperor* v. *Mahadeo* 32 All. 377, followed. *Babu Lal* v. *Ghansham Das*, Weekly Notes, 1908, p. 115, *Ganeshi Lal* v. *Nand Kishore*, 34 All.

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487, and *Sirdar Meru* v. *Jethabhai Amirbhai* 8 Bom. L. R. 513, distinguished. *Nirbhe Ram* v. *Kallu Ram* 4 O. C. 276, dissented from.—LANGRIDGE *v.* ATKINS, 35 All. 29 ... 1041

S. 195, *clauses* (*b*) *and* (*c*)—*Sanction to prosecute*—*Power of appellate court to grant sanction*—*Appeal*—*Revision.*—*Held* that the appellate Court, equally with the court of first instance, has power to grant sanction for a prosecution in respect of a document filed or evidence recorded in the suit.—*Held*, also, that a petition under s. 195 (6) of the Code of Criminal Procedure seeking the cancelment of an order under s. 195 (1) should be classed as a criminal appeal. BHADESWAR TIWARI v. KAMTA PRASAD, 35 All. 90 ... 1082

Ss. 202, 437—*Complaint summarily rejected*—*Further inquiry*—*Notice to person complained against not necessary.*—A notice to a person against whom a complaint is made is quite unnecessary where it is sought to set aside the summary order rejecting the complaint in a proceeding to which he was actually no party. ANGAN *v.* RAM PIRBHAN, 35 All. 78 ... 1074

S. 222 (2), See Act No. XLV, of 1860, s. 409, 33 All. 36 ... 25

S. 250—*Frivolous or vexatious complaint*—*Award of compensation to accused*—*Award to be made by order of dicharge or acquittal and not by separate order.*—*Held*, that s. 250 of the Code of Criminal Procedure was not intended to meet the case of false accusations, but of frivolus and vexatious accusations. *Held*, also that the direction to pay compensation in a case found to be frivolous or vexatious cannot be made in a subsequent proceeding, but must form part of the order of discharge or acquittal, RAM SINGH *v.* MATHURA, 34 All. 354 ... 788

Ss. 260, See ACT No. VI. OF 1882, s. 74 35 All. 173 ... 1140

S. 284—*Assessors*—*Trial with only one duly appointed assessor*—*Trial illegal.*—Of two assessors assisting the Sessions Judge in the trial as a sessions case, one only had been duly summoned to act as an assessor in that case. The other was a gentleman of some position who had formerely been on the list of assessors but had been exempted on the recommendation District magistrate. *Held* that in these circumstances there was no lawful trial before a lawfully constituted tribunal, and that a new trial must be ordered. *Queen Empress v. Badri.* Weekly not followed. EMPEROR *v.* RAM SINGH, 35 All. 570 ... 1417

Ss. 364 533, See ACT No. I, OF 1872, S. 91, 35 All. 260 ... 1201

S. 407—*Sanction to prosecute*—*Application to Magistrate of the first class*—*Appeal to District Magistrate*—*Transfer*—*Jurisdiction.*—S. 407 of the Criminal Procedure Code does not entitle a District Magistrate to send appeals under s. 195 of that Code to a Magistrate of the first class subordinate to him. That section deals with appeals from convictions. *Sadhu Lall* v. *Ram Churn Pasi*, I. L. R. 30 Cal. 394, followed. EMPEROR *v.* LAL SINGH, 34 All. 244 ... 713

Ss. 408, 415—*Appeal*—*Sentence.*—Where certain persons were tried by a Magistrate of the first class, convicted of an offence under s. 325, Indian Penal Code, and sentenced to a day's imprisonment and a fine of fifty rupees. *Held*, that the circumstances

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that the accused were in fact neither sent to jail nor actually imprisoned would not prevent their being entitled to appeal to the Sessions Judge. EMPEROR *v.* ALAM, 33 All. 510 ... 342

S. 423—*Appeal—Power of appellate court to alter finding of acquittal into one of conviction.*—An appellate court can, under s. 423 of the Criminal Procedure Code in an appeal from a conviction, after the finding of the lower court, and find the appellant guilty of an offence of which the lower court has declined to convict him. *Queen-Empress* v. *Jabanulla*, I. L. R. 23 Cal. 975, followed. EMPEROR *v.* SARDAR, 34 All. 115 ... 628

S. 435, 33 All. 84 ... 56

S. 439—*Revision—Powers of High Court—District Registrar.*—A District Registrar is not a court subordinate to the High Court either on the civil, criminal or revenue side, and the High Court has no power to interfere with the order of the Registrar impounding a document and calling upon the applicants to show cause why they should not be prosecuted for forgery. EMPEROR *v.* UDIT NARAYAN DUBE, 35 All. 109 ... 1096

Ss. 462 (3), 537—*European British subject—Jury—Jury not chosen by lot—Illegality.—Held* that the provisions of s. 460 (3) of the Code of Criminal Procedure are imperative, and if there is no choosing of the jury by lot, as provided for by the section, the result is that the whole trial is vitiated. *Brojendro Lal* v. *King-Emperor*, 7 C.W.N., 188, referred to. EMPEROR *v.* BHADSHAW, 33 All. 385 ... 260

S. 476—"*Brought under the notice of the Court*"—"*Judicial proceeding*"—*Decree on an award—Jurisdiction.—Held* that the words "brought under its notice" in s. 476 of the Criminal Procedure Code are wide enough to cover an offence which may have been committed in another *forum* and on some previous occasion. *Held* also that a proceeding in which a court is asked to pass a decree in accordance with an award made with reference to a pending suit cannot be said to be other than a "judicial proceeding" within the meaning of the same section. *Girwar Prasad* v. *King Emperor*, 6 A.L.J., 392, *Umrao Singh* v. *Hardeo*, I L.R., 29 All., 418 and *Banke Bihari Lal* v. *Pokhe Ram*, I.L.R., 23 All. 48, referred to. EMPEROR *v.* KAMTA PRASAD 33 All. 396... 267

S. 476—*Preliminary inquiry—Revision.*—When a Magistrate takes action under s. 476 of the Code of Criminal Procedure, it is not necessary to the validity of his order that he should hold a preliminary inquiry, nor if he does hold preliminary inquiry, it is necessary that he should give the person against whom such inquiry is being held, an opportunity of cross-examining the witnesses. *Queen-Empress* v. *Matabadal*, I. L.R. 15 All. 392, followed. ABDUL GHAFUR *v.* RAZA HUSAIN, 34 All. 267 ... 728

S. 476—"*Court*"—*Civil Procedure Code* (1908), *s.* 115—*Revision—Inexpediency of order no ground for revision on the civil side.*—The word "court" in s. 476 of the Code of Crimininal Procedure includes the successor of the Judge before whom the alleged offence was committed. *Bahadur* v. *Eradat-ullah Mallick*, I.L.R. 37 Cal. 642, followed. Whether a particular order is expedient or not is not a ground on which the High

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Court can interfere in revision under s. 115 of the Civil Procedure Code, IN THE MATTER OF THE PETITION OF NAWAB SINGH, 34 All. 394 ... 816

S. 517 *and* 520—*Appeal—Jurisdiction—Power of appellate Court to pass orders regarding property in respect of which an offence has been committed.*—*Held* that S. 520 of the Code of Criminal Procedure gives to an appellate Court the same power as the court which originally tried a case to pass orders under s. 517 of the Code. *Baloram Gogai* v. *Chintaram Kohta*, 9 C.W.N. 549 followed. *In re Devidin Durgaprasad*, 22 Bom. 844, distinguished. EMPEROR *v.* AZMAT SHAH KHAN, 35 All. 374 ... 1280

S. 526—*Transfer—Nature of grounds warranting a transfer outside the district.*—Where the Magistrate of a district refused to grant an interview to and cancelled the arms licence of a person who was under trial for various offences before the Joint Magistrate, it was *held* that these were sufficient reasons for transferring the cases against him out of the district, there being also grounds for granting a transfer from the court of the Joint Magistrate. *Farzand Ali* v. *Hanuman Prasad*, 19 All. 64 followed. EMPEROR *v.* RAM KISHEN DAS, 35 All 9 ... 1024

S. 526—*Transfer—Riot—Cross cases before same court—Opinion expressed by court on evidence in one case no ground for considering it incompetent to try the other.*—The fact that a court before which there are pending two cross cases of riot has, on the trial of the first case, expressed opinions to some extent unfavourable to the accused in the second case, is no good ground for holding that the court is incompetent to try the second case. *Asimaddi* v. *Gobinda Baidya*, 1 C.W.N. 426, referred to. EMPEROR *v.* HARGOBIND, 33 All. 583 ... 392

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Evidence—Presumption—Inference of existence of a custom from continued use of land for a particular purpose.—It is open to a court to infer from long enjoyment not exercised by permission, stealth or force, the existence of a custom. If after considering the evidence the court comes to the conclusion that an alleged custom is unreasonable or that the privilege is enjoyed as a result of permission given or that it is exercised by stealth or force the court is entitled to find against the custom. *Kuar Sen v. Mamman*, I.L.R. 17 All. 87, referred to. SHADI LAL *v.* MUHAMMAD ISHAQ KHAN, 33 All. 257 ... 173

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Easement.
Flow of water—Natural channel—Duty of owner of land through which a natural channel runs.—The owner of land through which a river or other natural channel flows is bound, within certain limits, as between himself and other riparian owners, not to do anything which shall obstruct the flow of the water or materially interfere with their rights. But such owner is not bound to keep the channel clear so that the amount of water that can pass down it may not be diminished. BALDEO SINGH *v.* JUGAL KISHORE, 33 All. 619 415
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Estoppel by conduct—Hindu law—Adoption by Hindu widow under authority of her husband—Subsequent suit to set aside adoption as invalid—Denial of any valid authority to adopt—Adopted son having on faith of representations by widow married, performed shraah of adoptive father and incurred heavy liabilities in maintaining his change of status and privileges.—In this case, which was an appeal from the decision of the High Court in *Dharam Kunwar* v. *Balwant Singh*, I. L. R. 30 All. 549,

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their Lordships of the Judicial Committee, while expressing their opinion that the question in the case might well be decided as one of fact on the appellant's own statement without recourse to the doctrine of estoppel, did not differ from the view of the High Court as to the applicability of that doctrine. The appellant, they held, had asserted her authority to adopt in the most solemn manner under her hand and seal, and her conduct both before and after that assertion had been of a like unequivocal character. She could not now be allowed to change her story without grave injustice ensuing to the respondent, who had acted in reliance upon her deliberate and repeated representations. The estoppel, however, their Lordships said, must be taken as being purely personal, and did not bind any one claiming by an independdent title, DHARAM KUNWAR *v.* BALWANT SINGH, 34 All. 398 ... 819

Occupancy holding, mortgaged to zamindar and sold in execution of a decree on the mortgage as a fixed rate holding--Ejectment of purchaser—Right of purchaser to recover possession—Possessory title.—An occupancy holding was mortgaged to the zamindar as a fixed rate holding; was sold as such in execution of a decree on the mortgage and purchased by a stranger, who remained in possession thereof for some eleven years, paying rent to the zamindar. Subsequently the purchaser was dispossessed by the judgment-debtor. *Held*, on suit by the purchaser to recover possession that the defendant was estopped from setting up the plea that the holding was an occupancy holding and that, the defendant having no title at all, the plaintiff was entitled to regain possession on the strength of his possessory title. ASGHAR HUSAIN *v.* PAL AHIR, 34 All. 538. ... 916

See CIVIL PROCEDURE CODE (1882), s. 43, 34 All. 172 ... 665

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See SUIT FOR DECLARATION OF INVALIDITY OF ADOPTION, 34 All. 8 ... 556

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Burden of proof—Usufructuary mortgage—Suit for possession of mortgaged property not brought for nearly twelve years—Presumption that no consideration passed.—Where the plaintiffs, who were usufructuary mortgagees, were never given possession of the mortgaged property and did not attempt to recover possession until the period of limitation had almost expired, it was *held*, on plea raised by the defendants that no cousideration had passed, that the burden of proving that consideration had passed was rightly shifted to the plaintiffs. *Achobandil* v. *Mahabir*, I. L. R. 8 All. 641 followed. *Mahabir Prasad* v. *Bishan Dayal*, Weekly Notes, 1904, p. 163, distinguished. BIHARI *v.* RAM CHANDRA, 33 All. 483 ... 325

Promissory note—Unstamped promissory note executed in Rampur in favour of the Nawab of Rampur—Suit on such note in British India—Lex loci contractus—*Rampur Stamp Law, s.* 52 *proviso* (*c*) *and* 53.—Certain moneys having been advanced by the

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Nawab of Rampur, a promissory note was accepted as security in favour of "The Nawab of Rampur" and bearing no stamp. The Nawab, being examined on commission, stated :—This debt is due to me personally, and ordinarily speaking, a debt which is due to me is due to the State, and a debt which is due to the State is due to me: but the said amount I advanced from my own funds." According to the stamp law of Rampur a document executed in favour of the State did not require to be stamped, *Held* that the *lex loci contractus* had to be applied and that the note in question not being drawn in favour of the Nawab in his private capacity did not require to be stamped. AMINA BEGAM *v.* H. H. THE NAWAB OF RAMPUR, 33 All. 571 ... 383
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See PARDA-NASHIN LADY, 34 All. 455 ... 858
Admissibility of evidence - Family settlement—Evidence of settlement consisting of a joint application by the parties for mutation in respect of the property in dispute.—The brother and widow of a deceased Hindu settled a dispute between them as to the ownership of the property of the deceased by means of a joint application in the Revenue Court asking that the property should be recorded half in the name of each. This was done, and subsequently each sold the share of which he or she was recorded as owner. Thereafter the widow sued to recover the share which had gone to her husband's brother. *Held*, that it must be presumed from the application in the mutation proceeding, the recording of names by the Revenue Court in accordance with that application and the subsequent sales on the strength of that record, that the parties entered into a family arrangement, and the application presented to the Revenue Court was, therefore, not compulsorily registrable and was admissible in evidence. KOKLA *v.* PIARI LAL, 35 All. 502 ... 1369
Mortgage—Recital of receipt of consideration— Recital admissible as against representative of original mortgagor.—*Held* that the admission of the receipt of consideration contained in a mortgage deed is admissible in evidence against the representatives in interest of the original mortgagors. *Brajeshware Peshakar* v.

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Budhanuddi, I, L R. 6 Cal. 268, *Nawal Kunwar* v. *Bakhtawar Singh*, 10 A. L. J. 390, and *Abdul Majid* v. *Mahbub Ali*, F. A. No. 129 of 1911, followed. *Manohar Singh* v. *Sumirta Kuar*, I. L R. 17 All. 428,, not followed, *Bisheshwar Dayal* v, *Harbans Sahay*, 6 C. L. J. 659, *Ghurphekni* v. *Purmeshwar Dayal*, 35 C. L. J. 653, and *Rahim Jan Bibi* v. *Imam Jan*, 14 C. L. J. 173, doubted. BIHARI LAL *v.* MAKHDUM BAKHSH, 35 All. 194 ... 1155

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See Act (Local) No. IV of 1910, s. 60 35 All. 575 ... 1420

Execution of Decree.

Attachment—Property under wrongful attachment stolen by bailiff —Liability of attaching decree-holder—Small Cause Court Act (Provincial Small Cause Courts Act), sch. II, No. IX of 1887 *art.* 35 *(j)—Jurisdiction.*—Where crops of a third party had been wrongfully attached by a decree-holder as those of his judgment-debtor and, while so attached, were stolen by the *shahna* (or bailiff) in whose custody they were, it was *held* that the decree-holder was responsible to the owner for their value: also that a suit by the owner against the decree-holder to recover the value of the crops and damages was not a suit cognizable by a Court of Small Causes. *Goma Mahad Patil* v. *Gokaldas Khimji*, I. L R. 3 Bom., 74, followed. *Musammat Subjan Bibi* v. *Shaikh Sariatulla*. 3 B. L. R. A J. 413, not followed. *Kissori Mohun Roy* v. *Harsukh Das*, I. L. R. 7 Cal. 436, referred to. BISHAMBAR NATH *v.* GADDAR, 33 All. 306 ... 206

Joint decree holders—Application for execution by one on behalf of himself and others—Leave to bid obtained for himself—Purchase by applicant alone—Rights of co-decree-holders in respect of property so purchased —One of several joint decree-holders made an application for execution on his own behalf and on behalf of his co-decree-holders, and then alone obtained leave to bid for the property and purchased it, the purchase money being equal to the amount of his share of the decree. *Held*, in a suit by the co-decree-holders to recover their shares of the property so purchased, that they were entitled to recover, the equity being on the side of the plaintiffs. KESRI *v.* GANGA SAHAI, 33 All. 563 ... 378

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Assignment—Ex parte *order passed subsequent to assignment—Power of court on application of assignee to reconsider such order.* Pending an application for execution of a decree the decree-holder sold the decree. The purchaser applied for execution; but whilst his application was pending the former application of the original decree-holder came on for hearing and, it was decided, *ex parte*, that the decree was barred by limitation. *Held*, that this decision was no bar to the consideration of the application for execution filed by the assignee of the decree nor was the court hearing this application bound by the former *ex parte* finding. BALMAKUND v. ASHFAQ HUSAIN, 34 All. 518 902

Decree passed in favour of several persons, one of whom was a minor and not properly represented.—Held, that the mere fact that at the time when the final decree in a suit was passed, one of the decree-holders was a minor, whose guardian *ad litem* had died and had not been replaced, was not sufficient to invalidate the decree. GOBARDHAN SAHAI *v.* MAHABIR SINGH, 34 All. 321 ... 765

See ACT NO. XV OF 1877, SCH. II, ART. 178, 34 All. 436 ... 846
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Limitation—Suit for sale on a mortgage—Decree payable by instalments—Civil Procedure Code (1882), *s.* 258—*Civil Procedure Code* (1908), *Or. XXI, r.* 2, *Or. XXXIV, r.* 5—*Act No. IX of* 1908 (*Indian Limitation Act*), *Sch.* 1, *Art.* 181.—On a compromise in a suit for sale on a mortgage a decree followed providing that the sum found due on the mortgage (Rs. 1,374), with interest at a certain rate, should be paid by instalments of Rs. 100 a year, along with the interest then due. Payments were to be made by the end of Jeth in each year, beginning with Jeth 1957 Fasli (June 1900) and it was provided that if default were made for three years in succession in the payments and interest, the decree-holder would be at liberty to recover at once the whole amount payable under the decree, that is, to apply for an order absolute for sale and execute the same. No payment was made in 1900 or 1901, but in June 1902, just before the end of Jeth 1959 Fasli, the judgment-debtor paid up all that was due on account of the first three years. He made no payment in 1903, but in June 1904 he paid up all that was due up to the end of Jeth 1960 Fasli (June 1903). No payment was made in 1905, but in June

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1906 he paid the instalment and interest which he ought to have paid in Jeth 1961 Fasli (June 1904). This payment was covered by the proviso to s. 20 (1) of the Limitation Act. The only other payment made was a small sum on account of interest in July 1909. The decree-holder applies for an order absolute for sale on the 3rd of August, 1909. *Held*, that the first three consecutive defaults were in 1905, 1906 and 1907, and that the decree-holder's application was in time applying art. 181 of the first schedule to the Indian Limitation Act, 1908. The following cases were referred to:—*Oudh Behari Lal* v. *Nageshar Lal*, 13 All. 278, *Kishan Singh* v. *Aman Singh*, 17 All. 42, *Roshan Singh* v. *Mata Din*, 23 All. 36, *Chunni Lal* v. *Harnam Das*, 20 All. 302, *Shankar Prasad* v. *Jalpa Prasad*, 30 All. 123, *Ajudhia* v. *Kunjal*, 30 All. 123, *Mon Mohan Roy* v. *Durga Churn Gooee*, 15 Cal. 502, and *Kashiram* v. *Pandu*, 27 Bom. 1. BADRI NARAIN *v.* KUNJ BIHARI LAL, 35 All. 178 ... 1144

Stay of execution of decree under appeal—Jurisdiction—Procedure. *Held* that the court which passed a decree has no power to stay execution thereof whilst the decree is under appeal; neither has a Court which has executed its own decree awarding possession of immovable property power to restore to possession the party whom it has ejected. SATYA SHANKAR GHOSAL *v.* MAHARAJ NARAIN SHROPURI, 35 All. 119 ... 1103

See ACT No. IX of 1908, sch. I, art. 128, 35 All. 389 ... 1291
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Sale by one of seveval co-owners holding sir land of his undivided zamindari share—Vendor exproprietary tenant of all the co-parceners and not merely of his vendees.—Where the owner of an undivided share in a *patti* sells his zamindari rights and becomes an exproprietary tenant of the *sir* land held by him he becomes the tenant as regards such land, not merely of his vendees but of all the co-sharers in the *patti*. DEBI PRASAD *v.* BHAGWAN DIN, 35 All. 27 ... 1039
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Gift—Gift in favour of an idol which is to be subsequently consecrated—Possession given to manager.—By a deed of gift certain zamindari property was expressed to be given to the idol, which was not at the time of execution in existence, and possession of the property was made over to a certain person as *pujari*. *Held* that the deed was valid and created a trust in favour of the idol. *Mohar Singh* v. *Het Singh*, I. L. R. 32 All. 337, and *Bhupati Nath Smritititha* v. *Ram Lal Maitra*, I. L. R. 37 Cal. 128, referred to. CHATARBHUJ *v.* CHATARJIT, 33 All. 253 ... 170
Change of religion—Effect of conversion of a member of Joint Hindu family to Muhammadanism—Regulation VII of 1832, *s.* 9—*Act XXI of* 1850—*Compromise—Effect of compromise entered into by members of family in settlement of disputes as to rights to property—Act XIV of* 1859, *s.* 1, *cl.* 128 *Act. IX of* 1871, *sch. II, art.* 141—*Act No. XV of* 1877, *schedule II,*

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artiele 141,—*Suit by reversioner.*—By Bengal Regulation VII of 1832, s. 9 and Act XXI of 1850 the Legislature virtually set aside the provisions of the Hindu Law which penalize the renunciation of religion, or exclusion from caste. Where, therefore, in a joint Hindu family consisting of a father and son, the father was converted to Muhammadanism in 1845. *Held* (reversing the decision of the High Court) that by the father's abandonment of Hinduism the son did not acquire any enforceable right to his father's share in the joint family property which he could either assert himself, or transmit to his heirs for enforcement, in a British Court of justice. *Semble* that whatever right the son acquired under the Hindu law to the share of his father came into existence on the conversion of the latter in 1845: and no suit could have been brought (even if Regulation VII of 1832 and Act XXI of 1850 had permitted it) to enforce that right after the lapse of 12 years from the time the cause of action arose (s. 1, clause 12 of Act XIV of 1859): and nothing in article 142 of Act IX of 1871, or in article 141 of Act XV of 1877 could revive a right which had already become barred. *Hari Nath Chatterjee* v. *Mothurmohun Goswami*, I.L.R. 21 Cal. 8; L.R. 20 I.A. 183, referred to. After the death of the father (who survived the son) and their widows a compromise was in 1860 effected between the two daughters of the son on the one side and the grandson of the father on the other under which an 8½ anna share was allotted to the daughters and a 7½ anna share to the grandson. The 8½ anna share eventually on the death of the survivor of the two daughters in 1899, devolved upon the respondents, her sons. In a suit by them in 1904, for possession of the 7½ anna share allotted to the grandson, against the appellants who were his successors in title as transferees from him or his heirs, *held* (reversing the decision of the High Court) that the compromise of 1860 was a family arrangement by the members then claiming title to the property in settlement of their disputes, "each one relinquishing all claim in respect of all property in dispute other than that falling to his share and recognising the right of the others as they had previously asserted it to the portion allotted to them respectively." [See *Lalla Oudh Beharee Lall* v. *Ranee Mewa Koonwar*, 3 Agra H. C. 82, (84)]. The compromise was therefore binding on the respondents. The true test to apply to a transaction which is challenged by reversioners as an alienation is whether the alienee derives title from the holder of the limited interest or life-tenant, which in this case the predecessor in title of the appellants did not do: for the compromise here was "based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is." [See *Rani Mewa Kunwar* v. *Rani Hulas Kunwar*, L. R. 1 I. A. 167]. KHUNNI LAL *v.* GOBIND KRISENA NARAIN, 35 All. 356 ... 1333

Mitakshara—Hindu widow—Gift—Consent of next reversioner not sufficient to validate a gift in favour of sister's son.—*Held*, that a gift of her deceased husband's estate made by a Hindu widow

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in possession thereof as such widow to her sister's son was invalid and could not be rendered operative by the consent of the next reversioner. *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*, I. L. R. 30 All. discussed. ABDULLA *v.* RAM LAL, 34 All. 129 ... 637

Adoption—Ahirs—Validity of adoption after marriage of adopted son.—*Held* that amongst Ahirs the adoption of a son after his marriage has taken place is not permissible. *Pichuvayyan* v. *Subbayyan*, (13) Mad. 128, followed. JHUNKA PRASAD *v.* NATHE, 35 All. 263 ... 1203

Daughter's estate—Decree for possession of father's estate obtained by daughter—Right of daughter's sons to execute such decree.—The daughter of a separated Hindu obtained a decree for possession of her father's estate against certain trespassers. Before, however, she could obtain possession, she died and her sons applied for execution. *Held* that the daughter represented her father's estate when she brought her suit for possession and that persons who succeeded to the estate were entitled to execute the decree which she had obtained. MAHADEO SINGH *v.* SHEO KARAN SINGH, 35 All. 481 ... 1355

Debts—Son's liability for father's debt—Money borrowed to defend a suit for defamation not an immoral debt.—*Held*, that under the Hindu Law money borrowed by the father to defend a suit for defamation is a debt for which a Hindu son and grandson are liable. SUMER SINGH *v.* LILADHAR, 33 All. 472 ... 317

Gift in favour of "the Thakurji in his Thakurdwara"—No temple built or idol installed—Gift void for uncertainty.—*Held* that a dedication, not to any particular deity which was subsequently to be installed in a temple, but to "the Thakurji in his Thakurdwara" without mentioning the particular Thakurji to whom the property was dedicated, was void for uncertainty. *Bhupati Nath Smrithitirtha* v. *Ram Lal Moitra*, I. L. R. 37 Cal. 128, *Mohar Singh* v. *Het Singh*, I. L. R. 32 All. 337, and *Chatarbhuj* v. *Chatarjit*, I. L. R. 33 All. 523 distinguished. PHUNDAN LAL *v.* ARYA PRITHI NIDHI SABHA, 33 All. 793 ... 530

Endowment—Right of succession to sebaitship of temple belonging to Ballavacharya Gossains—Evidence of dedication—claim of persons incompetent to be sebaits (as being Bhats) of Balav temple disallowed as defeating the purpose for which the founder established the worship—Title—Proof of indepedent title to succession as sebait.—In a suit for possession and the right of sebaitship of a temple belonging to the Ballavacharya Gossains founded by one Muttuji, the maternal grandfather of the plaintiffs (appellants) the defendant (respondent) contended that the ordinary Hindu law was not applicable as alleged by the plaintiffs, and that daughter's sons were excluded by custom from succession. *Held* that, apart from positive testimony on the point, the performance of the worship of the idol in accordance with the rites of the sect for whose benefit it was held, might be treated as good evidence of dedication, and the ordinary rule of Hindu law relating to the descent of private property was not applicable. *Held* also that the rule that the heirs of the founder succeed to the sebaitship

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laid down in *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee*, was, as there implied, subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. In the present case the appellants being Bhats, and not belonging to the Gossain *kul* were not competent to be sebaits of a Ballav temple where the rites were performed according to the ritual, which, it was clearly established they could not perform. To allow their claim would defeat the purpose for which the worship was established. *Held* further that the respondent had established an independent title of his own to the temple as being the nearest male relative of Muttuji both being descendants of two full brothers. The idol in the temple was brought from his temple at Nathdwara, and the worship founded by Muttuji was an off-shoot of the worship at Nathdwara. The temple was also built on land belonging to the Tekait respondent with the permission of his ancestor who held the office of Tekait at the time. He had therefore a clear title according to the customs and usages of the Ballav *kul* to the sebaitship of the temple. MOHAN LALJI *v.* GORI HAN LALJI MAHARAJ, 35 All. 283 ... 1217

Hindu widow—Legal representative—Reversionary heirs—Civil Procedure Code (1908), *s.* 2 (11)—*Act* (*Local*) *No. II of* 1901 (*Agra Tenancy Act*), *s.* 202.—One S. K. filed a suit for possession of certain land and for cancellation of a perpetual lease executed by her mother, but died during the pendency of the suit. *Held* that the reversionary heir of the last male owner of the property in suit was the proper legal representative of the plaintiff. *Held*, also, that where the defendant simply alleged that he was in possession of the land in suit as a tenant but did not allege that he was a tenant of the plaintiff, the Civil Court need not require the defendant to institute a suit in the Revenue Court as directed by s. 202 of the Agra Tenancy Act, 1910. RIKHAI RAI *v.* SHEO PUJAN SINGH, 33 All. 15 ... 10

Hindu widow—Money borrowed for legal necessity—Construction of well—Feast on return from pilgrimage—Daughter's marriage. —money borrowed to defray the expenses of the marriage of the daughter of a Hindu widow in possession of her husband's property, is money borrowed for legal necessity, but a feast given on return from pilgrimage is not so connected with the pilgrimage as to justify its allowance as money expended for legal necessity. Expenses incurred in the construction of a well may be a legal necessity if it be proved to be for the benefit of the estate. MAKHAN LAL *v.* GAYAN SINGH, 33 All. 255 ... 171

Hindu widow—Payment by wife of husband's debts during his lifetime—Voluntary payment—Absence of proof of obligation to repay—Burden of proof.—In this case, which was an appeal from the decision of the High Court in the case of *Himmat Bahadur* v. *Bhawani Kunwar*, I.L.R. 30 All. 352, the Judicial Committee merely affirmed that decision on the ground that

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the appellant on whom the onus lay had not proved that there was any obligation on the part of the husband or his estate to pay the moneys which were paid by his wife, and dismissed the appeal. BHAWANI KUNWAR v. HIMMAT BAHADUR, 33 All. 342 ... 230

Hindu widow—Nature of estate held by two widows succeeding jointly—Power to partition.—Whatever limitations there may be upon the power of alienation of one of two Hindu widows succeeding as such to a life interest in their husband's estates, so long as the property remains undivided, there is nothing to prevent them effecting a partition of such estate. *Musammat Sunder* v. *Musammat Parbati*, L.R. 16 I.A. 186; I.L.R. 12 All. 51, and *Kanni Ammal* v. *Ammakanna Ammal*, I.L.R. 23 Mad. 504, followed, *Ram Piyari* v. *Mulchand*. I.L.R. 7 All. 114, distinguished. *Bhawgandeen Doobey* v. *Myna Baee*, 11 Moo. I.A. 487, and *Gajapati Nilamani* v. *Gajapati Radhamani*, I.L. R. 1 Mad. 290, referred to. DURGA DAT v. GITA, 33 All. 443... 298

Hindu—Widow—Co-widow—Partition—Right to enforce partition when joint enjoyment impossible.—Although Hindu widows taking a joint interest in the inheritance of their husband have no right to enforce an absolute partition of the joint estate between them, yet where the widows cannot go on peaceably in the enjoyment of the property, they can by mutual agreement or otherwise separately hold the property, although they have no right to partition in the proper sense of the term, and the share of one will go by right of survivorship to the other notwithstanding the separation. *Gajapathi Nilamani* v. *Gajapathi Radhamani*, I. L, R. 1 Mad. 290, *Kathaperumal* v. *Venkabai*, I. L. R. 2 Mad. 194, and *Bhagwandeen Dubey* v. *Myna Baee*, 11 Moo. I. A. 487, referred to. CHHITTAR KUNWAR *v.* GAURA KUNWAR, 34 All. 189 ... 677

Hindu widow—Suit by remote reversioner to set aside alienation by widow—Immediate reversioner a female having a life estate only—Acceleration of estate.—N died leaving a widow W, a daughter R. D. and a daughter's son K. S. W. during the lifetime of R. D. made a gift of the property to K. S. *Held*, on suit by other reversioners more remote than K. S for a declaration that the gift was not binding on them, that the suit would lie. The question of the acceleration of K. S's estate would not arise because at the date of the gift the donee was not the next reversioner. *Balgovind* v. *Ram Kumar*, I.L.R. 6 All 491, *Hanuman Pandit* v. *Jota Kunwar*, Weekly Notes 1908, p. 907, and *Abinash Chandra Mazumdar* v. *Harinath Shaha*, I. L. R. 32 Cal. 62 followed. *Madari* v. *Maliki*, I. L. R. 6 All. 428, and *Ishwar Narain* v. *Janki*, I. L. R. 15 All. 132, dissented from, *Rani Anand Keor* v, *The Court of Wards*, L. R. 8 I. A. 14; I. L. R. 6 Cal. 764, referred to. RAJA DEI *v.* UMED SINGH, 34 All. 207 ... 689

Hindu widow—Reversioners—Decree fairly obtained against widow binding on reversioners although the widow did not contest the suit.—A decree in a suit against a Hindu widow, respecting property of her husband, of which she is in possession as such

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widow, may be binding on the reversioners notwithstanding that the widow did not contest the suit, provided that the plaintiffs' case was properly and fairly stated and the widow had reasonable opportunities, of which she did not choose to avail herself, of defending the suit. GUR NANAK PRASAD *v.* JAI NARAIN LAL, 34 All. 385 ... 809

Hindu widow—Compromise followed by an award settling disputes as to the property of various members of the family—Effect of such award on reversionary interests.—Where the widow of one and the son of the other of two brothers, Hindus separated in estate entered into a compromise, which was found to be reasonable in its nature, concerning the partition of the property of the two brothers, and an award was made on the basis of such compromise, it was *held* that it was not open to the reversioner to dispute the validity of the compromise and award, especially when a considerable time had elapsed and most of the property had changed hands meanwhile. *Khunni Lal* v. *Gobind Krishna Narain*, I. L. R. 33 All. 356, and *Mohan Lal* v. *Chuttan Singh*, 10 A. L. J. 101, followed. BIHARI LAL *v.* DAUD HUSAIN, 35 All. 240 ... 1187

Hindu widow—Powers of alienation possessed by a Hindu widow in respect of property of her husband—Transfer of debt secured by a mortgage.—A Hindu widow in possession as such of property which had been the property of her husband in his life-time can always alienate her life interest in such property and a transfer by her of the corpus of the property without legal necessity and not for a pious purpose is not void but only voidable at the instance of the reversioners. A Hindu window, without legal necessity transferred a mortgage debt and the security therefor, which had been the property of her late husband, to D, who thereafter sued to recover the debt by sale of the mortgaged property. *Held* that the transferee acquired all the rights which the widow had and could exercise during her life-time in respect of the mortgage, one of these being to recover the debt. *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*, 34 Cal. 329, DURGA KUNWAR *v.* MATU MAL, 35 All. 311 1287

Hindu widow—Investments by widow from income of husband's estate—Whether or not such investments become accretions to the husband's estate.—Where immovable property is purchased by a Hindu widow in possession as such of the estate of her late husband out of the income of that estate, such property does not necessarily become an accretion to the husband's estate. The widow has full power to dispose of it during her life-time, and it is only when she manifests during her life-time a clear intention to treat it as an accretion to her husband's estate, or allows it at her death to remain undisposed of, that such property will become part of that estate. WAHID ALI *v.* JORI RAM, 35 All. 551 ... 1404

Mitakshara—Impartible property—Succession—Impartible property governed by the rule of primogeniture nevertheless joint property.—Where ancestral property is impartible and is held by a single member of the family all the members of the family must be deemed to be joint in estate and the rule of succession

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to the property is the same as that which governs the case of partible property so that a junior member of the family, who gets maintenance from the person holding the impartible estate, succeeds upon his death to the estate by right of survivorship. Whatever may be the powers of alienation of the holder of an impartible estate, the succession to it is governed not by the rule which applies to separate property but by rule of survivorship. Therefore the person who succeeds to the estate does not do so as the heir or legal representative of his predecessor and the estate cannot be regarded as the assets of the last previous holder. *Harpal Singh v. Bishan Singh* 6 A. L. J. 753 followed. *Raja of Kalahasti v. Achigadu* I. L. R., 30 Mad., 454 and *Zamindar of Karvetnagar v. Trustee of Tirumalai* I. L. R., 32 Mad., 429 dissented from. INDAR SEN SINGH *v.* HARPAL SINGH 34 All 79 ... 603

Inheritance—Impartible estate governed by the rule of primogeniture—Estate devised to widow of owner—Suit by reversioner—Compromise of suit by widow and reversioner—Descent of estate governed by the compromise and not by will. The owner of an impartible estate governed by the rule of primogeniture died leaving a will by which he gave an absolute estate to his widow against whom S, the next reversioner, brought a suit on the ground that the will was invalid and that he was entitled to possession of the estate. In that suit the parties came to a compromise, by the terms of which it was agreed that the widow should hold for her life the possession of "gaddinashin," paying S a monthly allowance, and that after her death S or "any representative of his who may be living at that time will be the absolute owner of all the movable and immovable properties and will occupy the gaddi." S predeceased the widow leaving no male issue and without having made any disposition by will otherwise of his interest in the estate. On the death of the widow in possession, the widow of S sued to recover the estate from members of her husband's family who had possession of it. *Held*, by the Judicial Committee (affirming the decision of the High Court) that the rights of the parties depended not on the will but on the compromise, the terms of which gave S a vested interest in the estate, which retained its character of impartibility, and on the death of S. descended not to his widow (the appellant) but to the respondent, his heir, according to the rule of primogeniture. LEKHRAJ KUNWAR *v.* HARPAL SINGH, 34 All. 65 ... 594

Inheritance—Mitakshara—Joint Hindu family—Mother's share on partition of joint family property between her and her sons after father's death—Stridhan—*Maintenance.*—According to the Mitakshara there is no substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition. *Held*, therefore (reversing the decision of the courts in India) that the share which the mother in a joint Hindu family obtains after the death of the father on partition of the joint family property between the mother and the sons is not her *stridhan*, but is given for her maintenance,

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and on her death it devolves upon the heirs of her husband not upon her own heirs. *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*, I. L. R. 32 All. 259, and *Chhiddu* v. *Naubat*, I. L. R. 24 All. 67, overruled. DEBI MANGAL PRASAD SINGH v. MAHADEO PRASAD SINGH, 34 All. 234 ... 706

Joint Hindu family—Son's liabilities for father's debts—Mortgage—Suit for sale—Act No. IV of 1882 (*Transfer of Property Act*), s. 85—*Property sold in execution of decree for sale—Purchase by mortgagee decree-holder.*—In execution of a decree for sale upon a mortgage of joint family property executed by the head of a Hindu joint family certain property was brought to sale and purchased by the mortgagees. A member of the family (great grandson of the original mortgagor) sued the mortgagees for redemption upon the ground that the mortgagees at the date of the suit had been aware of his existence and had not impleaded him. *Held* that the plaintiff's suit would not lie on this ground alone and that his position was not affected by the fact that the mortgagee had himself purchased the mortgaged property. *Debi Singh* v. *Jia Ram*, I. L. R. 25 All. 214, followed. *Ram Prasad* v. *Man Mohan*, I. L. R. 30 All. 256, dissented from. *Lal Singh* v. *Pulandar Singh*, I. L. R. 28 All. 182, referred to. BALWANT SINGH *v.* AMAN SINGH, 33 All. 7 ... 5

Mitakshara—Joint Hindu family—joint family property sold in execution of decree on mortgage executed by managing member—Suit by other members for redemption—Act No. IV of 1882 (*Tranfer of Property Act*), *s.* 85—*Parties—Representative capacity of managing member.*—Although the manager of a joint Hindu family is not as a rule entitled to sue or liable to be sued on behalf of the family—*Padmakar Vinayak Joshi* v. *Mahdev Krishna Joshi*, I. L. R. 10 Bom. 21, and *Kashi Nath Chimnaji* v. *Chimnaji Sadashiv*, I. L. R. 30 Bom. 477, nevertheless in certain circumstances the whole family may be bound by the result of suits brought by or against the manager, notwithstanding that some members of the family were not made parties thereto. *Balwant Singh* v. *Aman Singh*, supra p. 7, *Debi Singh* v. *Jia Ram*, I. L. R. 25 All. 214 *Sundar Lal* v. *Chhittar Mal*, 3 A. L. J. 644; 4 A. L. J. 17, *Dhurm Dass Pandey* v. *Mussumat Shama Soondri Dibiah*, 3 Moo. I. A. 229, *Hari Saran Moitra* v. *Bhubaneswari Debi*, I. L. R. 16 Cal. 40, *Narayan Gop Habbu* v. *Pandurang Ganu*, I. L. R. 5 Bom. 685, *Jogendro Deb Roy Kut* v. *Funindra Deb Roy Kut*, 14 Moo. I. A. 367, *Bissessur Lal Sahoo* v. *Maharajah Luchmessur Singh*, L. R. 6 I. A. 233; 5 C. L. R. 477, *Ram Krishna Narayan*, v. *Vinayak Narayan*, 12 Bom. L. R. 219, and *Gan Savan Bal Savant* v. *Narayan Dhond Savant*, I. L. R. 7 Bom. 467, referred to. JADDOO KUNWAR *v.* SHEO SHANKAR RAM, 33 All. 71 ... 48

Mitakshara—Partition—Mother's share on partition between sons—Mother no right to share where merely legal severance of interest between sons without partition by metes and bounds.—Under the Mitakshara law upon a partition being made by sons, after the death of their father the mother is entitled to a share

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equal to that of a son; but she would obtain such a share only if an actual partition took place between the sons. A mere severance of interest where no actual division of the property takes place does not confer on the mother a right to a share. *Ganesh Dutt* v. *Jewach*, I. L. R. 31 Cal. 262, distinguished. BETI KUNWAR *v.* JANKI KUNWAR, 33 All. 118 ... 79

Mitakshara—Joint Hindu family—Debt—Legal necessity—Money borrowed to comply with a decree for pre-emption in favour of the father.—A decree for pre-emption, providing that the pre-emptor shall acquire the property if he pays the amount mentioned therein, but otherwise his suit will be dismissed, is a debt such as will support a bond given by the father of a joint Hindu family to raise money for its satisfaction. NATHU *v.* KUNDAN LAL, 33 All. 242 ... 162

Joint Hindu family—Alienation of family property—Right of subsequently born member of family to object to alienation.—Held that a member of a joint Hindu family who was born after the alienation of the family property by another member of that family cannot question the validity of that alienation. *Chattarpal Singh* v. *Natha*, Weekly Notes, 1906, p. 26, followed. *Hurodoot Narain Singh* v. *Beer Narain Singh*, 11 W. R. 480 and *Bunwari Lal* v. *Daya Shunkar*, 13 C. W. N. 815, distinguished. CHUTTAN LAL *v.* KALLU, 33 All. 283 ... 191

Mitakshara—Joint family property—Mortgage by father—Sons not made parties to suit for sale on mortgage—Sale under decree—Suit by sons to redeem their interest.—Where ancestral property belonging to a joint Hindu family has been sold in execution of a decree for sale on a mortgage executed by the father, the sons cannot maintain a suit for redemption of their interests in the property sold upon the ground solely that they had not been made parties to the suit of the mortgagee, nor is their position affected by the fact that the auction purchaser is the mortgagee. *Debi Singh* v. *Jia Ram*, I. L. R. 25 All. 214; *Lal Singh* v. *Pulandar Singh*, I. L. R. 28 All. 182, and *Balwant Singh* v. *Aman Singh*, I. L. R. 33 All. 7 followed. *Ram Prasad* v. *Man Mohan*, I. L. R. 30 All. 256, dissented from. *Ram Nath Rai* v. *Lachman Rai*, Weekly Notes, 1899, p. 27, referred to. KEHRI SINGH *v.* CHUNNI LAL, 33 All. 436 ... 293

Mitakshara—Joint Hindu family—Alienation by one member without the consent of a co-parcener—Legal necessity—Right of subsequently born co-parcener to impugn the transaction.—Where an alienation of ancestral property is invalid as having been made without legal necessity by one member of the co-parcenary without the consent of the rest, it is open to co-parceners to object to such alienation notwithstanding that they were born subsequently thereto. *Kali Shanker* v. *Nawab Singh*, I. L. R. 31 All. 507, referred to. *Chuttan Lal* v. *Kallu*, I. L. R. 33 All. 283, distinguished. TULSHI RAM *v.* BABU, 33 All. 654. 439

Joint family property—Separate property—Burden of proof—Nucleus—Presumption.—It is necessary to establish the existence of a nucleus of joint family property before the property in the possession of any one member can be presumed to be joint

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family property. There is no presumption that a Hindu family has any joint property. *Taruck Chunder Totadar* v. *Joodheshteer Chunder Koondoo*, 19 W. R. C. R. 178, dissented from. *Moolji Lila* v. *Gokuldas Vulla*, I. L. R. 8 Bom. 154, *Toolseydas Ludha* v. *Premji Tricumdas*, I. L. R. 13 Bom. 61, *Dwarka Prasad* v. *Jamma Das*, 13 Bom. L. R. 133, followed. *Lal Bahadur* v. *Kanhaiya Lal*, I. L. R. 29 All. 244, referred to. RAM KISHAN DASS *v.* TUNDA MAL, 33 All. 677 ... 454

Joint family property—Mortgage by father alone—Subsequent sale by father to a third party—Suit by mortgagees for sale—Competence of purchaser to rely on invalidity of mortgage.—The head of a joint Hindu family mortgaged in 1886 property belonging to the joint family, but neither for legal necessity nor to pay an antecedent debt. In 1888 the mortgagor sold the same property to a third person. The purchaser remained in possession for more than twelve years, when the mortgagees instituted a suit for sale on their mortgage. *Held* by RICHARDS, C. J. and BANERJI, J. that in view of the fact that the purchaser had acquired a title to the property by adverse possession as against all the members of the family, it was open to him, notwithstanding that his title was originally acquired from the mortgagor alone, to set up as a defence the invalidity the mortgage. *Per* CHAMIER, *J.*, according to the ruling of the majority of the Full Bench in *Chandradeo* v. *Mata Prasad*, I.L. R. 31 All. 176, the mortgage made by the father alone was void, and, this being so, it was open to the purchaser, who was in possession of the property to rely upon its invalidity, whatever the weakness of his own title might be. *Chandradeo* v. *Mata Prasad*, I. L. R. 31 All. 176, *Balgobind Das* v. *Narain Lal*, I. L. R. 15 All. 339, *Brijbasi Lal* v. *Gopal Das*, Weekly Notes, 1908, p. 200, *Kali Shankar* v. *Nawab Singh*, I. L. R. 31 All. 507, and *Bhagirathi Misr* v. *Sheobhik*, I. L. R. 20 All. 325, referred to. MUHAMMAD MUZAMIL-ULLAH *v.* MITHU LAL, 33 All.783 ... 524

Mitakshara—Joint Hindu family—Father committed to the Court of Session—Loan taken for his defence—Legal necessity.—Held that the necessity of raising money to pay for the defence of the head of a joint Hindu family committed to the Court of Session on a serious criminal charge was a valid legal necessity such as would support a mortgage of the family property executed by the father and one of his sons for such purpose. *Chandradeo* v. *Mata Prasad*, I. L. R. 31 All. 176, *Luchman Koour* v. *Mudaree Lall*, 5 S. D. A. N. W. P. 327, and *Duleep Singh* v. *Sree Kishoon Panday*, 4 N. W. P. H. C. Rep. 83, referred to. BENI RAM *v.* MAN SINGH, 34 All. 4 ... 553

Mitakshara—Joint Hindu family—Money borrowed by father at a high rate of interest—Legal necessity—Burden of proof.—When money is borrowed by the father of a joint Hindu family on the security of the family property at a very high rate of interest, it is for the lender seeking to enforce his claim to prove not only that there was necessity for borrowing the money, but also that there was necessity for borrowing it at an exorbitant rate of interest. *Chandradeo* v. *Mata Prasad*, I. L. R., 31

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All., 176, *Hurro Nath Rai Chaudhri* v. *Randhir Singh*, I.L.R., 18 Cal., 311, and *Kameswar Pershad* v. *Run Bahadur Singh*, I.L.R., 6 Cal., 843, referred to. NAND RAM *v.* BHUPAL SINGH, 34 All. 126 ... 635

Mitakshara—Joint Hindu family—Debt incurred by managing member of family—Presumption as to family necessity or benefit—Burden of proof.—There is no presumption that a debt contracted by the manager of a Hindu firm or family is contracted for the benefit of the firm or family, and the plaintiff who seeks to bind the other members of the joint family will have to prove that it was a debt contracted for their benefit or with their consent, or that there was an urgent family necessity therefor. *Soiru Padmanabh Rangappa* v. *Narayanrao bin Vithalrao*, I. L. R., 18 Bom., 520, *Sunkur Pershad* v. *Goury Pershad*, I.L.R. 5 Cal., 321, *Nagendra Chandra Dey* v. *Amar Chandra Kundu*, 7 C. W. N., 725, and *Krishna Ramaya Naik* v. *Vasudeo Venkatesh Pai*, I. L. R., 21 Bom., 808, referred to. *Sheo Pershad Singh* v. *Saheb Lal*, I. L. R., 20 Cal., 453, distinguished. GANPAT RAI *v.* MUNNI LAL, 34 All. 135 ... 641

Joint Hindu family--Mortgage—Purchase of mortgaged property by managing members—Suit for sale against managing members only—Civil Procedure Code (1908), *order XXXIV, rule* 1.—Where in a suit for sale on a mortgage the dependants mortgogors were the managing members of a joint Hindu family, who in that capacity had purchased the mortgaged property, it was held that the family was sufficiently represented by the managing members and that the suit would not fail by reason of the non-joinder of the other members of the family. HORI LAL *v.* MUNMAN KUNWAR, 34 All. 549 ... 924

Joint Hindu family--Mortgage--Mortgage for the benefit of joint family—Suit for sale by managing member alone—Paties—Civil Procedure Code (1908), *order XXXIV, rule* 1.—Where in a suit for sale on a mortgage executed in favour of the manager of a joint Hindu family the plaintiff was the then managing member of the family, it was *held* that he was entitled in that capacity to maintain the suit and that it would not fail by reason of the non-joinder of the plaintiff who was joint with him. *Hori Lal* v. *Munman Kunwar* (1) referred to. MADAN LAL *v.* KISHAN SINGH, 34 All. 572 ... 939

Joint family—Allegation of separation in suit by some members for separate share—Expression of intention to hold share separately not proved—Right to mesne profits on separation—Exclusion from joint family, allegation of—Non-receipt of share of profits of joint property—Voluntary residence not with joint family—Refusal of allowance as being inadequate. The appellant, a member of a joint undivided Hindu family, brought a suit in 1905 against the respondents, the other members of the family, alleging a separation by him in 1901, when he had expressed his intention to hold his share separately, and claiming possession of his share, with mesne profits. *Held* that what may amount to a separation, or what conduct on the part of some of the members may lead to separation of a joint undivided

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Hindu family, and convert a joint tenancy into a tenancy in common, must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation: but to have that effect the intention must be unequivocal and clearly expressed. Separation from commensality does not as a necessary consequence effect a division. *Rewun Pershad* v. *Radha Beeby* (1846) 4 Moo. I. A. 137. A separation in mess and worship may be due to various causes, and yet the family may continue joint in estate. In this appeal it was held (affirming the decision of the court of the Judicial Commissioner) that on the evidence in, and under the circumstances of, the case and the conduct of the party alleging division of the family there had been no separation in 1901, and the appellant was consequently not entitled to mesne profits on that ground. He also claimed mesne profits on the ground of exclusion from the joint family, as he had not since 1901 received any share of the profits of the joint property. *Held* that although he had not received any of the profits of the joint estate, the evidence was clear that the appellant was offered an allowance from the profits of the joint property which he refused to accept as being inadequate, and that would not amount to exclusion. SURAJ NARAIN *v.* IQBAL NARAIN, 35 All. 80 ... 1076

Joint Hindu family—Execution of decree—Power of managing member to enter up satisfaction of decree on behalf of the family.—*Held*, that the managing member of a joint Hindu family can execute decrees on behalf of the family, and can receive payment and give good receipts on behalf of the family, which will be binding on the family. *Hori Lal* v. *Munman Kunwar*, I. L.R. 34 All. 549, followed. *Ganga Dayal* v. *Mani Ram*, I.L.R. 31 All. 156, distinguished. ACHHAIBAR SINGH *v.* RAM SARUP SAHU, 35 All. 380 ... 1284

Mitakshara—Joint Hindu family—Liability of sons in respect of a mortgage executed by father—Exemption of son's interests—Subsequent suit against the sons—What plaintiffs are entitled to recover.—In 1892 a decree was passed on appeal for sale on a mortgage of joint family property against the father of the family. In 1896, the sons, who were not made parties to the original suit, obtained a decree exempting their shares in the family property. In 1897, the share of the father was sold and realized less than half the amount of the decree. In 1910 the mortgagees brought a suit against the sons to recover the balance of the mortgage debt after giving credit for the amount realized by sale in execution of the decree of 1892. *Held*, the suit was not barred, but that the plaintiffs could only recover the unsatisfied portion of the decree of 1892 together with future interest as allowed by that decree. They could not treat the suit as an ordinary mortgage suit, merely giving credit for the amount realized under the decree of 1892, nor could they claim interest at the contractual rate on the unpaid amount of the decree.

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Lachman Das v. *Dalu*, Weekly Notes, 1900, p. 125, followed. *Dharam Singh* v. *Angan Lal*, I. L. R. 21 All. 301, and *Ram Singh* v. *Sobha Ram*, I. L. R. 29 All. 544, referred to. JAGESHAR RAI *v.* ANRUT RAI, 35 All. 302 ... 1230

Joint Hindu family—Mortgage—Suit for cancellation of mortgage executed by managing member — Compromise — Liability of sons. One K, as head of a joint Hindu family, executed in 1905 a usufructuary mortgage of the family property, in which the widow of his deceased brother joined as a co-mortgagor. In 1907 the mortgagors sued for cancellation of this deed, but entered into a compromise with the mortgagee, upon which a decree was passed maintaining the mortgage, but in a modified form. The mortgagee thereafter instituted a suit for enforcement of the mortgage as settled by the compromise decree. *Held* that, in view of the fact that the courts below found that the compromise was genuine and for the benefit of the family, it was not open to the defendants to raise the question of the genuineness of the original mortgage, and that, whether or not the original mortgage was a genuine transaction, the compromise decree gave rise to a debt which was binding on the descendants of the original mortgagor K. *Madan Lal* v. *Kishan Singh*, I. L. R. 34 All. 572, referred to. RAM KUBER PANDE *v.* RAM DASI 35 All. 428 ... 1318

Joint Hindu family—Mortgage by two brothers of undivided shares, each assenting to the other's mortgage—Partition—Entire mortgaged property falling to the share of one brother—Effect of partition on rights of mortgagee.—Two brothers constituting a joint Hindu family jointly mortgaged in 1879 a ten biswa share in village Chauwar. In 1881, in substitution for this mortgage, each brother mortgaged to the same mortgagee a five biswa undivided share in Chauwar, and each brother also signed the mortgage executed by the other. In 1888 the family property was partitioned and the whole ten biswas of Chauwar fell to the share of one brother. *Held* on suit by the son of the mortgagee for sale that the plaintiff was entitled to bring to sale a five biswa share in Chauwar under the mortgage executed by the brother who had lost possession of the village and not merely to have recourse against such portion of the family property as he had taken in exchange therefor. *Bijnath Lall* v. *Ramoodeen Chowdry* 1 I. A. 106. distinguished. SUNDAR LAL *v.* BRIJ LAL, 35 All. 543 ... 1399

Joint Hindu family—Mortgage—Guardian ad litem—*Suit on mortgage executed by father prior to birth of son—Father appointed son's guardian* ad litem.—*Held* that, inasmuch as an after-born son cannot on a suit on mortgage, made by his father set up the defence of the immoral nature of the debt on account of which the mortgage was executed, it cannot be said that the appointment of the father as guardian *ad litem* in such suit would be necessarily prejudicial to the interests of the son. NARAIN DAS *v.* HAR DAYAL, 35 All. 571 ... 1418

Joint Hindu family—Power of father to bind the family property—Father no power to revive a time-barred debt.—*Held* that the

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father and manager of a joint Hindu family cannot legally revive a time-barred debt and bind the family property to secure its repayment. *Chandra Deo Singh* v. *Mata Prasad* 31 All. 176, and *Indar Singh* v. *Sarju Singh* 8 A. L. J. 1009, followed. DALIP SINGH *v.* KUNDAN LAL, 35 All. 207 ... 1164

Marriage—Marriage of a Hindu girl without force or fraud but without consent of legal guardians—Maxim "factum valet." —The marriage of a Hindu girl of some 16 years of age was effected by the maternal grandfather and the maternal uncle of the girl. There was no evidence of force or fraud; but the marriage was against the wishes of the paternal relatives of the girl, who desired to make a profit by marrying her to a rich but one eyed man called Tulshi. *Held* that the case was one to which the doctrine of *factum valet* should be applied, and the marriage was declared to be valid. *Ghazi* v. *Sukru* 19 All. 515, *Venkatacharyulu* v. *Rangacharyulu* 14 Mad, 316, *Surjyamoni Dasi* v. *Kali Kanta Das* 28 Cal. 37, *Mulchand* v. *Bhudhia* 22 Bom. 812, and *Khushalchand Lalchand* v. *Bai Mani* 11 Bom. 247, referred to. KASTURI *v.* CHIRANJI LAL, 35 All. 265 ... 1205

Mitakshara—Partition—Whether grandmother entitled to share in the case of a partition between father and sons.—*Held* that upon a partition between a father and his sons, the grandmother, that is, the father's mother, does not get a share in the case of a family governed by the Benares school of the Mitakshara law. *Radha Kishen Man* v. *Bachchaman* I. L.R. 3 All. 118, followed. *Sheo Dayal Tewaree* v. *Judoo Nath Tewaree*, 9 W. R. C. R. 61, *Badri Rai* v. *Bhagwat Narain Dobey*, I. L. R. 8 Cal. 649 and *Shibbosoondery Dabia* v. *Bassoomutty Dabia*, I. L. R. 7 Cal. 191, distinguished. SHEO NARAIN *v.* JANKI PRASAD, 34 All. 505. 893

Partition—Requisites for partition—Agreement to hold property in certains specific and defined shares, effect of—Re-union, failure to prove as alleged.—The members of a joint Hindu family came to the following agreement.—"Now we have already come to terms, and according to the shares given below we have been in possession and enjoyment of our respective shares. As regards it we have with our mutual consent entered into an agreement according to the terms given below. The same share in the property which is in the possession of a particular person as given below shall be considered to be the property of that very person who is in possession thereof. If any of us brings any suit in the Civil or Revenue Court to the effect that his share is less or he is a loser, it shall be considered to be false in every court. By virtue of this agreement no person shall be competent to bring any claim in any court in respect of any portion of the property other than the property detailed below". Then followed a specification of the villages belonging to the family, and the shares in which those villages were thereafter to be held. From that time the property had been entered in the register in accordance with the arrangement contained in the agreement, and the agreement had been acted upon up to the time of suit. *Held* by the Judicial Committee (affirming the decision of the High Court) that on the evidence

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and circumstances of the case, the agreement was one which operated as a partition of shares, and the family thenceforth ceased to be joint in accordance with the principle laid down in *Appovier* v. *Rama Subba Aiyan*, 11 Moo. I.A. 75, *Balkishen Das* v. *Ram Narain Sahu*, 30 Cal. 738, L.R. 30 I.A. 139, and *Parbati* v. *Naunihal Singh*, 31 All. 412; L.R. 36 I,A. 71. There was no re-union. That was a question of fact, and there was no evidence to show that any of the members of the family re-united, or even contemplated re-union. RAGHUBIR SINGH *v.* MOTI KUNWAR, 35 All. 41 ... 1049

Partition—Requisites for partition—Partition created by so-called will in life-time of father dividing family property among his sons and taking no share himself—Double share to eldest son—Unequal partition under alleged custom—Provision for forfeiture on mismanagement or bad behaviour—Conduct of parties after execution of document of partition.—By a document called a "will" dated the 26th of November. 1895, the father and head of a Hindu joint family governed by the Mitakshara law recorded a division of the ancestral family property amongst his three sons (giving himself no share but alloting a double share to his eldest son). The document recited that, "my three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present, while in a sound state of body and mind and of my own free will and accord, divided the property among my sons, heirs, as follows." Then followed the details of the division. There was provision that, "If I at any time come back from pilgrimages and find mismanagement or character of any one bad then I shall have power to cancel this will which shall be enforced from the date of its execution" and the document concluded as follows—"All the three sons were put in separate possession of the estate in the beginning of the year 1303 Fasli" (September 1885) "I have no other heir having a right besides those mentioned in this will. I have therefore executed this will in order that it may serve as evidence." Mutations of the various shares were subsequently made into the names of those to whom they were separately allotted, and the evidence showed that the division had been assented to, acquiesced in and acted upon by the sons up to 1905. In a suit brought in September, 1905, four years after the father's death, by the two younger sons for partition of the property, which they alleged to be joint and undivided, and of which they claimed to be entitled to two one-third shares, *held* (reversing the decision of the High Court) that the document of the 26th of November, 1885, was not a will but was intended to operate from its date and was in fact a family arrangement contemporaneously made and acted upon by all parties, the effect of which was, under the circumstances of the case, to create a partition of the joint ancestral property. There was nothing in the fact that the document was called a will which invalidated the partition, which was undoubtedly made in fact, and which was acted upon for ten years without any dispute or misunderstanding as to the respec-

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tive rights of the parties under it. *Held* also, that the provision in the will giving the father power to cancel it in certain events, evidenced a contractual condition which the sons accepted in order to obtain the partition, which gave them immediate possession of the property, and viewed thus the contractual acceptance of a power of forfeiture in case of bad behaviour would not be sufficient to prevent the partition operating *in praesenti*. BRIJRAJ SINGH *v.* SHEODAN SINGH, 35 All. 337 ... 1255

Joint Hindu family—Presumptions as to property in the possession of members of a joint family.—Property in the possession of a joint Hindu family should be presumed to be joint family property until the contrary is shown, even though it may have been acquired in the name of a particular member of the family. The fact that property stands in the individual name of one or other member or a joint Hindu family does not of itself give rise to the presumption that it is the separate property of that member, *Gurumurthi Reddi* v. *Gurammal*, 32 Mad. 88, *Shiu Golam Sing* v. *Baran Sing*, 1 B. L. R. 164, and *Taruck Chunder Totadar* v. *Joodheshteer Chunder Kundoo*, 19 W. R. C. R. 178, referred to. *Ram Kishan Das* v. *Tunda Mal*, 33 All. 677, discussed. KUNDAN LAL *v.* SHANKAR LAL, 35 All. 564 ... 1413

Hindu widow—Suit for declaration that mortgage by widow did not affect plaintiffs reversionary rights—Plaintiffs not nearest reversioners.—Where plaintiffs sued as next reversioners for a declaration that a mortgage executed by a Hindu widow was not binding on them, and it was found that as a matter of fact even the nearest of the plaintiffs could only succeed to the estate if four males and one female died in his life-time; it was *held* that the plaintiffs ought not to have a decree. MEGHU RAI *v.* RAM KHELAWAN RAI, 35 All. 326 ... 1247

Mitakshara—Succession—Unchastity of mother no bar to her inheriting son's estate.—*Held*, that unchastity does not preclude a Hindu mother from succeeding to her son's property. *Musammat Ganga Jati* v, *Ghasita*, I. L. R. 1 All. 46, *Dal Singh* v. *Musammat Dini*, I. L. R. 32 All. 155, and *Vedammal* v. *Vedanayaga Mudaliar*, I. L. R. 31 Mad. 100, followed. BALDEO SINGH *v.* MATHURA KUNWAR, 33 All. 702 ... 470

Mitakshara—Succession—Great-grandson of the grand-father—Grand son of the great-grandfather.—According to the Mitakshara law the three immediate descendants of the grandfather succeed in preference to the great-grandfather and his descendants, and the greatgrandson of the grand father is a preferential heir as against the grandson of the great-grandfather. The following cases were referred to in the judgments delivered:—*Kalian Rai* v. *Ram Chandar*, I. L. R. 24 All. 123, *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae*, 2 Moo. I. A. 193, *Kashibai Ganesh* v. *Sitabai Raghunath Shivram*, 13 Bom. L. R. 552, *Rachava* v. *Kalingapa*, I. L. R. 16 Bom. 716, *Kureem Chand Gurain* v. *Oodung Gurain*, 6 W. R. 158, *Chinnasami Pillai* v. *Kunju Pillai*, I. L. R. 35 Mad. 152, *Bhyah Ram Singh* v. *Bhyah*

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Ugur Singh, 13 Moo. I. A. 373 and *Suraya Bhukta* v. *Lakshminarasamma*, I. L. R. 5 Mad. 291. BUDDHA SINGH v. LALTU SINGH, 34 All. 663 ... 1002

Will—Construction—Bequest in favour of two married daughters—Joint tenancy or tenancy in common.—A Hindu died, leaving a will whereby he bequeathed the whole of his property to his two married daughters without specification of shares. *Held*, that the estate taken by the legatees was a tenancy in common and not a joint tenancy. *Jogeswar Narain Deo* v. *Ramchundra Dut*, L. R. 23 I. A. 37, followed. GOPI *v.* MUSAMMAT JALDHARA, 33 All. 41 ... 28

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Will—Construction of will—Bequest to testator's daughter-in-law after death of wife—Whether it conferred an absolute or only a life estate in the property.—The will of a Hindu testator after reciting that he had no male heir, and had already provided for his widowed daughter, stated :—"I have resolved that after my death my wife, legatee No. 1, shall remain in possession and enjoyment of all my property with all powers or authority like myself; and that after the death of my wife my daughter-in-law, widow of Raghuraj Singh, legatee No. 2, shall remain in possession and enjoyment of all the properties aforesaid like myself and legatee No. 1 * * * * * I therefore excute a will in favour of my daughter-in-law, so that on the demise of myself and my wife the estate and name of my ancestors may continue as before, and she in place of Raguraj Singh shall perform my funeral ceremonies and those of my wife according to the *shashtras* and the custom of the family, and then she shall have power to nominate any one whom she may think fit as 'heir' so that the name of the family may continue as formerly and now with honour." *Held* (affirming the decision of the Court of the Judicial Commissioner) that, on the true construction of the will, the word "heir" meant heir to the testator, and the daughter-in-law took (as did the wife) not an absolute interest, but only a life estate in the testator's property, which was therefore on her death not liable to attachment and sale under decrees against her representative. BRIJ LAL *v.* SURAJ BIKRAM SINGH, 34 All. 405 ... 824

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Joint Owners.
Partition—Abadi *not formally divided but separate portions thereof taken possession of by the various owners—Agreement amongst owner—Rights of owners as to portions in possession of each.*—A village was divided into three mahals, with the exception of the *abadi*, as to which it was found that it had not been divided between the mahals by demarcation on the village map, or on the spot, but the owners of the mahals had been in separate possession of portions of it. *Held* that the only possible inference from this finding was that the parties had agreed among themselves as to their possession of the *abadi*, and that, so long as the agreement continued, each party was entitled to use the portion in his possession in any way he pleased so long as such user or possession did not interfere with the user or possession of the owners of the other mahals. *Kumudini Mazumdar v. Rasik Lal Mazumdar*, 11 C. W. N. 517, followed. JAGANNATH PRASAD *v.* BADRI, PRASAD, 34 All. 113 ... 626

Jurisdiction.
Offence committed in British India—Appeal from conviction—Transfer pending appeal of place where offence was committed to a native state.—An offence was committed within British India. Certain persons were convicted thereof and appealed against their conviction to the appropriate Court in British India. Pending the hearing of their appeal, however, the place where the offence had been committed was constituted part of an independent Native State. *Held* that this subsequent transfer of territory did not derpive the court in which the appeal had been filed of its jurisdiction to hear it. EMPEROR *v.* MAHABIR, 33 All. 578 ... 388
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Civil and Revenue Courts—Act (Local) No. II of 1901 (Agra Tenancy Act), Ss. 4, 95, 167, 197—Act (Local) No. III of 1901 (United Provinces Land Revenue Act), Ss. 56, 233 (i)—Suit for declaration regarding various alleged customary rights of zamindari mostly of the nature of cesses.—A suit was filed by certain tenants of a village against the zamindars praying for a declaration that no custom existed in their village which entitled the zamindars to take certain fruits and wood, or to the use of a plough or to a number of other dues, including sugarcane juice from some of the tenants poppy seed from the Keries, and various other matters of the same description, *Held* that the suit was properly filed in a Civil Court and was not excluded from the jurisdiction of such court by anything contained in either the Agra Tenancy Act, 1901, or the United Provinces Land Revenue Act, 1901. SHEOAMBAR AHIR *v.* THE COLLECTOR OF AZAMGARH, 34 All. 358 ... 791
Offence committed in British India—Accused committed to Sessions—Transfer of territory to native state—Accused discharged for want of jurisdiction—Revision.—Certain persons were charged with committing an offence at a place in British India and were committed to the Sessions Court of Mirzapur, the case being subsequently transferred to the Sessions Court of Benares. Before trial, however, the place where the offence had been committed became part of the newly constituted state of Benares. *Held* that the Sessions Court, whether of Mirzapur or Benares, was not deprived of jurisdiction to dispose of the case which had been committed to it for trial, inasmuch as at the time of the transfer to the state of Benares of the place where the alleged offence had been committed the accused were in British India in custody in point of law, if not in fact, of a court of competent jurisdiction. *Emperor* v. *Mahabir*, I.L.R. 33 All. 578, followed. *Damodhar Gordhan* v. *Deoram Kanji*, I. L. R. 1 Bom. 367, distinguised. EMPEROR *v.* RAM NARESH SINGH, 34 All. 118 ... 629
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Practice—Evidence in criminal case recorded by Assistant Sessions Judge—Judgement pronounced by Sessions Judge without rehearing the evidence.—Where a Sessions Judge decided a case upon evidence taken, not before him, but before an Assistant Sessions Judge, it was *held* that the Sessions Judge's judgment was *ultra vires* and a fresh trial ordered. EMPEROR v. BADRI PRASAD, 35 All. 63 ... 1064
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Lambardar and Co-sharer.
Powers of lambardar—Lease of timber-bearing common land for the purpose of cutting the timber and making charcoal.—*Held* that a lambardar has ordinarily no authority to grant leases of timber-bearing common land of the village to lessees for the purpose of having the timber cut and converted into charcoal. JAGANNATH PRASAD *v.* RUSTAM ALI, 33 All. 17 ... 12
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Landholder and Tenant.
Co-owners—Receipt for rent collusively given to tenant by one co-owner—Rights of the others to sue tenant and remaining co-owner for rent.—W and others were co-owners of a shop which was let to U. The other co-owners, suspecting, W's good faith, gave notice to U forbidding him to pay rent to W. They then commenced proceedings for partition of the shop. Subsequently W executed in favour of U a receipt for arrears of rent and for a further sum alleged to represent rent paid in advance. *Held* that in the above circumstances the co-owners other than W were entitled to sue the tenant and W for their proportionate share of the rent, their allegation being that the receipt referred to above was fictitious and collusive. *Durga Charan Surma* v.

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Jampa Dassee, 12 B. L. R. 289, referred to. ZIA-UD-DIN *v.* MUHAMMAD UMAR, 33 All. 308 ... 208

Occupancy tenant—Usufructuary mortgage—Relinquishment of tenancy during the term of the mortgage.—*Held* that an occupancy tenant who has made a usufructuary mortgage of his holding and put the mortgagee in possession cannot during the subsistence of such mortgage relinquish his holding to the prejudice of the mortgagee's rights. *Rannu Rai* v. *Rafi-ud-din*, I. L. R. 27 All. 32 followed. CHHOTE LAL *v.* SHEOPAL SINGH, 33 All. 335 ... 225

Presumption as to land—holder's rights in the abadi *of an agricultural village—House-site occupied by a person not an agriculturist nor one of the customary village servants or artizans—Adverse possession.*—In a village which was not a purely agricultural village, but in which on the contrary some two-thirds of the inhabitants were non-agriculturists, certain persons, father and son, were in possession of a house-site in the *abadi*. They carried on the occupation of inn-keepers and sellers of tobacco, and there was no evidence of the origin of their possession or that they ever paid rent to the zamindar or acknowledged his title in any way. The site was sold by the son, and some time after such sale the house or shop thereon having fallen down, the zamindar sued to eject the purchosers. *Held* that in the circumstances of the case the defendants and their predecessors in interest, were properly held to have acquired a title to the site by adverse possession. *Chajju Singh v. Kanhia* Weekly Notes 1881, p. 114 and *Bhaddar v. Khair-ud-din Husain*, I. L.R. 29 All. 133, referred to. INCHA RAM *v.* BANDE ALI KHAN, 33 All 757 ... 507

See Act (Local) No. II of 1901 ss 102 and 198, 33 All. 61 ... 41

Rights of tenants with regard to groves—Custom—Wajib-ul-arz—Construction of document—"*Malik.*"—The wajib-ul-arz of a viliage contained the following provision as to grove land—"Persons who have planted a grove and who are in possession of a grove have the rights of an owner (*ikhtiyar malikana*). If any trees fall down, they can plant fresh trees without the permission of the zamindar. * * * When the land becomes denuded of all trees, the planter of the grove will have the first right to cultivate the land." *Held* that these provisions implied a right of transfer in the possessor of grove land. MUHAMMAD YASIN *v.* ILAHI BAKHSH, 34 All. 145 ... 921

Fixed rate tenant—Liabilities of fixed-rate tenants for rent joint and several and not joint merely—Act No. IX of 1872 (*Indian Contract Act*), *s.* 43.—*Held* that the liability of joint holders of a fixed-rate tenancy of payment of rent is joint and several and not joint only. The failure, therefore, of the plaintiff in a suit for rent against several fixed rate tenants jointly to bring upon the record the representatives of a deceased defendant is no bar to the continuance of the suit against the remaining defendants. *Jai Govind Laha* v. *Monmotha Nath Banerji* I. L. R. 38 Cal. 580, followed. *Muhammad Askar* v. *Radha Ram Singh*, I.

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L. R. 22 All. 307, referred to. ABDUL AZIZ *v.* BASDEO SINGH, ... 961
I. L. R. 34 All. 604 ... 631
See ACT NO. III OF 1907, s. 16, 34 All. 121 ... 631
Agreement to deliver agricultural produce over and above cash rent —Cess—Agreement opposed to public policy.—Certain tenants holding under a registered qabuliat agreed therein to deliver to their landlord, over and above the sum specified as a money rent, certain agricultural produce, and further to supply the landlord with a cart and bullocks "when necessary" and in default the landlord might claim the cash value of the said dues along with rent. *Held*, on suit by the landlord to recover the cash equivalent of such dues for several years, that the covenant in question was for various reasons unenforceable. *Abdul Hai* v. *Nathua*, 1 A. L. J. 537, *Sadanand Pande* v. *Ali Jan*, I. L. R. 32 All. 193 and *Sheoambar Ahir* v. *The Collector of Azamgarh*, I. L. R. 34 All. 358, referred to. SIS RAM *v.* ASGHAR ALI, 35 All. 19 ... 1034
House in abadi—*Well sunk by tenant inside his house—Mandatory injunction—Discretion of court.*—In this case the High Court refused to grant a mandatory injunction at the suit of the zamindar for the removal of a well recently constructed inside their house by tenants of a house in a town: the position of the tenants being that they and their predecessors in title had paid no rent for generations, and were only liable to ejectment in the event of the site occupied by them being cleared of buildings. BHAGWAN DAS *v.* MUHAMMAD YAHIA, 35 All. 292 ... 1223
Tenant in possession without a patta—*Suit to enforce hypothecation of property as security for rent.*—*Held* that a hypothecation of other property by certain tenants as security for their rent was none the less enforceable because, though the tenants had executed a *qabuliat* in respect of the land held by them, no *patta* had been executed by the landlords in their favour. *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh*, I.L.R. 31 All. 276, referred to. SRI KISHAN DAS *v* YAKUB KHAN, 35 All. 505 ... 1372
See Act No. IV of 1882, s. 111, 35 All. 145 ... 1120
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Ss. 79 and 95, 35 All. 299 ... 1228

"Land."
See ACT (LOCAL) No. II OF 1901, s. 4, cl. X, 35 All. 200 ... 1159

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Lease.
See Lambardar and co-sharer, 33 All. 17 ... 12

Legal Necessity.
See Hindu Law, 34, All. 126, 135. 635, 641

Letters Patent.
S. 10—*Appeal from a dissentient judgment in an appeal under s.* 10 *—Pre-emption—Wajib-ul-arz—Custom or contract—Partition of village—No new wajib-ul-arz framed—Construction of document—"Hissadar deh."—Held*, that an appeal will lie under s. 10 of the Letters Patent from the judgment of a Judge who has differed from his colleague in an appeal under the same

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section. The wajib-ul-arz of an undivided village gave a right of pre-emption, first, to a near co-sharer (*hissadar karib*) and then to a co-sharer in the village (*hissadar deh*). Subsequently the village was divided by perfect partition into two mahals. No new wajib-ul-arz was prepared. In a suit for pre-emption by the co-sharers in one of the mahals consequent upon a sale of property situated in another mahal to a stranger :—*Held*, that the right might be enforced notwithstanding the partition. The meaning of the words *deh* and *mahal* discussed by Karamat Husain, J. *Dalganjan Singh* v. *Kalka Singh*, I. L. R. 22 All. 1 and *Dori* v. *Jiwan Ram*, I. L. R. 32 All. 265, referred to. JIWAN RAM *v.* TONDI SINGH, 34 All. 13. 559

Limitation.

Execution of joint decree—Decree set aside as against one of several joint judgment-debtors against whom it had been ex-parte—*Decree passed subsequently against the exempted party—Civil Procedure Code* (1882), *s.* 108—*Order on a former application whether* res judicata.—A decree for sale on a mortgage was passed against several defendants jointly on the 25th August 1900 and made absolute on the 21st December, 1901. As against one defendant, however, the decree was *ex-parte*, but it was set aside as against her on appeal on the 11th March, 1902. Subsequently, a decree was passed on the merits against this defendant on the 15th August, 1902, and her appeal was dismissed by the High Court on the 16th November, 1904, and as against her that decree was made absolute on the 27th, November, 1905. An application for execution was made against all the defendants on the 21st December, 1905, based on the decrees of the 25th August, 1900, the 15th August, 1902, the 16th November, 1904, the 21st December, 1901, and the 27th November, 1905. The defendants filed an objection to the application on the 7th February 1906, alleging that they were no parties to the decrees of the 15th August, 1902, and the 27th November, 1905 and that as to the decrees of the 25th August, 1900, and the 21st December, 1901, they were time-barred. *Held* (affirming the decision of the High Court) that the decrees of the 25th August 1900, and the 16th November, 1904 were steps in granting the plaintiff the relief to which he was entitled. The latter decree supplemented and completed the former, and for the first time justified the plaintiff in applying for the joint execution of the decree. Time under the Limitation Act (XV of 1877) began to run from the date of the latter decree, or rather from the date it was made absolute—the 27th November, 1905, and consequently the application was not barred. *Held*, also, that the plaintiff was not estopped in the present proceedings, by the order of the 27th November, 1905, dismissing his former application for execution of the 15th February, 1906, which was based on the decree of 15th August, 1902, alone; whereas the present application was based on the joint effect of the two orders absolute of the 21st December, 1901, and the 27th November, 1905, which were in effect one decree of the latter date. The applications therefore were different and the

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former did not operate as a *res judicata*. ASHFAQ HUSAIN *v.* GAURI SAHAI, 33 All. 264	... 178
See Act No. I of 1877 s. 42, 33 All. 430	... 289
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See Act No. XV of 1877, sch. II, art. 104, 33 All. 568	... 382
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See Act No. XV of 1877, sch. II, art. 180, 33 All. 154	... 104
See Act No. IV of 1882, s. 6, 33 All. 414	... 278
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See Act No. VI of 1882, s. 159, 33 All. 641	... 430
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Mahabat.
See MUHAMMADAN LAW, 33 All. 421 ... 283

Maha-Brahman.
Agreement as to distribution of offerings—Construction agreement.—The members of a family of Maha Brahmans entered into an agreement amongst themselves whereby certain members of the family were to take the offerings made on certain days of the month, and the other members of the family the offerings made on the other days. *Held* by BANERJI and LYLE. JJ. (RICHARDS. C. J., dissenting) that such an agreement as above described would not prevent a person who wished to do so from making a special individual gift to a member of one branch of the family, even on a day which was appropriated by the agreement to the other branch, and that a claim for such gift by a member of the other branch was not maintainable. *Per* RICHARDS, C. J. If the offering was of a nature which was included in agreement between the parties the wishes of the donor could not regulate the rights of the parties, but the recipient of such an offering on a day which did not belong to his branch of the family was bound to account for it to the branch to which the day belonged. *Doorga Pershad* v. *Budree*, 6 N. W,P.H.C. Rep. 189, and *Oochi* v. *Ulfat*, 20 All. 234, referred to. SONA DEI *v.* FAKIR CHAND, 35 All. 412. 1307

Mahant.
See ACT (LOCAL) No. II of 1901, S. 11 *et seq*, 35 All. 474 ... 1350

Majority.
See Act No. IX of 1875, Ss. 2, 3, 33 All. 525 ... 352
Age of,—*See* Act No. IX of 1875, S 3, 35 All. 150 ... 1124

"Mandadari Tenure."
Nature of such tenure—Land held under it not transferable—Occupancy holding.—*Held*, that land held under what is known, in Gorakhpur chiefly, as '*mandadari* tenure is nothing more than an occupancy holding and is not therefore transferable. Such land cannot therefore be sold in execution of a decree upon a mortgage thereof. KEDAR NATH KASONDHAN *v.* NAIPAL SINGH, 34 All. 155 ... 654

Marriage
Muhammadan Law—Conversion of wife to Christianity—Dissolution of marriage.—Suit for restitution of conjugal rtghts.—Under the Muhammadan law a wife's conversion from Islam to Christianity effects a complete dissolution of marriage with her Muhammadan husband. The fact of such a conversion is therefore a bar to a suit by the husband for restitution of conjugal rights. *Zuburdust Khan* v. *His wife*, 2 N.-W. P. H. C. Rep 370, and *Imam Din* v. *Hasan Bibi*, Punj. Rec. 1906, 309 followed. AMIN BEG *v.* SAMAN, 33 All. 90 ... 61
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Master and Servant.

See Act, No. I of 1878, Ss. 5, 9, 34 All. 319 ... 764

Clerk engaged on a monthly salary—Relinquishment of employment without consent of master—Clerk not entitled to salary for broken portion of month in which he left his service.—Held that an office clerk engaged on a monthly salary is not entitled to any salary for the broken portion of a month in the course of which he leaves his service without the consent of his employer. *Ridgeway* v. *Hungerford Market Company*, 3 A. & E. 171, *Dhumee Behara* v. *Sevenoaks*, 13 Cal. 80, and *Ramji Manor* v. *Little*, 10 Bom. H. C. R. 57, referred to. RALLI BROTHERS *v.* AMBIKA PRASAD, 35 All. 132 ... 1112

Minor

Capacity of—to be a transferee, See ACT NO. IX of 1872, Ss. 10 and 11, 33 All. 657 ... 441

Mortgage executed by minor—Money borrowed to discharge debts of father—Contract executed by minor—Effect of.—In this appeal, which was one from the decision of the High Court in *Maharaj Singh* v. *Balwant Singh*, I. L. R. 28 All. 508, their Lordships of the Judicial Committee on the evidence upheld that decision on the question whether the defendant' Maharaj, was a minor at the time he signed the mortgage and said:—"Having found as a fact that Maharaj Singh was a minor," at that time "it is not necessary for their Lordships to consider any other issues. This suit has been brought on the mortgage deed of the 28th of October, 1892, by the assignee of that mortgage, and as their Lordships have held that the mortgage was not made by Sheoraj Singh as the manager of the family or in any respect as representing Maharaj Singh, and as Maharaj Singh was then a minor, the mortgage deed as against him and his interest in the estate was not merely voidable, it was void and of no effect and must be regarded as a mortgage deed to which he was not even an assenting party, and as a mortgage deed which did not affect him or his interest in the estate. BALWANT SINGH *v.* R. CLANCY, I. L. R. 34 All. 296 ... 748

See EXECUTION OF DECREE, 34 All. 321 ... 765

Representation of minor in suit—Suit to set aside compromise of and decrees in suits to which minors were parties—Civil Procedure Code (1882), *ss.* 443, 456, 452—*Minors unrepresented owing to fraud and misrepresention of* de facto *guardian whose interest conflicted withtheirs—Form of decree—Civil Procedure Code* (1908) *s.* 98—*Act No. I of* 1877 (*Specific Relief Act*), *s.*42—*Question of law.*—In this case the appellants sued for a declaration that a compromise of certain pre-emption suits and decrees based thereon, made on their behalf in 1899 when they were minors, were not binding on them having been obtained by the fraud and misrepresentation of the respondent (who was then their *de facto* guardian and manager of their property) and in proceedings in which they were practically unrepresented ; and they prayed that they might be restored to the position held by them prior to the date on which the compromise and decrees were made. It appeared that, although, the appellants

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were described in the proceedings as " under the guardianship " of one *H. P.*, he had never been properly appointed their guardian *ad litem* by the Court as required by s. 443 of the Civil Procedure Code, 1882; that no *bona fide* application had ever been made under s. 456 to have a guardian *ad litem* appointed by the Court; and that the leave of the Court had not been obtained to enter into the compromise on the appellant's behalf as was necessary under s. 462. *Held* that the appellants were entitled to the declaration they sought. *H. P.* had, their Lordships found, been introduced into the suits of 1899 by the respondent as the guardian or next friend of the appellants to advance the interests of the respondent and to defeat the interests of the appellants, which conflicted with those of the respondent: he had throughout acted under the directions and on behalf of the respondent and in his interest and contrary to the interest of the appellants, and the respondent had taken advantage of his position to the detriment of the appellants. There was therefore no one to protect them, and they where unrepresented in the proceedings, which were therefore not binding on them, *Manohar Lal* v. *Jadunath Singh* 28 All. 585; L. R. 33 I. A. 128, followed. S. 42 of the Specefic Relief Act (I of 1877) which had been applied to the case by the majority of the Court of the Judicial Commissioners was held not to be applicable. *Semble* the question whether on certain stated facts the relief which the appellants prayed for should be granted or refused. was a question of law within the meaning of s. 98 of the Civil Procedure Code (Act V of 1908); and where, on a difference of opinion on that question between two Judges of the Court, the case was referred under that section to a third Judge, that was the only question he had jurisdiction to consider and decide. PARTAB SINGH *v.* BHABUTI SINGH, 35 All. 487 ... 1359

See ACT No. IX OF 1872, S. 11, 35 All. 370 ... 1277

See ACT (LOCAL) No. III OF 1901, Ss 111, 112 and 233 (k), 35 All. 126 ... 1108

Mischief.

See Act No. VIII OF 1873, Ss. 7 and 70, 34 All. 210 ... 691

Misjoinder of Causes of Action.

See Act. (LOCAL) No. II OF, 1901, s. 34, 35 All. 512 ... 1377

Mitakshara.

See HINDU LAW, 33 All. 436 ... 293

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Money had and received.

Money deposited " in usum jus habentis " improperly withdrawn by a person not entitled to it.—Where money is deposited in Court *in usum jus habentis*, and it is withdrawn by a person who is declared not to have any right thereto, the money so obtained may properly be held to be received for the use of the person entitled to it. *Litt* v. *Martindale*, 18 C. B., 314, referred to. MAHDI HUSAIN *v.* SUKH CHAND, 33 All. 450 ... 303

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Mortgage.

Construction of document—Liability for deficiency in interest whether personal merely or a charge on the mortgaged property.—A mortgage deed provided that the mortgagee should take possession of the mortgaged property and out of the rents and profits pay the Government revenue and appropriate Rs. 132 per annum on account of interest at the rate of 11 annas per cent. permensem. It further provided that should the amount of profits calculated on the basis of the patwari's accounts, be found insufficient to cover the whole amount payable for interest, the deficiency would be made good by the mortgagor together with interest at the rate of Rs. 2 per cent. per mensem. *Held* that deficiency in the stipulated interest was realizable as well from the mortgaged property as from the mortgagor personally. *Muhammad Husain* v. *Sheodarshan Das*, 4 A. L. J. 176, referred to. CHINTAMAN *v.* DULARI, 33 All. 107 ... 72

Mortagage of sir *land—Purchase of proprietary rights by mortgage—Suit for redemption—Amount payable by mortgagor.*—After a usufructuary mortgage of certain *sir* lands the mortgagee at an auction sale in execution of a simple money decree purchased the proprietary rights in the mortgaged property, the mortgagor becoming an ex-proprietary tenant. On a suit for redemption being brought, *held* that the mortgagee having himself broken up the integrity of his security, could not be permitted to cast the whole burden of the debt upon the ex-proprietary rights. *Bisheshar Dial* v. *Ram Sarup*, I. L. R. 22 All. 282, referred to. CHUNNI LAL *v.* SIKISHAN SINGH, 33 All. 434 ... 292

Prior and subsequent mortgagees—Decree obtained on a prior mortgage satisfied by execution of a fresh mortgage in favour of decree-holder—Priority over an intermediate mortgage.—A decree for sale upon a mortgage of 1895 was obtained in 1901. In 1903 the decree-holder accepted in satisfaction of the decree a sale deed of a certain portion of the mortgaged property, but this adjustment was never certified to the court. Subsequently the decree was put into execution and a sale was ordered, but before it was carried out the parties came to terms, and the judgment-debtor executed a fresh mortgage to secure the decretal amounts. This was in May 1904. Meanwhile, in April 1904, another mortgage had been executed by the judgment-debtor. *Held* that the mortgage of May 1904, being in satisfaction of the earlier mortgage of 1895 had priority over that of April 1904. *Kanhaiya Lal* v. *Chedda Singh* 7. A. L. J., 984, and *Shyam Lal* v. *Bashir-ud-din*, I. L. R. 28 All. 778, followed. RAHIM-UN-NISSA v. BADRI DAS, 33 All. 368 ... 248

Prior and subsequent mortgagees—Sale of mortgaged property in execution of prior mortgagee's decree—Subsequent mortgagee no party to suit—Price to be paid by subsequent mortgagee seeking to redeem.—A susequent mortgagee is not entitled to redeem the prior mortgage by simply paying the price for which the mortgaged property may have been purchased at an auction sale held in execution of a decree obtained by a prior mortgagee without joining the subsequent mortgagee as a party; but such sub-

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sequent mortgagee must, if he wishes to redeem, pay to the prior mortgagee the full amount due on the prior mortgage. *Dip Narain Singh v. Hira Singh*, I. L. R. 19 All. 527 applied. PHULMANI CHAUDHRAIN *v.* NAGESHAR PRASAD, 33 All. 370... 250

Private sale of mortgaged property—Consideration left with purchaser for discharge of two mortgages—First mortgage alone discharged.—Suit for sale by second mortgagee—Purchaser not entitled to hold up first mortgage as a shield.—Where a purchaser of mortgaged property undertook to discharge out of the purchase money two subsisting mortgages, and in fact discharged only the earlier one; *Held* that it was not competent to him to hold up this mortgage as a shield against the suit of the puisne mortgagee for sale. *Gopal Das* v. *Puran Mal*, I. L. R. 10 Cal. 1035, referred to. MUHAMMAD SADIK *v.* GHAUS MUHAMMAD, 33 All. 101 ... 68

Redemption—Right to redeem one of two properties separately mortgaged.—Two persons mortgaged certain property in 1879. In 1883 one of the mortgagors executed a mortgage comprising in part property subject to the mortgage of 1879 and in part other property in favour of the same mortgagee. This latter mortgage contained a stipulation that the mortgagor would redeem it before redeeming the mortgage of 1879. Certain property comprised in the first mortgage, but not in the second, was sold, and the purchasers sued for redemption of that mortgage alone. *Held* that in the circumstances they were not precluded by the covenant in the second mortgage from redeeming the first. GANGA RAI *v.* KIRTARATH RAI, 33 All. 393 ... 265

Redemption—Bengal Regulation No. XV of 1793, *s.* 10—"*Redeemed*," *meaning of—Jurisdiction—Act No. XII of* 1887 (*Bengal, N.-W. P. and Assam Civil Courts Act*) *s.* 19—*Competence of Court to pass a decree for an amount exceeding the pecuniary limits of its jurisdiction.*—*Held* that the word " redeemed " as used in s. 10 of Regulation XV of 1793, was not used in the sense that the mortgage had been redeemed in the full sense of that word, that is, satisfied and possession given to the mortgagor. So long, therefore, as the property remains in the hands of the mortgagee, the mortgagor can bring a suit for redemption even if the mortgage had been satisfied over 12 years before suit. *Held*, also, that where a suit as filed is within the pecuniary jurisdiction of a court, the jurisdiction of the court is not ousted by the subsequent discovery that a sum is in fact due to the plaintiff exceeding the pecuniary limits of the jurisdiction. *Madho Das* v. *Ramji Patak*, I. L. R. 16 All. 286, followed. *Golap Singh* v. *Indra Coomar Hazra*, 13 C. W. N. 493, dissented from. SUDARSAN DAS SHASTRI *v.* RAM PRASAD, 33 All. 97 ... 65

See Act No. IV. of 1882, s. 82, 33 All. 387, 708. ... 261, 474
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Construction of document—"*Muakhiza*"—*Act No. IV of* 1882(*Transfer of Property Act*), *Ss.* 58, 100.—A deed the basis of a suit for sale as on a mortgage opened with a recital that the executant had borrowed a sum of money, followed by a promise to pay the amount with interest at 2 per cent per month within a certain time and then provided; "*muakhiza asl o sud ta yom-ul-wasul upar* (description of the share) *haqiyat min muqir..... qaim rahega .....lihaza.....batarik tamassuk muhakhiza-i-jadad ka likhaya.*" *Held* that this deed could not be construed as a mortgage. The word *muakhiza* did not necessarily imply a power of a sale, and there was nothing else in the deed from which an intention to give a power of a sale could be inferred. DALIP SINGH *v.* BAHADUR RAM, 34 All. 446 ... 852
See PRE-EMPTION, 34 All. 416 ...
Decree on mortgage—Decree set aside as against one mortgagor—Second suit to recover proportionate share of the debt maintainable.—A mortgagor died leaving him surviving a brother, two daughters and an illegitimate son. The four sons of the brother took an assignment of the mortgage from the mortgagee and subsequently brought a suit for sale of the mortgaged property against the children of the mortgagor, and inasmuch as they were themselves owners of part of the mortgaged property, framed their suit as one for the recovery of specific shares of the mortgage money from the portions of the property in the possession of each of the defendants. They obtained in this suit an *ex-parte* decree, which, however, was set aside as against one of the daughters upon the ground that she was a minor and not properly represented therein. *Held* that the plaintiffs were not precluded from maintaining a fresh suit against this defendant for the recovery of a share in the mortgage debt proportionate to her share in the property. RASHID-UN-NISSA *v.* MUHAMMAD ISMAIL KHAN, I. L. R. 34 All. 474 ... 872
Estoppel—Power of representatives of mortgagor to question validity of mortgage—Adverse possession—Possession adverse to mortgagor not necessarily adverse to mortgagee.—*Held* that, although the representatives of a mortgagor cannot as such question the validity of the mortgage, it may be open to them as *mutawallis* to plead that the property was waqf and that the mortgage of it was void. *Gulzar Ali* v. *Fida Ali*, I. L. R. 6 All. 24 distinguished. *Held*, also, that a simple mortgage being not merely a security for a debt but a transfer of an interest in the property mortgaged, a trespasser who ousts the mortgagor and holds the property adversely to him may by prescription become the owner of the limited estate which the mortgagor had in the property, but such adverse possession cannot extinguish the right of the mortgagee. *Agency Company* v. *Short*, L.R. 13 A. C. 793, *Smith* v. *Lloyd*, 9 Ex. 562, *Secretary of State for*

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India v. *Krishnamoni Gupta*, I. L. R. 29 Cal. 518, and *Ismdar Khan* v. *Ahmad Husain*, 1. L. R. 30 All. 119, referred to. *Ramaswami Chetty* v. *Ponna Padayachi*, 21 M. L. J. 397, and *Pratap Bahadur Singh* v. *Maheshwar Bakhsh Singh*, 12 O. C. 45, not approved. *Aimadar Mandal* v. *Makhan Lal Day*, I. L. R. 33 Cal. 1915, and *Parthasarathi Naikan* v. *Lakshmana Naikan*, 21 M. L. J. 467, approved and followed. *Karan Singh* v. *Bakar Ali Khan*, I. L, R. 5 All. 1, disoussed. NANDAN SINGH *v.* JUMMAN, 34 All. 640 ... 986

Non-payment of greater part of mortgage money—Mortgagee allowed to redeem before expiry of term of mortgage.—Certain property was mortgaged by way of conditional sale for Rs. 599-15-0 for ten years. Of the mortgage money Rs. 50-15-0 only were paid, and the balance was left with the mortgagees for payment to prior incumbrancers. The mortgagees did not pay off the prior incumbrancers, and, the mortgagor having meanwhile sold the mortgaged property, his assignees sued for redemption of the mortgage before the expiry of ten years. *Held* that on equitable grounds, the defendants not having performed what was a most essential part of the contract, the plaintiffs ought to be allowed to redeem before the expiration of the period of ten years. CHHOTKU RAI *v.* BALDEO SHUKUL, 34 All. 659 ... 999

Prior and subsequent incumbrancers—Third mortgagee paying off first mortgage and claiming priority as against second mortgagee —Presumption as to intention of third mortgagee.—Where a mortgagee pays off prior incumbances on the mortgaged property it is to be presumed that he does so with the intention of keeping these incumbrances alive and using them as a shield should occasion arise; and he can so use them as much when he is a plaintiff suing for sale as when he is a defendant to an intermediate or subsquent mortgagee's suit. If the payment is made in the form of leaving part of the money with the mortgagee to be paid to the prior mortgagees, the subsequent mortgagee does not thereby become the agent of the mortgagor for the purpose of paying off the prior mortgages. *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* I. L. R. 10 Cal. 1035, *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*, I. L. R. 29 Cal. 154, and *Jagatdhar Narain Prasad* v. *A. M. Brown*, I. L. R. 33 Cal. 1133, followed. *Tufail Fatma* v. *Bitola*, I. L. R. 23 All. 400 and *Baij Nath* v. *Murlidhar*, Weekly Notes, 1907, p. 85, dissented from. GUR NARAIN *v.* SHADI LAL, 34 All. 102 ... 618

Prior and subsequent mortgages—Suit by first mortgagee without impleading second—Decree and sale—Subsequent suit by second mortgagee against purchase under decree in first suit—Plaintiff held bound to redeem first mortgagee.—The plaintiff brought his suit for sale of certain property in satisfaction of a mortgage of the year 1877, which was a renewal of a mortgage of 1875. The defendants were purchasers at a sale in execution of a decree on a mortgage which bore a later date in 1875 than the plaintiff's first mortgage, but was a renewal of a previous mortgage of 1869. To the suit in which this decree had been passed the plaintiff had not been made a party. The defendants had

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been in possession of the property so purchased by them for some twenty years. *Held*, that the plaintiff had no absolute right to bring the property to sale in satisfaction of his mortgage subject to the mortgage of 1869, and that in in the circumstances he ought to redeem that mortgage before bringing the property to sale. *Mata Din Kasodhan* v. *Kazim Husain*, I. L. R. 13 All. 432, *Ram Shankar Lal* v. *Ganesh Prasad*, I. L. R. 29 All. 385, *Har Prasad* v. *Bhagwan Das*, I. L. R. 4 All. 196, *Kanti Ram* v. *Kutub-ud-din Mahomad* I. L. R. 22 Cal. 33, *Baldeo Prasad* v. *Uman Shankar*, I. L. R. 32 All. 1, *Mati-ullah Khan* v. *Banwari Lal*, I. L. R. 32 All. 138, *Kanhai Lal* v. *Hulas Singh*. 9 A. L. J. 29, *Cangayam Venkataramana Iyer* v. *Henry James Colley Gompertz*, I. L. R. 31 Mad. 425, and *Har Pershad Lal* v. *Dalmardan Singh*, I. L. R. 32 Cal. 891, referred to. *Debendra Narain Roy* v. *Ramtaran Banerjee*, I. L. R. 30 Calc. 599, discussed and doubted. MANOHAR LAL *v.* RAM BABU, 34 All. 323 ... 766

Prior and subsequent mortgagees—Release of part of mortgaged property for less than its value—Suit for recovery of entire balance of mortgage debt from the residue of mortgaged property.—Held that a first mortgagee cannot be allowed to release part of the mortgaged property for less than its due proportion of the mortgaged money and then claim a decree against the mortgagor and a puisne mortgagee for the recovery of the whole of the balance of the mortgage money out of the remainder of the property. *Mir Yusuf Ali Haji* v. *Panchanan Chatterjee*, 15 C. W. N. 800, *Hari Kissen Bhagat* v. *Velait Husain*, I. L. R. 33 Cal. 755, and *Ponnusami Mudaliar* v. *Srinivasa Naiokan*, I. L. R. 31 Mad. 333, referred to. JUGAL KISHORE SAHU *v.* KEDAR NATH, 34 All. 606 ... 962

Redemption—Subsequent agreement qualifying right to redeem—Loss of deed—Onus of proving terms of mortgage—Act No. I of 1862 (*Oudh Estates Act*), *s.* 6—*Limitation—Compromise barring right to redemption.*—There is nothing in law to prevent the parties to a mortgage from coming to a subsequent arrangement qualifing the right to redeem.—In this case the mortgage which it was sought to redeem was dated in 1846, and in 1870, the mortgagors had, in consideration of certain additional benefit reserved to them under a compromise, agreed to subject their right of redemption to certain conditions. The deed having been lost, the onus was on the plaintiffs to prove the terms of the mortgage, so as to show that the suit was not barred by s. 6 of the Oudh Estates Act (I of 1869) [see *Raja Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh*, L. R. 3 I. A. 85], which onus he was found unable to discharge.—*Held* (affirming the decision of the Judicial Commissioner of Oudh) that the plaintiffs were not in any case entitled to redeem as long as there was no breach by the defendants of the covenants contained in the compromise. SHANKAR DIN *v.* GOKAL PRASAD, 34 All. 620 ... 972

Suit for redemption of usufructuary mortgage—Defendants setting up title under sale of mortgagor's interest—Title by adverse pos-

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session—Separation of member of joint Hindu family and purchase of property with self-acquired means—Possession adverse to mortgagors.—These were cross appeals from the decision of the High Court in *Muzaffar Ali Khan* v. *Parbati*, I. L. R. 29 All. 640. The plaintiffs relied on a usufructuary mortgage of 1846 and sued for redemption of the property in suit, two shares in a village called Lohari. The case of the defendants was that they were in possession not under the mortgage but under sales of the 27th May, 1853, and the 20th of March 1854, respectively, by which the equity of redemption in the shares mortgaged in 1846 had passed to those through whom they claimed title, and they pleaded adverse possession. Both the lower courts had upheld the later sale and dismissed the suit as to that share in Lohari. As to the earlier sale the courts below had differed, the first court upholding it, and the High Court deciding in favour of the plaintiffs. On appeals by both parties, it was immaterial, in the view taken by their Lordships of the Judicial Committee of that sale (27th May, 1853) by what title Ashraf unnissa, one of the widows of the mortgagor, obtained the share she took, and whether or not she had a daughter who survived him. Her share was certainly transferred by the sale to Baldeo Sahai, who, though he was the grandson of one of the mortgagees and the son of the other, with both of whom he had lived as a member of a joint Hindu family, had, according to reliable evidence, separated from them and at the time of the sale was carring on, with a nucleus of property derived from his grandmother, a money-lending business from the profits of which he was enabled to purchase, with self acquired funds, the share in Lohari from Ashraf-un-nissa, who purported to sell it to him as a person who was not a mortgagee under the mortgage of 1846; and he was therefore not precluded from setting up a title by adverse possession, which it was conclusive in the evidence he had held for more than 50 years. Their Lordships therefore, while affirming the decision of the courts below as to the later sale, reversed the decision of the High Court as to the earlier sale, and upheld that transaction also. PARBATI *v.* MUZAFFAR ALI KHAN, 34 All. 289 ... 743

See Act No. III of 1877, s. 50, 34 All. 631 ... 980
See Act No. IX of 1872, s. 39, 34 All. 273 ... 732
See Act No. IV of 1882, s. 90, 34 All. 63 ... 592
See Act No. IV of 1882, s. 101, 34 All. 268 ... 729
See Act No. IX of 1908, s. 31, 37 All. 375 ... 802
See Act No. XVI of 1908, s. 17 (2) (xi), 34 All. 528 ... 909
See Bengal Regulation No. XV of 1793, 34 All. 261 ... 724
See Civil Procedure Code (1882), s. 4, 34 All. 223 ... 700
See Civil Procedure Code (1908), s. 60 (1) (c), 34 All. 25 ... 567
See Civil Procedure Code, (1908), s. 11, 34 All. 599 ... 957
See Hindu Law, 34 All. 549, 572 ... 924, 939
See Minor, 34 All. 296 ... 748
See Pre-emption, 34 All. 416 ... 831

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Interest—Construction of document—Mortgage by conditional sale with no provision for post diem *interest—*Post diem *interest not allowed.*—A mortgage executed in 1869 provided for the payment of the sum Rs. 300 with interest at Rs. 1-8 per mensem in one lump sum upon a certain specified date four years from the date of the mortgage. It further provided that, if the money was not paid upon that date, the property mortgaged should become the absolute property of the mortgagee. There was no stipulation of any kind as to the payment of interest after the date fixed. *Held* that the mortgagee was not entitled to *post diem* interest. *Mathura Das* v. *Raja Narindar Bahadur*, 19 All. 39, distinguished. *Gudri Koer* v. *Bhubaneswari Coomar Singh*, 19 Cal. 19, and *Moti Singh* v. *Ramohari Singh*, 24 Cal. 699, followed. BALWANT SINGH *v.* GAYAN SINGH, 35 All. 534 ... 1392

Parties—Suit for entire mortgage money and sale of entire mortgaged property—Omission to implead certain persons interested—Decree to which plaintiffs entitled.—Where a plaintiff mortgagee sued for the recovery of the whole of the mortgage money by the sale of the whole of the mortgaged property, but by an oversight omitted to implead certain persons who had acquired a share in the property subsequent to the mortgage in suit, it was *held*, that so much of the claim should be decreed as was proportionate to the interests of the persons who were before the court. GANESH LAL *v.* CHARAN SINGH, 35 All. 247 ... 1192

Redemption—Construction of mortgage as to the terms of redemption—Mortgage and lease to mortgagor contemporaneously granted—Mortgage executed before Transfer of Property Act (IV of 1882) *came into force—Mortgagee's security reduced by portion of property being withdrawn—Section* 66 (*a*) *of Transfer of Property Act—Right of mortgagee to compensation.*—The plaintiff (respondent) mortgaged to the defendant (appellant) certain property by a deed, dated the 25th of August 1880, for Rs. 70,000 for eight years. On the 29th of August (and so practically contemporaneously with the mortgage) a lease of the mortgaged property was executed by the mortgagee in favour of the mortgagor at an annual rent Rs. 4,200, which represented interest on the mortgage debt at the rate of 6 per cent. per annum. The mortgage contained a clause that "it is agreed by mutual consent of the parties that the profits of the property mortgaged shall belong to the mortgagee in lieu of the interest on the mortgage money, and I, the mortgagor, shall have no claim for mesne profits. The mortgagee also shall have no right to claim interest on the mortgage money advanced by him." The lease, after reciting the mortgage, referred to a provision in the latter that the mortgagor should be entitled to sell a certain portion of the mortgaged property on condition that he handed over the whole of the proceeds of the sale to the mortgagee in payment of the mortgage debt, and provided that "under the condition whatever sum of money the mortgagor should pay to the mortgagee in a lump sum should be credited and set off against the rent payable under

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the lease with interest at 8 annas per cent. per mensem." Subsequently three further charges were tacked on to the mortgage, the latest of which was dated the 13th December 1882. In June 1888, the mortgagor was in arrear with his rent and the mortgagee brought a suit against him on which the mortgagor gave up possession of the property to the mortgagee. In a suit for redemption (the right to redeem not being disputed), *held* that the mortgagee was entitled under the terms of the mortgage to appropriate the profits of the mortgaged property in lieu of the interest on the mortgage money not paid by the mortgagor. Evidence of preliminary negotiations and previous conversations were not admissible to contradict or vary the terms of the mortgage (Evidence Act, section 92.) *Held* also that the mortgage and the lease were both parts of one and the same transaction. But there was no inconsistency between the two instruments nor would there have been any inconsistencey if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted. *Held* further that the original mortgage having been executed before the Transfer of Property Act came into operation, that Act was not applicable, notwithstanding that one of the further charges was executed subsequently to that date. Whatever might be the construction of s. 65 (*a*) of that Act (which was cited in support of the mortgagee's claim) he was not on the evidence and under the circumstances of the present case entitled to compensation for any loss or damage occasioned by his security being diminished owing to a portion of the mortgaged property being successfully claimed from the mortgagor. ABDULLAH KHAN *v.* BASHRAT HUSAIN, 35 All. 48 ... 1054

Suit for sale against auction purchaser of mortgaged property—Evidence, admissibility of—Recital of receipt of consideration—Estoppel.—*Held* that an admission made by a mortgagor in a mortgage deed and also before the registering officer as to the receipt of consideration is admissible in evidence against the purchaser of the mortgaged property at an auction sale in execution of a simple money decree. *Bihari Lal* v. *Makhdum Bakhsh*, I. L. R. 35 All. 194, followed. *Manohar Singh* v. *Sumirta Kuar*, I. L. R. 17 All. 428, not followed. *Mahomed Mozuffer Hossein* v. *Kishori Mohan Roy*, I. L. R. 22 Cal. 909, referred to. *Held* also, that a purchaser at auction of the right, title and interest of the father alone in joint family property which had been mortgaged by the father was not entitled to raise the plea that the mortgage was made without legal necessity so long as there was time yet for the sons to challenge the purchase. *Muhammad Muzamil-ullah Khan* v. *Mithu Lal*, I. L. R. 33 All. 783, distinguished. BAKHSHI RAM *v.* LILADHAR, 35 All. 353 ... 1266

See Act No. VII of 1870, s. 7, clause is, 35 All. 92, 94 1084, 1086

See Act No. VII of 1870, sch. I, art. 1; sch. II, art. 11, 35 All. 476 ... 1351

See Act No. I of 1872, s. 68, 35 All. 254 ... 1196

See Act No. IV of 1882, ss. 59, 100, 35 All. 154 ... 1134

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See Act No. IX of 1908, s. 31, 35 All. 167 ... 1136
See Act No. XVI of 1908, s. 50, 35 All. 271 ... 1209
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See Civil Procedure Code (1908), or. XXXIV, r. 1; or. I, r. 9, 35 All. 441 ... 1326
See Civil Procedure Code (1908), Or. XXXIV, r. 1, 35 All. 484 ... 1357
See Civil Procedure Code (1908), Or. XXXIV, r. 8, 35 All. 116 ... 1101
See Civil Procedure Code (1908) Or. XXXIV, r. 14, 35 All. 518 ... 1381
See Evidence, 35 All. 194 ... 1155
See Hindu law, 35 All. 311, 326, 428, 543, 571. 1237,1247,1380,1399,1418
Proof of execution of ——, *See* Act No. I of 1872, ss. 69 and 70, 35 All. 364 ... 1273

Muafidar.

Mortgage—*See* Act No. XIX of 1873, ss. 146, 148 and 167, 35 All. 190 ... 1153

Muakhiza.

See Mortgage, 34 All. 446 ... 852

Muhammadan law.

Dower—Interst—Liability of widow in possession to account for profits.—*Held* by the Full Bench that a Muhammadan widow who has been put in possession by her husband, of his estate in lieu of her dower debt, is entitled, when called upon by her husband's heirs other than herself, to account for rents and profits received by her during the time of her possession, to claim interest at a reasenable rate upon her dower debt. The liability of the heirs of the husband not being personal the heir who sues the widow for possession fo his share is only liable to pay the proportionate part of the dower debt. *Abdul Karim* v. *Maqbulan*, I. L. R. 30 All. 315, *Soorna Khatoon* v. *Attaff-oon-nissa Khatoon*, 2 Hay 210, *Woomatool Fatima Begum* v. *Meer-un-nissa Khanum*, 9 W. R. 318, *Bakresdun* v. *Ammatul Fatima*, 3 C. L. R. 541, *Mia Jan* v. *Bibijan*, 5 B. L. R.500, and *Chaudhri Wasi Ahmad* v. *Musammat Maina Bibi*, F. A. No. 65 of 1904, decided 3rd July, 1906, referred to. HAMIRA BIBI *v.* ZUBAIDA BIBI, 33 All. 182 ... 122

Sunnis—Dower—No determination at marriage whether dower is to be prompt or deferred—Presumption—Civil Procedure Code (1908), Or. II, r. 2—Estoppel.—In the case of Muhammadans of the Sunni persuasion, where it is not settled at the time of the marriage whether the wife's dower is to be prompt or deferred, part will be prompt and part deferred, the proportion referable to each category being regulated by custom, or, in the absence of custom, by the status of the parties and the amount of the dower settled. *Eidan* v. *Mazhar Husain*, I. L. R. 1 All. 483, and *Taufik-un-nissa* v. *Ghulam Kambar*, I. L. R. 1 All. 506, followed. A suit, therefore, brought by the wife during the lifetime of her husband for the recovery of the prompt portion of her dower will be no bar to a subsequent suit for the recovery of the deferred portion. UMDA BEGAM *v.* MUHAMMADI BEGAM, 33 All. 291 ... 196

Dower—Agreement between husband and wife as to satisfaction of wife's dower—Construction of document — Mortgage—"Mahabat."—

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A Muhammadan made over to his wife, to whom a dower of Rs. 1,25,000 was due, certain property. In the deed of transfer it was stipulated (1) that the wife was to take possession of the property in lieu of her dower and enjoy the usufruct; (2) that the property was to revert to the husband if the wife predeceased him, the dower debt being deemed to have been discharged; (3) that if the husband predeceased the wife the property was to become hers absolutely. *Held* that the transaction was neither a mortgage by conditional sale nor a *mahabat*, but the wife obtained a right to enjoy the usufruct during her husband's lifetime, with the possibility of the interest developing into full ownership if the husband predeceased her. MUBARAK-UN-NISSA *v.* MANSAB HASAN KHAN, 33 All. 421 ... 283

Shias—Dispute between husband and wife as to wife's dower—Arbitration—Awards transferring property of husband to wife—Further conveyance unnecessary.—A Muhammadan husband and wife of the Shia persuasion referred a dispute relating to the wife's dower to arbitrators, who, under a registered award, transferred the absolute ownership of the husband's property *in praesenti* to the wife, reserved possession of it to the husband for life with control over the income, and provided that, in the event of the wife predeceasing the husband, he should continue in possession for life, while in the event of the husband dying before the wife, she should be owner and the heirs of the husband could not interfere. Mutation of names followed in favour of the wife, who executed a mukhtarnama in favour of her husband for the management of the property conveyed to her under the award:—*Held*, that the award was sufficient to transfer the ownership of the property covered by it *in praesenti* to the wife, and no conveyance need have been executed. *Ram Bakhsh* v. *Moghlani Khanam*, I. L. R. 26 All. 266, followed.—*Quaere*, whether an award is governed by Muhammadan law. MUHAMMAD TALIB HUSAIN *v.* INAYATI JAN, 33 All. 683 ... 458

Suit for dower—Compromise—Family arrangement—Transfer of expectancy—Act No. IV of 1882 (*Transefr of Property Act*), *s.* 6(*a*).—A Muhammadan wife brought a suit for dower against her husband which resulted in a compromise, the terms being that the wife was given possession of some property in lieu of her dower and the husband retained possession of some other property for life, which life interest in case of urgent necessity he was authorized to sell or hypothecate, and it was agreed that on the death of the wife the persons who should be the heirs of both would be the owners of the properties. The wife predeceased her husband, who then transferred certain properties in his own right and as heir of his wife, *held* that the compromise was in the nature of a family settlement under which the husband was not competent to dispose of more than the life interest in certain property therein named. The relinquishment by the husband of his right to succeed as heir to his wife was not obnoxious to the prohibition contained in s. 6(*a*) of the Transfer of Property Act, 1889. *Musammat Hurmat-ul-nissa Begam* v. *Allahdia Khan*, 17 W.R. 108, *Shams-un-din Ghulam*

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Husein v. *Abdul Husain Kalim-ud-din*, I. L. R. 31 Bom. 165, *Kunhi Mamod* v. *Kunhi Moidin*, I. L. R. 19 Mad. 176 and *Ram Nirunjun Singh* v. *Prayag Singh*, I. L. R. 8 Cal, 138, referred to. NASIR-UL-HAQ *v.* FAIYAZ-UL-RAHMAN, 33 All. 457 ... 307

Waqf—Charitable object—Expenses of fatiha of executant—Burning lamps in mosque—Salary of Hafiz.—Held by BANERJI, J. STANLEY C.J. *dubitante*, that a *waqf* by which a substantial portion of the income of the endowed property was appropriated for (1) expenses of the annual *fatha* of the waqif, of her husband and members of her family; (2) the annual expenses of burning lamps in a mosque, and (3) the salary of Hafiz and readers of the Quran, was a valid *waqf*, and that there was a substantial dedication of the property to religious or charitable purposes. *Mahomed Ahsanulla Chowdhri* v. *Amarchand Kundu*, I. L. R. 17 Cal. 418, *Luchmepat* v. *Amir Alum*. I. L. R. 9 Cal. 176. *Phul Chand* v. *Akbar Yar Khan*, I. L. R. 11 All. 211, and *Biba Jan* v. *Kalb Husain*, 6 A. L. J. 115; I. L. R. 31 All. 136, referred to. *Kaliloola Sahib* v. *Nuseeruddeen*, I. L. R. 18 Mad. 201, and *Fakir-ud-din Shah* v. *Kifayat-ul-lah*, 7 A. B. L. J. 1905 doubted. *Per* STANLEY, C. J.—The general dedication of villages in the name of God is not sufficient to render the waqf valid in respect of so much of the property as has been dedicated expressly for specific objects which are not proper objects of waqf; *fatiha* ceremonies and the eading of the Quran in private do not seem to be such objects. MAZHAR HUSAIN *v.* ABDUL HADI KHAN, 33 All. 400 ... 270

See Act No. XV of 1877 sch. II, art. 104, 33 All 568 ... 382

See Act No. VII of 1889 ss. 2 and 4, 33 All 327 ... 220

See Civil Procedvre Code (1882) ss. 325A, 33 All 233 ... 156

See Marriage, 33 All 90 ... 61

See Pre-emption, 33 All 28, 299 19, 202

Gift of a fixed share of offerings made at a shrine—Possesion of subject of gift—Held that gift of the right to receive a certain share of the offerings which might be made at a particular shrine was a valid gift and not repugnant to the doctrines of the Muhammadan Law. *Amtul Nissa Begam v. Mir Nurudin Husain Khan* I. L. R., 22 Bom 489 distinguished. AMHAD-UD-DIN *v.* ILAHI BAKHSH, 34 All 465 ... 866

Hanafi law—Gift—Construction of document—Condition in derogation of the grant invalid.—A deed of gift of certain property provided as follows:—My son, Naki Khan, will remain owner (*malik*) of the remaining two-thirds and of the said two-thirds Naki Khan will remain full and and absolute owner of one-third (*malik kamil o katai*), and he shall have the powers of an owner with respect to it, and Naki Khan will be owner (*malik*) of the other third also, and his name will be entered in the khewat, but the income of it is given for the maintenance of my minor grandson, Muhammad Shafi Khan, son of Muhammad Taqi Khan, deceased. According to law, Naki Khan is guardian of Shafi Khan he must give the income of that one-third for the maintenance of the minor and Naki Khan will not have the power of transfer over that one-third

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during the life of the minor. *Held*, on a construction of the deed, that the condition against alienation was invalid; but the condition as to the payment of one-third of the income to Muhammad Shafi Khan was valid and attached to the property in the hands of a transferee who was found to have notice thereof. *Nawab Umjad Ali Khan* v. *Musammat Mohumdee Begum*, 11 Moo. I. A. 517, followed. LALI JAN *v.* MUHAMMAD SHAFI KHAN, 34 All. 478 ... 875

Guardian—Construction of will—Alienation of property of minor by his brother acting as executor of will and guardian of minor—Sale not binding on minor—Right of suit to redeem mortgage, Act No. XV of 1877 (*Indian Limitation Act*), *Sch. II, Arts.* 44 *and* 144.—A Muhammadan testator by his will left all his property to his four grandsons (brothers), but did not expressly appoint any executors of his will or guardians of such of his grand-children as might be minors at his death, nor was there in the will any intention to entrust the administration of the property to any particular individuals. The testator died in 1887; and on the 15th of the June, 1889, the three elder grandsons on their own behalf, and purporting to act also as the guardians of the fourth grandson, the respondent (plaintiff) then a minor, sold some of the property to the appellant (defendant). The appellant was a mortgagee of two villages on the estate under two mortgages executed by the testator on the 2nd of December, 1885, and the 7th of August, 1886 for ten years and seven years respectively; and the effect of the sale had been to pay off the later mortgage on the smaller village, and other debts, by selling the larger village to the mortgagee. The respondent attained his majority in 1892 or 1893, and treating the sale of the 15th June, 1889, as a nullity, and mortgage as still subsisting, he tendered to the appellant the amount of mortgage money necessary to redeem the larger village, and on the appellant refusing to accept it, brought a suit for redemption on the 14th of September, 1905. *Held* that the elder brothers were not authorized either by the will or by the Muhammadan law to act as guardians of the minor, and he was entitled on attaining his majority to treat the transaction of the 15th of June, 1889, as being void as against him. *Held*, also, that the possession of the appellant did not become adverse to the respondent until the expiry of the term of the mortgage of 1885 namely, the 2nd of December, 1885, and therefore the suit was not barred by the 12 years period provided by Art. 144 of sch. II of the Limitation Act (XV of 1877). Art. 44, sch. II, of the same Act was not applicable, as the sale was made not by a guardian but by an unauthorized person. MATA DIN *v.* AHMAD ALI, 34 All. 213... 692

Waqf—Right of Muhammadans to worship in mosques—Suit by individual Muhammadans whose right is infringed—Civil Procedure Code (1908), *Or. I, r.* 8.—Every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance and is competent to maintain a suit against anyone who interferes with its exercise,

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but if he brings his suit in his personal capacity and not on behalf of the whole Muhammadan community, the decision will be binding only as between the plaintiff and the defendant and cannot be taken advantage of by, or be binding on, the Muhammadan community in general. *Jawahra* v. *Akbar Husain* 7 All. 178, and *Dasondhay* v. *Muhammad Abu Nasar*, 33 All. 660, followed. RAM CHANDRA *v.* ALI MUHAMMAD, 35 All. 197 ... 1157

Waqf—Subsequent failure of title of waqif--Right of mutawalli to sue on indemnity bond executed in favour of waqif as purchaser —Right of plaintiff to shift basis of claim during suit—Practice —*A* purchased a village, the vendors giving him an indemnity bond in case he should be dispossessed. *A* then made a waqf of the property purchased, naming himself as mutawalli and after him his son *M*. *A* lost the property as the result of a suit, and subsequently (A meanwhile having died) *M* sued as mutawalli to enforce the terms of the indemnity bond. *Held* that the waqf was invalid, and that M. could not be permitted to change the character of the suit by claiming as one of the heirs of *A*. *Per* CHAMIER, J:—Even if the waqf was valid, the mutawalli was not entitled to miantain the suit in the absence of a transfer to him as such of the vendee's rights under the indemnity.

Municipal Board.

See Act (Local) No. I of 1900 ss. 87 (5) 147, 152, 33 All. 147 ... 99

Suit against member of a—, *See* Act (Local) No. I of 1900, s. 49, 33 All. 540 ... 362

See Act No. X of 1883, s. 10, 35 All. 308 ... 1235

Powers of—*See* Act (Local) No. I of 1900, s. 88, 35 All. 375 ... 1281

Municipal Rules.

See Act (Local) No. I of 1904, s. 23, 34 All. 391 ... 814

Municipal Election.

35 All. 450 ... 1333

Municipality.

Election—Practice—Petition against elected member on ground of personation of voters—Limitation—Fresh instances of personation allowed to be pleaded after expiry of time for filing petition.—An elector on the roll of a municipality filed a petition under the rules framed in that behalf by the Local Government against a successful candidate in a municipal election alleging various instances of personation of voters for which the opposite party was stated to be legally responsible. The petition was filed within the time limited by law. *Held*, that it was competent to the court in which such petition was presented to allow the petition to be amended by the addition of fresh instances of personation. NAWAB KHAN *v.* MUHAMMAD ZAMIN, 34 All. 649 ... 992

" New and important matter. "

See Civil Procedure Code (1908), order XLVIII, rule 1, 33 All. 566 380

Non-Joinder of parties.

See Parties, 33 All. 272 ... 183

Notice.

See Act No. IX of 1890, s. 77, 33 All. 544 ... 365

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Occupancy holding.

See Act (Local) No. II of 1901, s. 20, (2) 33 All. 136 ... 91
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——————————— s. 22, 34 All. 419 ... 834
See Estopel, 34 All. 538 ... 916
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——————————— Ss. 79 and 95, 35 All. 299 ... 1228
See Civil and Revenue Courts, 35 All. 464 ... 1343

Offence.

"Involving a breach of the peace," *See* CRIMIAAL PROCEDURE CODE, s. 106, 33 All. 771 ... 516
See LANDLORD AND TENANT, 33 All. 335 ... 225

Opium.

See ACT No. I OF 1873, ss. 5, 9, 34 All. 319 ... 764

Ostensible owner.

See ACT No. IV OF 1882, s. 41, 34 All. 22 ... 565

Parda-nashin lady.

Execution of deed depriving herself of nearly all her preperty—Burden of proof—Requisites to be proved—Concurrent findings on facts that burden had not been discharged—First court's decision on that point affirmed by appellate court—Finding sufficient to dispose of case.—A para-nashin lady, separated from her husband, unable to read or write, and without independent legal advice, created an endowment of practically her whole property by a deed of which she appointed the appellants (plaintiffs) trustees. In a suit for a declaration that the property was waqf and for possession of it. *Held* that, as they relied upon the deed, the onus was on the appellants to show that the nature and effect of it had, at the time of its execution, been explained to and understood by the executant. *Shambati Koeri* v. *Jago Bibi*, I. L. R. 29 Cal. 749; L. R. 29 I. A. 127, followed. Upon the question whether that onus had been discharged, the appellate court in India affirmed the decision of the first court to the effect that it had not, but nevertheless allowed an appeal to His Majesty in Council under s. 596 of the Civil Procedure Code (XIV of 1822) on the ground that the judgment of the lower court had not been *wholly* affirmed. *Held* that the findings of the courts below amounted to concurrent findings of fact which could not be disturbed on appeal, and there being no "substantial question of law" the appeal must be dismissed. *Karuppanan Servai* v. *Srinivasan Chetti*, I. L. R. 25 Mad. 215; L. R. 29 I. A. 38, followed. SAJJAD HUSAIN *v.* WAZIR ALI KHAN, 34 All. 455 ... 858

Parties.

Parties to suits—Jcint Hindu family—Managing members—Suit to recover debt due to members of family in family business—Power of managers to sue alone—Act No. XV of 1877 (Indian Limitation Act), section 22—Parties added after expiry of period of limitation.—Where joint family business has to be carried on in the interests of the joint family as a whole, the managing members may properly be entrusted with the power of making contracts, giving receipts, and compromising or discharging claims ordinarily incidental to the business; and

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where they are so entrusted and empowered they are entitled as the sole managers of the family business to make in their own names contracts in the course of that business, and to maintain suits brought to enforce those contracts without joining in the suit with them either as plaintiffs or defendants the other members of the family. *Arunachala Pillai* v. *Vythialinga Mudaliyar*, I. L. R. 6 Mad. 27, approved. *K. P. Kanna Pisharody* v. *V. M. Narayanan Somayajipad*, I. L. R. 3 Mad. 234, *Ramsebuk* v. *Ramlal Koondoo*, I. L. R. 6 Cal. 815, *Imam-ud-din* v. *Liladhar*, I. L. R. 14 All. 524; and *Alagappa Chetti* v. *Vallian Chetti*, I. L. R. 18 Mad. 33 distinguished. In this case the original plaintiffs were the managing members of a joint family business of money-lending, entrusted with and regularly exercising the power of doing everything necessary to carry on the business. In the course of such business they contracted in their own names with the defendants for a loan, and on the accounts a balance was struck between the parties on the 9th August 1901. In a suit brought by the managing members on the 3rd June 1904, and therefore within the period of limitation, to recover the amount due, the other members of the family were, on an objection by the defendants that the suit was improperly constituted, joined as plaintiffs on the 22nd August 1904, after the period of limitation for the suit had expired, and the defence was set up that under s. 22 of the Limitation Act (XV of 1877) the whole suit was barred. *Held* (reversing the decision of the High Court) that the suit as orginally brought was properly constituted: that the members of the family subsequently added were unnecessary parties: and that the suit was consequently not barred. KISHAN PRASAD *v.* HAR NARAIN SINGH, 33 All. 272 ... 183
See HINDU LAW, 33 All. 71 ... 48
Array of—See HINDU LAW, 34 All. 549, 572 924, 939
See ACT NO. I OF 1872, s. 69, 34 All. 615 ... 968
to suit, 35 All. 441 ... 1326
See MORTGAGE, 35 All. 247 ... 1192
See VENDOR AND PURCHASER, 35 All. 273 ... 1211

Partition.

Appeal—Appeal against preliminary decree—Final decree passed since the appeal—No appeal against final decree.—*Held* that an appeal against the preliminary decree in a suit for partition cannot be heard if after the filing of such appeal the final decree has been passed and no appeal is preferred against that decree. *Kuriya Mal* v. *Bishambhar Das*, I. L. R. 32 All. 225, referred to. NARAIN DAS *v.* BALGOBIND, 33 All. 528 ... 354
See Act No. I of 1872, s. 44, 33 All. 143 ... 96
See Act (Local) No. III of 1901, s. 233 (*k*), 33 All. 169 ... 114
See Act (Local) No. III of 1901, s. 233 (*k*), 33 All. 440 ... 296
See Pre-emption, 33 All. 28 ... 19
See Hindu Law, 33 All. 118, 443 ...79, 298
Appeal against preliminary decree—Final decree passed during pendency of appeal—Cross objections filed against final decree—Appeal against preliminary decree maintainable.—Where the

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plaintiffs in a suit for partition had preferred an appeal from the preliminary decree, and had also, in the defendant's appeal from the final decree filed cross objections, it was *held* that there was no bar to the hearing of the plaintiffs' appeal against the preliminary decree. *Kuriya Mal* v. *Bishambhar Das*, I. L. R. 32 All. 225, and *Narain Das* v. *Balgobind*, 8 A. L. J. 604, distinguished. MUHAMMAD AKHTAR HUSAIN KHAN *v.* TASADDUQ HUSAIN, 34 All. 493 ... 885

See Hindu Law, 34 All. 189, 234, 505 677, 706, 893

See Joint owners, 34 All. 113 ... 626

Suit for—*See* Act No. VII of 1870, sch. II, article 17 (vi), 34 All. 184 ... 673

See Act No. IV of 1893, ss. 1, 2 and 3, 35 All. 387 ... 1289

See Act (Local) No. III of 1901, ss. 107 and 111, 35 All. 527, 545 1387, 1402

See Act (Local) No III of 1901, ss. 111, 112, and 233 (*k*), 35 All. 126 ... 1108

See Civil Procedure Code (1908), s. 47, 35 All. 243 ... 1189

See Civil Procedure Code (1908), Or. XX, r. 18, 35 All. 159 1131

See Hindu Law, 35 All. 41, 337, 543 1049, 1255, 1399

Penalty.

See Act No. VI of 1882, s. 74, 35 All, 173 ... 1140

"Pension".

See Act No. XXI of 1871, ss. 3, 4, 6 and 8, 33 All. 580 ... 389

Plaint, Amendment of.

See Act No. IX of 1908, 33 All. 616 ... 413

See Suit against an Idol, 33 All. 735 ... 492

Pleader's Fees.

See Rules of Court of the 4th April 1894, r. 80 (1), Proviso, 33 All. 374 ... 252

Pleadings.

See Hindu Law, 33 All. 783 ... 524

Suit for cancellation of father's will brought by daughters—Plea of custom excluding daughters from inheritance—Custom not allowed to be raised in this suit.—On suit by the daughters of the testator for a declaration that a will alleged to have been executed by their father was a false and fraudulent document and not binding on them, the defendants set up a custom by virtue of which the daughters, but not apparently daughters' sons, were excluded from inheritance to their father's property. *Held*, that, as member of their father's family, the daughters, who, but for the will, on the death of their mother, would take the property of their father, had a cause of action which entitled them to bring the suit, and the issue whether or not a custom existed excluding them from inheritance was not a fit and proper issue to be determined in the present suit. RISELI *v.* BALAK RAM, 34 All. 351 ... 786

See Hindu Law, 35 All. 326 ... 1247

Possession.

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Possessory Suit.

33 All. 674 ... 434
Title, 33 All. 174 ... 117
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See Act No. II of 1899, s. 2 (21) and 60, 33 All. 487 ... 327

Practice.

See Act No. IV of 1869, s. 23, 33 All. 500 ... 336
See Civil Procedure Code (1908), Or. V, rr. 15—23, 33 All. 649 ... 436
See Suit against an idol, 33 All. 735 ... 492
See Civil Procedure Code (1908), Or. XXI, r. 35, 34 All. 150 ... 650
See Civil Procedure Code (1908), Or. XLI, r. 22, 34 All. 140 ... 644
See Criminal Procedure Code, s. 476, 34 All. 267 ... 728
See Execution of decree, 34 All. 518 ... 902
See Municipality, 34 All. 649 ... 992
See Privy Council, 34 All. 57 ... 589
See Act No. XV of 1877, s. 19 and sch. II, art. 148, 35 All. 227 ... 1178
See Jurisdiction, 35 All. 63 ... 1064
See Muhammadan Law, 35 All. 68 ... 1067

Pre-emption.

Claim of pre-emptor based on purchase by him of another share in the same mahal—Claim made before confirmation of sale in plaintiff's favour—Civil Procedure Code (1882), *s.* 316.—*Held* with reference to s. 316 of the Code of Civil Procedure, 1882, that a purchaser at auction sale in execution of a decree of a share in zamindari property does not become a co-sharer in the mahal, in which such property is situate until the sale has been confirmed in his favour. HASAN ALI *v.* MIAN JAN KHAN, 33 All. 45 ... 30

Muhammadan Law—Shafi-i-sharik—Shafi-i-khalit—Shafi-i-jar—Effect of perfect partition.—When a mahal has been perfectly partitioned, no right of pre-emption under the Muhammadan law subsists in favour of the owner of one of the new mahals in respect of the other new mahal or any portion of it on the ground of vicinage alone. *Mahadeo Singh* v. *Mussamut Zeenut-un-nissa*, 11 W.R. C.R. 169, *Sheikh Mohamed Hossein* v. *Shaw Mohsin Ali*, 6 B. L. R. 41, and *Abdul Rahim Khan* v. *Kharag Singh*, I. L. R. 15 All. 104, referred to. Nor will the fact that a village chaupal has remained undivided give the owner of either of the new mahals a right of pre-emption against the owner of the other as a *shafi-i-khalit*. *Rahtab Singh* v. *Tahal Misser*, 10 W.R. C.R. 314, and *Sheikh Karim Buksh* v. *Kamr-ud-din Ahmad*, 6 N. W.P. H.C. Rep. 377, distinguished. *Abdul Rahim Khan* v. *Kharag Singh*, I. L.R. 15 All. 104, and *Lalla Puriag Dutt* v. *Shaik Bunde Hossein*, 15 W.R.C.R. 225 referred to. But a right of pre-emption as *shafi-i-sharik* may subsist in relation to villages, in large estates equally with houses, gardens, and small plots of ground. *Shaikh Mohamed Hossein* v. *Shaw Mohsin Ali*, 6 B. L. R. 41, and *Shaikh Karim Buksh* v. *Kamr-ud-deen Ahmad*, 6 N. W. P. H. C. Rep. 377, referred to. MANNA LAL *v.* HAJIRA JAN, 33 All. 28 ... 19

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Wajib-ul-arz—Construction of document—Contract or custom—Presumption in absence of evidence that the record is one of custom.—Where it is not apparent, either from the language of the wajib-ul-arz itself or from other evidence, that the pre-emption clause of a wajib-ul-arz is merely the record of a new contract between the co-sharer, the presumption is that it is the record of a pre-existing custom. *Majidan Bibi* v. *Shaikh Hryatan*, Weekly Notes 1897, p. 3, followed. The pre-emptive clause of a wajib-ul-arz was headed "Relating to the right of pre-emption" and ran as follows:—"If a co-sharer has to sell and mortgage his *haqiat*—then at the time of transfer it will be incumbent that he should after giving information sell and mortgage for a proper price, &c., &c." *Held* that this in the absence of evidence to the contrary indicated a pre-existing custom of pre-emption rather than a contract. BHIM SEN *v.* MOTI RAM, 33 All. 85 ... 57

Wajib-ul-arz—Construction of document—"Intiqal" Perpetual lease.—*Held* that the word "intiqal" used in the pre-emptive clause of wajib-ul-arz was wide enough to include a perpetual lease. *Jagdam Sahai* v. *Mahabir Prasad*, I.L.R. 28 All. 60, and *Ahamad Ali Khan* v. *Ahmad*, I. N. W. P. H. C. Rep. 101, referred to. LALJI MISR *v.* JAGGU TEWARI, 33 All. 104 ... 70

Wajib-ul-arz—Custom or contract—Construction of document—Regulation—VII of 1882.—In a suit for pre-emption, wajib-ul-arz of 1839 and 1869, were produced. The preamble to the former was worded thus:—"Having well understood the following matters we willingly accept them." It then dealt with the right of pre-emption in the following terms:—"Mode of sale or transfer of whole or part of share," giving the right of pre-emption to co-sharers as against strangers, and concluded with the words; "therefore we write this *iqrarnama* so that it may be of use in future." The wajib-ul-arz of 1869 provided that "near co-sharers and other pattidars would have the right of pre-emption. Preference amongst them would be according to degrees of nearness":—*Held*, (STANLEY, C. J. dissenting) that the wajib-ul-arzes contained the record of custom and not of contract. *Per* STALNEY, C. J.:—A custom to be binding must be unaltered, uniform, constant and definite. If the settlement of 1833 recorded a custom, then the co-sharers in the village at the time of the later settlement of 1869 must be deemed to have abrogated it and to have adopted by agreement the right of pre-emption which it recorded in the later wajib-ul-arz as more suitable to the then existing conditions. The variance in the rights as defined in two wajib-ul-arzes leads to the conclusion that the right recorded in 1869, cannot be treated as a right existing by custom. *Per* KNOX and CHAMIER, JJ.:—The word *iqrar* does not necessarily mean a contract. It means *ratification* or *assent*. RETURAJI DUBAIN *v.* PAHALWAN BHAGAT, 33 All. 196 ... 132

Wajib-ul-arz—Construction of document—"Apna shafi-" Muhammadan law.—A wajib-ul-arz provided that if any co-sharer of a

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patti in the *khalisa* wished to sell his share, he would do so paying due respect to his own pre-emptor (*apna shafi*), and if the latter refused and all the other pre-emptors of the village (*aur sab shafian deh*) refused then he might sell to a stranger. *Held*, that the expression *apna shafi* connoted nearness in space and not a blood-relationship, and therefore where the vendor and pre-emptor were co-sharers in the same patti, the vendee being a co-sharer in a different patti, the co-sharers in the same patti had a preferential right. LAKHAN SINGH *v.* BISHAN NATH, 33 All. 299 ... 202

Wajib-ul-arz—Construction of document—Partition of village—New wajib-ul-arzes prepared after partition.—The wajib-ul-arz of a village before partition provided for pre-emption in the following way :—" Rights of co-sharers as among themselves on the basis of custom or agreement. The custom of pre-emption obtains. In case of sale of property by a co-sharer, another co-sharer in the mauza can bring a suit for pre-emption. If he offers a low price, then the vendor can sell the property to a stranger." The village was divided by perfect partition into three mahals. New wajib-ul-arzes were drawn up after partition, and the condition as to pre-emption in each ran as follows :—" Rights of co-sharers *inter se* based on custom or agreement. The custom of pre-emption prevails. In case one co-sharer sells his share (*hakiat*), another co-sharer in the village (*hissadar sharik mauza*) can claim pre-emption. If he offers a smaller price the seller can sell it to a stranger." The plaintiff pre-emptor was a co-sharer in a different mahal from that in which the property sold was situate. The vendee was a stranger to the village. The entire body of co-sharers in the village were Mubammadans of the same stock, and continued so up to the time of partition. *Held*, upon a construction of the language of the wajib-ul-arz and the circumstances of the case that the pre-emptor must succeed as against the stranger vendee notwithstanding that a partition had taken place. *Janki v. Ram Partab Singh*, I. L. R, 28 All., 286, referred to. CHEPHUR *v.* ABDUL HAKIM, 33 All. 296 ... 199

Wajib-ul-arz - Custom—Evidence—Nature of evidence required to establish a custom of pre-emption.—The plaintiffs claimed a right based upon contract or custom, to pre-empt a sale of zamindari property. The property was situate in one of the three mahals of a village named Suram. The plaintiffs were not co-sharers with the vendors in that mahal ; the vendees were strangers. In 1873 the village Suram consisted of a single mahal, and the village wajib-ul-arz of that date contained the following reference to pre-emption:—"In future if any *pattidar* wishes to transfer his share by sale * * * to a stranger * * * first, the sharers in the *patti khas*, then *pattidars* in the *thok*, and then *digar pattidaran deh* shall have a right to purchase." In 1883 perfect partition took place, and the village was divided into three separate mahals. A fresh wajib-ul-arz was drawn up for each of the new mahals but in each the provisions regarding pre-emption were copied

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verbatim from the wajib-ul-arz of 1873. *Held*, (1) that the plaintiffs had failed to establish any right of pre-emption based on contract; (2) that the oral evidence was worthless as supporting the custom set up by the plaintiffs; and (3) that the evidence afforded by the wajib-ul-arz of 1873 and 1883 was quite insufficient to establish the right claimed by the plaintiffs, if such right was to be regarded as one based on an alleged custom. *Dalganjan Singh v. Kalka Singh*, I. L. R. 22 All. 1, referred to: *Auseri Lal* v. *Ram Bhajan Lal*, I. L. R. 27 All. 602, and *Sardar Singh* v. *Ijaz Husain Khan*, I. L. R. 28 All. 614, discussed. GANGA SINGH *v.* CHEDA LAL, 33 All. 605 ... 406

Wajib-ul-arz—Notice of sale given to member of a joint Hindu family—Effect of such notice—Effect of conditional reply disputing amount of alleged consideration.—*Held* that a person having a right of pre-emption does not lose it by refusing to purchase the property at the price at which it is offered to him, because he believes that such price is in excess of the real price, where such belief is entertained and expressed in good faith. Where the pre-emptor and his brothers were members of a joint Hindu family and the vendor addressed a notice to him and his brothers jointly, to which the pre-emptor's brother sent a reply. *Held* that the plaintiff pre-emptor was entitled to claim the benefit of this reply as it had been sent by himself. *Lajja Prasad* v. *Debi Prasad*, I. L. R. 3 All. 236, *Amir Chand* v. *Ishar Das*, Weekly Notes, 1882, p. 136, *Bholi Bibi* v. *Fahima Bibi*, Weekly Notes, 1882, p. 46, and *Karim Bakhsh* v. *Khuda Bakhsh*, I. L. R. 16 All. 247, followed. SRI KISHAN SINGH *v.* BACHCHA PANDE, 33 All. 637 ... 427

Conditional decree—Decretal amount deposited in court—Decree enhanced in appeal—Additional payment made not covering amount withdrawn as costs.—A successful plaintiff pre-emptor deposited in court the amount of the decree in his favour, but subsequently withdrew therefrom the amount of the costs decreed in his favour. On the amount payable being enhanced on appeal he paid into Court the difference between the original and appellate decrees. *Held* that the decree had been fully complied with. *Gopal Saran* v. *Ishri*, I. L. R. 6 All. 351, *Balmukand* v. *Pancham*, I. L. R. 10 All. 400, *Parmanand Raot* v. *Gobardhan Sahai*, I. L. R. 28 All. 676, and *Bechai Singh* v. *Shami Nath*, 8 A. L. J. Notes, p. 27, followed. ALI HUSAIN *v.* AMIN-ULLAH, 34 All. 596 ... 955

Muhammadan Law—Demand made "on the premises"—Demand made in the abadi which was part of the premises sold.—Where a person claiming pre-emption in respect of a certain zamindari share prove that he had made the demand with witnesses while sitting on his *chabutra* in the *abadi*, which formed part of the premises sold, it was *held* that the demand of pre-emption was a good demand made "on the premises" within the meaning of the Muhammadan law. *Kulsum Bibi* v. *Fakir Mukammad Khan*, I. L. R. 18 All. 298, followed. MUHAMMAD USMAN *v.* MUHAMMAD ABDUL GHAFUR, 34 All. 1 ... 551

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Muhammadan law—Talab-i-mawasibat.—Where a person immediately on hearing of the sale of a house exclaimed "*mera haq shafa hai*" and without any delay took the price and brought it to the vendee and claimed the house, *held* that the expression used by him coupled with the circumstances constituted a sufficient first demand. *Muhammad Abdul Rahman Khan* v. *Muhammad Khan*, 8 A. L. J. 270, distinguished. MUHAMMAD NAZIR KHAN *v.* MAKHDUM BAKHSH, 34 All. 53 ... 586

Custom—Wajib-ul-arz—Owner of isolated revenue-free plots—Evidence of custom.—The pre-emptive clause of a wajib-ul-arz contained the following provision:—"If the owner of a share wish to sell it, he shall do so first to his near relation, who may be a co-sharer in the zamindari, and in case of his refusal to anyone he likes." *Held* that this by itself was not sufficient evidence of a custom giving owners of isolated revenue-free plots of land in the village a right to pre-empt. MAWASI *v.* MUL CHAND, 34 All. 434 ... 844

Wajib-ul-arz—Custom—Effect of joining in the purchase a co-sharer having an inferior right.—The vendee in a suit for pre-emption having equal rights with the pre-emptor disables himself from resisting a suit for pre-emption as much by associating with himself in the purchase another co-sharer whose rights are inferior to those of the pre-emptor as by associating with himself a stranger. GUPTESHWAR RAM *v.* RATI KIRSHNA RAM, 34 All. 542 ... 918

(*Pre-mortgage*)—*Joint usufructuary mortgage—Further simple mortgage on share of one mortgagor in favour of same mortgagee—What amount the claimants of the right to pre-mortgage are liable to pay.*—Certain persons made a joint usufructuary mortgage of their property. On the same day one of them executed a deed by way of a further charge, or simple mortgage, of his share in favour of the same mortgagee. In a suit for pre-mortgage, of his share in this second mortgagor it was *held* that the plaintiffs were not liable to pay the sum secured by the deed of further charge, which was a separate and independent transaction, but were entitled to pre-mortgage upon paying such amount of the mortgage debt as was proportionate to the share of the said mortgagor. KALLA *v.* HARGIAN, I. L. R. 34 All. 416 ... 831

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Custom—Evidence—Sales to strangers unchallenged as evidence negativing custom—Mode in which such sales should be proved.—Where the court is trying the issue of the existence or non-existence of a custom of pre-emption, every instance of a sale to a stranger is material evidence which the court ought to take into consideration and weigh when coming to a conclusion on the issue. But a mere vague statement that there had been sales to strangers without the production of the sale deeds or certified copies thereof and without some further details of the sale is not sufficient to prove sales to strangers. *Sewak Singh* v. *Girja Pande*, 2 A. L. J. 6, discussed. JANKI MISIR *v.* RANNO SINGH, 35 All. 472 ... 1348

Subject matter of suit re-sold at advanced price—Second sale subject to right of pre-emption in respect of the first.—A house in

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the city of Benares subject to a customary right of pre-emption was sold for Rs. 1,150. The vendee resold it shortly afterwards to the defendant for Rs. 4,000. *Held* on suit brought to pre-empt the property at the original price of Rs. 1,150, that the second sale was subject to the right of pre-emption and the pre-emptor was only bound to pre-empt the first sale, making the subsequent vendee a party to the suit so as to bind him by the proceedings. *Kamta Prasad* v. *Mohan Bhagat*, I. L. R. 32 All. 45, referred to. KHETTAR CHANDRA BASU MALIK *v.* NABIN KALI DEBI, 35 All. 385 ... 1288

Wajib-ul-arz—*Partition of village into several mahals*—Dastur dehi, *relating to whole village—Suit by co-sharer of one mahal against co-sharer of another mahal on ground of nearness in relationshsp to vendor.*— The *dastur dehi* of a village divided into several mahals, but which nevertheless was held to be applicable to the whole village, and to represent an arrangement come to by the co-sharers in the village amongst themselves, provided as to pre-emption, as follows :—" If a co-sharer want to sell his share, he must sell first to near co-sharers, then in the patti, then in the mahal, then in the village." *Held* that the effect of this clause was to give to a co-sharer in one mahal who was a relation of the vendor a preferential right of pre-emption over a co-sharer in another mahal who was not a relation, YAD RAM *v.* CHEDA LAL, 35 All. 478 ... 1353

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Sale to raise funds for litigation—Transfer whilst vendor was out of possession—Agreement depending on success of litigation—Transfer of undivided share in joint ancestral property—Interest in property giving right to sue—Vendee and provider of funds made co-plaintiffs.—The original plaintiffs in the two suits out of which these appeals arose were in one suit the sons, and in the other the grandson of the heads and managers of two distinct joint Hindu families, owners of an estate in Oudh, by whom alienations of the joint ancestral property had been made in favour of the appellant, whom they sued in ejectment to set aside those alienations on the ground that the managing members had no power to make them. As they required funds to enable them to prosecute the suits, they entered into agreements with a third person (who was made a co-plaintiff in the suits and was now respondent) to the effect that "in the share of each of them in the property he will be a co-sharer of a one-half share, and the remaining one-half share will, belong to us . . . He will bear the entire expenses in connexion with the suit, and in case of success he will be entitled to proprietary possession of the above mentioned one-

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half share, or one-half of the share which may be decreed which can remain joint or be partitioned by him as he pleases." In the course of the litigation the original plaintiffs compromised the suits with the appellant and withdrew from them leaving the respondent to prosecute them alone. *Held* (reversing on this point the decision of the Courts in India) that the agreements (which constituted his only right to sue) conferred upon the respondent no present right to the possession of any share in the property in suit. He would only have the right to possession in case of success, and success had not been achieved. Until then he was merely a co-owner in a certain undivided share of the property. There was no present grant or assignment to him of any separate share of the property, divided or undivided and he could not therefore maintain the suit. *Achal Ram* v. *Kazim Husain Khan*, 27 All. 271; L. R. 32 I. A. 113 distinguished. BASANT SINGH *v.* MAHABIR PRASAD, 35 All. 273 ... 1211

See Contract, 35 All. 325 ... 1246

Wagering Contract.

See Act No. IX of 1872, s. 30, 33 All. 219 ... 147

Wajib-ul-arz.

See Act No. XXI of 1871, ss. 3, 4, 6 and 8, 33 All. 580 ... 389

See Pre-emption, 33 All. 85, 104, 196, 296, 299, 605, 637 57, 70, 132, 199, 202, 406, 427

See Pre-emption, 35 All. 478 ... 1353

See Civil Procedure Code, (1882), ss. 584, 585, 34 All. 579 ... 943

See Letters Patent, s. 10, 34 All. 13 ... 559

See Pre-emption 34 All. 434, 542 844, 918

Waqf.

See Civil Procedure Code (1882), ss. 30 and 539, 33 All. 660 ... 443

See Muhammadan Law, 33 All. 400 ... 270

See Civil Procedure Code, s. 92 (1) 35 All. 98 ... 1089

See Civil Procedure Code. (1908), s. 92, 35 All. 459 ... 1340

See Muhammadan law, 35 All. 68, 197 1067, 1157

Warrant.

See Criminal Procedure Code, ss. 55, 56 and 110, 35 All. 407 ... 1303

——For search of house, *See* Act No. III of 1867, s. 5, 34 All. 597 ... 956

Water.

Rights respecting flow of, 33 All. 619 ... 415

Well.

See Land-holder and tenant, 35 All 292 ... 1223

Will.

Construction of document—Bequest to take effect after deaths of testator and his wife—Legatee surviving testator but predeceasing wife--Vested or contingent interest.—One executed will whereby he gave all his property after the death of himself and his wife *M.* to his daughter *B* and his nephew *D*. *D* survived the testator but predeceased *M*. *Held* that *D* took a vested interest in the property which was transmissible to his sons. *Bhagbati Barmanya.* v. *Kali Charan Singh*, I. L. R. 38 Cal. 463; 8 A. L. J. 433, followed. BILASO *v.* MUNI LAL, 33 All. 558 ... 374

See Civil Procedure Code (1882), s. 25A, 33 All. 233 ... 156

Will.—(*Contd.*) PAGE

See Construction of document, 33 All. 66, 665 ...44, 416

See Hindu Law, 33 All 41 ... 28

Construction of will—Rules of justice equity and good conscience—Devise to eldest son and his lawful male children according to law of inheritance—Mortgages made by testator as full owner and mortgages made by son with an estate for life only—Rights of mortyagee—Alternative case set up on appeal—Costs.—*T. S.* a domiciled resident of the North Western Provinces of India, died on the 9th of November, 1864, leaving a will dated the 22nd of October, 1864, and therefore before the Indian Succession Act (X of 1865) came into force whereby he made provision that certain villages, houses and other property should "at my demise descend to my eldest son *T. B. S.* and to his lawful male children according to the law of inheritance and in the event of my eldest son *T. B. S.* dying without lawful male children to my female children, or in the event of their death to the female children born in wedlock of my sons in succession." The testator had in 1853 mortgaged his property to the extent of Rs. 50,000 with interest and his son *T. B. S.* after he succeeded to the property, further mortgaged it in 1867, 1869, and 1872, and in execution of decrees obtained against him on those mortgages the property was sold and his interest herein was acquired by the various auction purchasers. *T. B. S.* died in 1900, without lawful male children and was succeeded by the second son of the testator, the present appellant, who in 1905 and 1906 brought the present suits for ejectment against the auction purchasers, in which he prayed for decrees for "full proprietary possession" and the suits were dealt with on that footing in the Courts in India, the High Court, however only dismissing the suits because there was no specific claim for redemption. On his appeal part of the appellant's case was that the High Court instead of dismissing the suits, should have made decrees for possession conditional upon payment of the debts binding on the estate of the testator; and during the hearing it was conceded by counsel that on the construction of the will the appellant was only a life-tenant of the property. *Held* that the regulation of the succession under the will was to be determined by the rule of "justice equity and good conscience," that the bequest was to be read in its entirety and together, and that so read there was in it no intention that his son *T. B. S.* should have an absolute ownership: the testator intended to regulate the succession after the death of *T. B. S.* and settle the mode of the subsequent enjoyment of the property, and such detailed regulations were only natural, necessary and entirely in place if *T. B. S.* was intended to be merely a tenant for life. *Held*, therefore, that the rights under mortgages granted by *T. B. S.* ceased at his death, and that the appellant, as the next male heir, was entitled to the enjoyment of the estate for life free from any rights so acquired. The case, however, was very different with regard to the rights acquired under mortgages granted by the testator himself. Even if *T. B. S.* renewed such mortgages